



CITY OF West Linn

Memorandum

Date: March 13, 2023
To: Mayor Bialostosky and City Council
From: Darren Wyss, Planning Manager
Subject: AP-23-01 Applicant Testimony

Between the publishing of the Council Packet on March 2, 2023 and the March 13, 2023 noon deadline to submit comments, staff received additional testimony (attached) from Alex Kalmalson, Applicant, for the appeal of an approved Water Resource Area Permit at 19679 Wildwood Drive.

Please feel free to contact me at dwyss@westlinnoregon.gov or 503-742-6064 with any questions regarding the materials or process.



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Water Resource Area Permit for 19679 Wildwood Drive
Alex Kalmanson

Proposal: Water Resource Area (WRA) Alternate Review WAP-22-02

- Per express terms of CDC Chapter 32.070 proposal will accurately characterize the water course under the site-specific Natural Resource Assessment by Schott & Associates wetland ecologist.
- Approval will establish the correct WRA buffer.
- Approval will make property the city has zoned residential, in a residential subdivision, in the city limits, that the CDC contemplates being available to meet future housing needs, actually available to serve its zoned purpose.
- Approval **does not authorize particular development**. Proposal is **not for** a partition & **not** to develop housing

Robinhood Creek is an “Ephemeral Stream” not a “Riparian Corridor”

- CDC protects WRA based on classification of resource.
- Each classification has precise definition and standards that apply.
- Staff is correct: Robinhood Creek was improperly mapped as a “Riparian Corridor” at this location, as a perennial (continuous flowing) stream. But that is mistaken – it is not continuously flowing here.
- The record only shows it is an “Ephemeral Stream” that dries up and has no defined stream channel.
- CDC Table 32-2: It should have a 15-foot vegetated buffer on each side, not a 100-foot buffer. A 100-foot buffer serves no purpose and cannot be justified under CDC.

Subject Property

- Address: 19679 Wildwood Drive
- Tax Lot: 2S 1E 23AC tax lot 4600
- Site Area: 0.67 Acres
- Neighborhood: Hidden Springs Neighborhood Association
- Comp. Plan: Low Density Residential
- Zoning: R-10 Residential
- Zoning Overlay: Water Resources Area

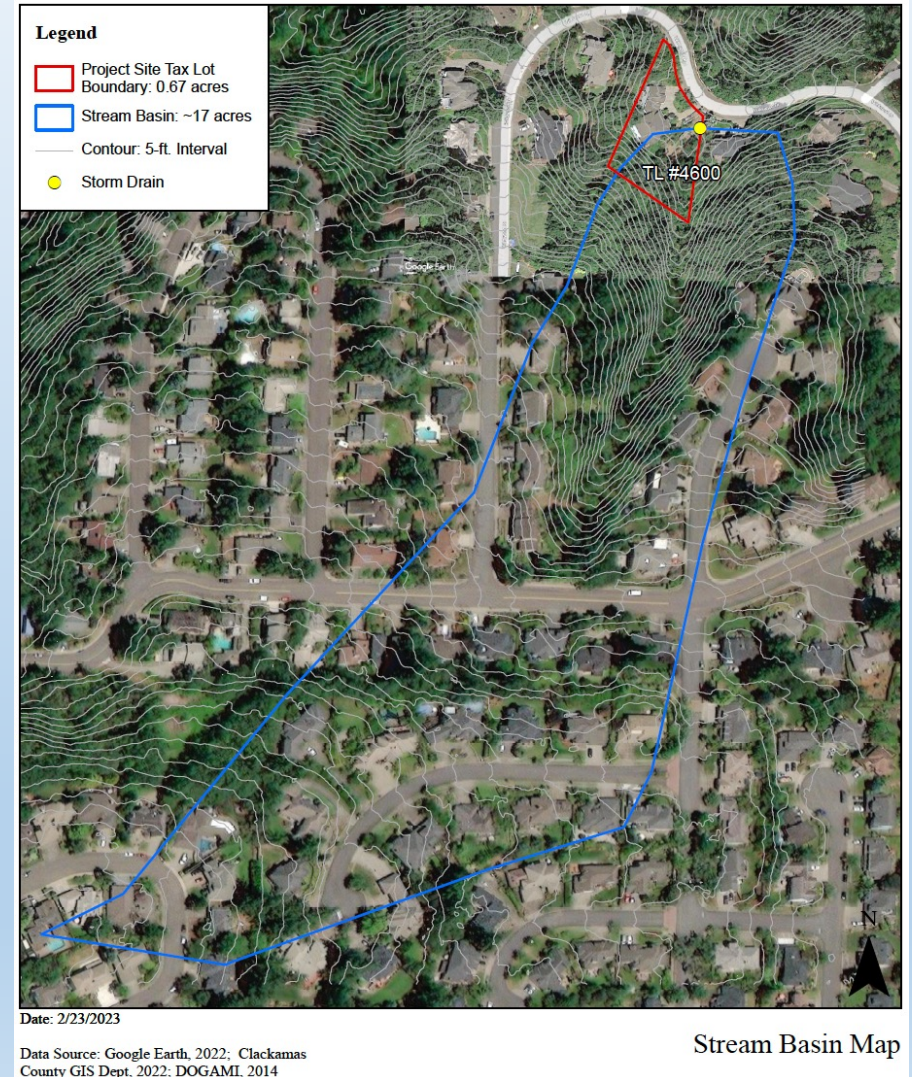


Mapping: Robin Creek and Stream Basin

CDC Definition: “ephemeral stream”

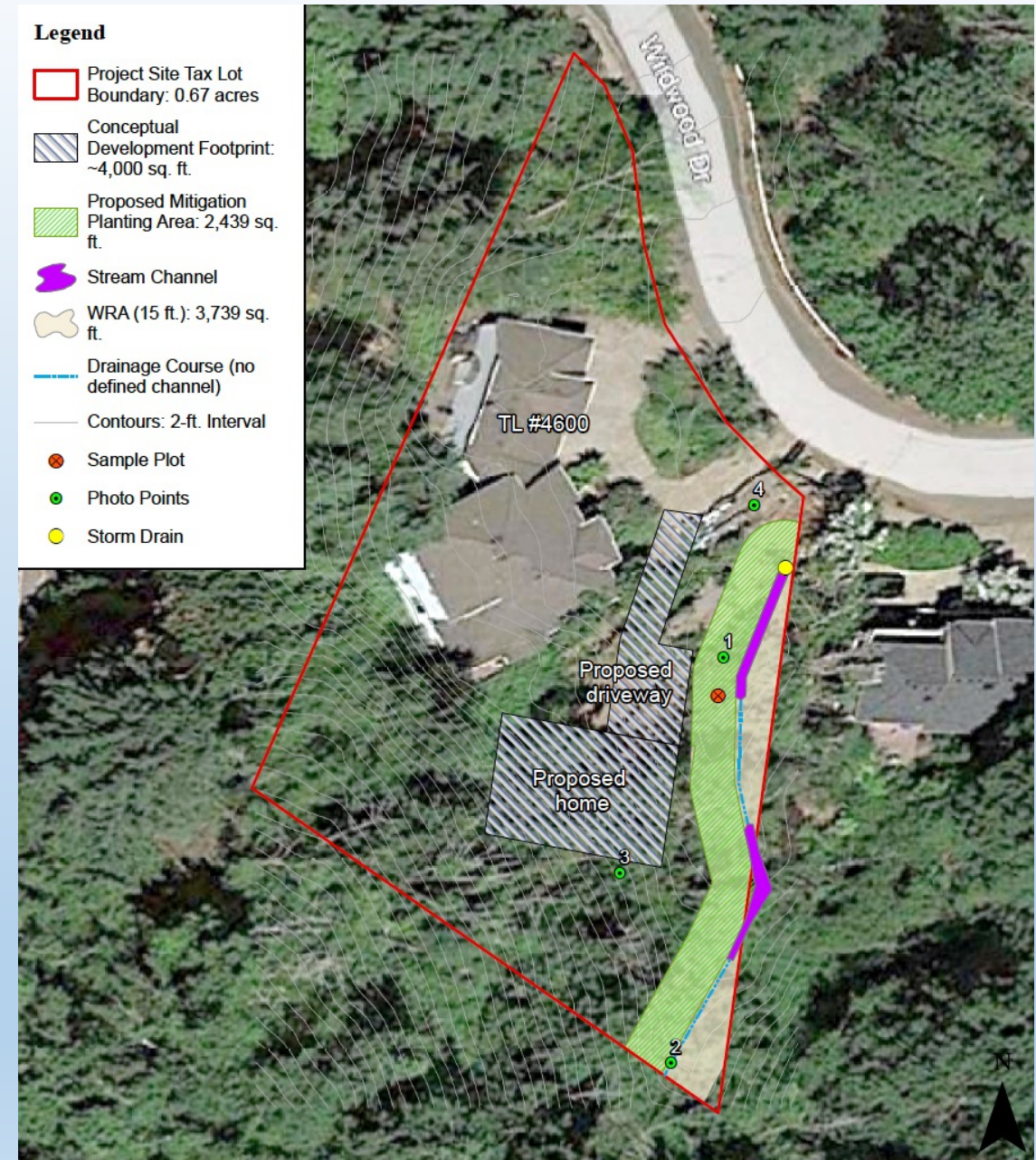
“A stream or reach of a stream which flows only in direct response to precipitation and whose channels are always above groundwater or water table levels. Ephemeral streams typically drain sub basins of under 20 acres, have slopes of less than 10 percent as measured laterally from the stream thread, and often traverse superficially with no recognizable drainage channel.”

This basin is 17 acres, has intermittent stream flows and flows only after sustained precipitation events.



Proposed WRA Area

- Schott & Associates Exh PD-1 & CC-2.
- Planning Manager properly determined all CDC standards met.
- Proposal properly shows location of drainage course and WRA Area
- Proposal properly shows Mitigation Planting Area
- Proposal properly shows existing development, conceptual shared driveway and where a home could be situated.



Applicant's Proposed WRA Enhancement Plan Per CDC 32.100(A) for 2,439 sq. ft. in WRA Area

- Improves functions of WRA
- Removes invasive species
- Plants a diverse assemblage of native trees and shrubs along length of ephemeral stream
- Enhances hydrological functions, organic material recruitment & riparian wildlife habitat quality.
- Bare root trees will be planted between 12/1 and 2/28
- Potted plants will be planted between 10/15 & 4/30.
- Bare ground will be immediately seeded with native shade-adapted upland grass mix

Table 2. Planting Palette for WRA Enhancement Area (2,439 sq.ft..)

Species	Type	Minimum Size	Spacing	Quantity
Bigleaf maple <i>Populus balsamifera</i>	Tree	0.5" diam or 1 gal.	12'OC	8
Red alder <i>Alnus rubra</i>	Tree	0.5" diam or 1 gal.	12'OC	9
Swamp rose <i>Rosa pisocarpa</i>	Shrub	1 gal.	4-5'OC	26
Red elderberry <i>Sambucus racemosa</i>	Shrub	1 gal.	4-5'OC	26

Red flowering currant <i>Ribes sanguineum</i>	Shrub	1 gal.	4-5'OC	26
Western swordfern <i>Polystichum munitum</i>	Ground cover	1 gal.	Clusters 10' OC	26
*Protime 460 or equivalent	Ground cover	1 lb/1,000 sq. ft.		2.4 lbs

*Seed mix includes California brome (*Bromus carinatus*), blue wildrye (*Elymus glaucus*), California Oatgrass (*Danthonia californica*), Roemer's Fescue (*Festuca roemeri*), Prairie Junegrass (*Koeleria macrantha*)

Planning Manager's Conditions of Approval

1. Mitigation Plan. The applicant shall submit a detailed planting plan that conforms to the provisions of CDC Chapter 32 and contains at least a dimensioned site plan with references to the mitigation and re-vegetation plan requirements for review by staff before mitigation is completed on-site. The applicant shall submit a final report documenting the mitigation measures proposed within PD-1 upon completion of the measures.
2. Site Plan and Narrative. Planting and mitigation shall conform to site plan shown in Figure 2 of Applicant Submittal PD-1, the approved planting plan required in Condition 1, and all applicable standards within CDC Chapter 32.



Planning Manager's Conditions of Approval

3. Stormwater Plan. The applicant shall submit a stormwater management plan at time of permit submittal for future development that demonstrates its compliance with applicable provisions of Chapters 32 and 92.
 4. Construction Management Plan. The applicant shall provide a construction management plan at time of permit submittal for future development that demonstrates its compliance with the applicable provisions of Chapter 32.
- All future development must comply with these conditions of approval.

Undisputable Oregon Land Use Law Applicable to Appeal Issues

Local decision makers must consider and apply only the adopted standards and criteria applicable to the application before them and must base their decision on evidence in the record:

1. Standards for this application, not a future application.
2. The adopted standards and criteria for this type of application.
Nothing more. ORS 227.173.
3. Decision must be based on substantial evidence, not speculation or unsupported allegations.



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Appeal Issue #1: The City and Applicant confused or misled the neighborhood about the purpose of an application for building/development.

- There is nothing hidden here. The allegation is mistaken.
- Regardless, this and related allegations not based upon any relevant approval criteria for the Water Resource Area (WRA) permit application.
- This is not an application for a building or any other development. The applicant did not submit any application for building or development, nor does the WAR-22-02 decision approve any development.
- This is an application to accurately determine the WRA buffer for the subject property and to adjust the buffer accordingly as provided in CDC 32.070.
- Its purpose is to determine the buildable area of the subject property.
- The allegation provides no basis to reverse the Planning Manager's decision.



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Appeal Issue #2: The applicant provided a building plan for a 4,000 square foot home that does not conform to the neighborhood character, zoning, WRA setbacks, and other unspecified development standards.

- The applicant has not submitted a building plan for a 4,000 square foot home.
- As application Figure 2. Existing and Proposed Conditions plainly states, the hatched area, which includes both the proposed driveway and proposed home, is a “Conceptual Development Footprint.”
- Appellants do not identify any CDC Chapter 32 or Chapter 99 approval criteria that require or even allow for consideration of “the neighborhood character” or other “unspecified standards.”
- No development standards apply because the application does not request approval of development.



Appeal Issue #3: The applicant proposes to build a home on unstable slopes within the WRA buffer and that the proposal does not meet the intent of CDC Chapter 32.

- There is no application for development either submitted or approved by WAP-22-02. This issue is irrelevant.
- Regardless, it is likely that the property can be developed because there are homes all around it.
- The point of this application is to establish the proper WRA buffer based on adopted City standards.
- All future applications to develop the property must conform to applicable City building and development codes, to include any applicable geotechnical engineering requirements and WRA standards.
- Appellants seek to apply standards that are not applicable to this WRA application.
- The “intent” of CDC Chapter 32 is not an approval standard.
- The “intent” of CDC Chapter 32 is met by complying with the Chapter 32 approval standards and criteria that implement the CDC 32.010 Purpose Statement. Compliance with those standards necessarily means the proposal complies with CDC 32.010 Purpose statement.
- The Planning Manager correctly approved the proposal based upon findings and evidence demonstrating that the proposal is consistent with all relevant standards, properly protecting and further improving the functions and values of the WRA as properly classified.
- No codified rule is served by a 100’ WRA buffer for an ephemeral stream that the CDC makes clear is unnecessary, other than to make City residential zoned land in a residential subdivision, undevelopable.



Appeal Issue #4: The proposed structure in the applicant submittal does not adhere to the size requirement of CDC 34.030(A)(4).

- CDC 34.030(A)(4) concerns Accessory Dwelling Units (ADUs) – this is not an application for an ADU. This standard is inapplicable.
- The only applicable standards for this application are those evaluated by the Planning Manager and addressed in the WAP-22-02 decision findings:
 - CDC 32.070 Alternate Review Process
 - CDC 32.080 Approval Criteria (Alternate Review Process)
 - CDC 32.060 Approval Criteria (Standard Process) [by incorporation]
 - CDC 32.090 Mitigation Plan [by incorporation]
 - CDC 32.100 Re-vegetation Plan Requirements [by incorporation]
 - CDC 32.050 Application [by incorporation]



Appeal Issue #5: The applicant is attempting to subdivide 19679 Wildwood Dr.

- No land division is proposed as part of this WRA application. The application does not seek to partition or subdivide the subject property.
- The Planning Manager did not approve a partition or subdivision of the property in the WAP-22-02 decision.
- This appeal issue provides no basis to deny the application.



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Appeal Issue #6: The applicant consultant, Schott & Associates, provided misleading statements about the quality and value of the riparian corridor within their report (Exhibit CC-3). The appellant does not specify which statements are misleading.

- The Schott & Associates Natural Resource Assessment (Exhibit PD-1) and February 23, 2023 supplemental letter regarding the City's codified CDC definitions of ephemeral & intermittent streams (Exhibit CC-2) is the type of expert testimony land use decisions are supposed to be based upon.
- Nothing in the record undermines the Schott & Associates analysis and conclusions.
- The Schott & Associates reports were prepared consistent with professional engineering standards and fully comply with the requirements of the Alternative Review process per CDC 32.070.
- Their reports plainly explain the methodologies used, the data gathered, and conclusions reached, with photographs demonstrating the conclusions are accurate.
- Opponents fail to specify what statements are misleading or to provide any evidence that the quality and value of the WRA resource studied by Schott & Associates is different than how they describe it in their reports.



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- The stream is dry (ephemeral and intermittent). It does not flow continuously.



Photo Point 2.. From the upper end of the drainage at the southern property boundary facing north, downstream. No defined channel is present.



Photo Point 1. From the lower end of the drainage facing south, upstream. No defined stream channel is present.

- There is no defined stream channel.

Appeal Issue #7: The applicant consultant submittal from Schott & Associates did not adequately address CDC 32.030 Table 32-1 or ‘...other associated chapter figures.’

- CDC 32.030 Prohibited Uses only applies to development within the WRA and Table 32-1 summarizes where development and activities subject to Chapter 32 may occur.
- The only entry within Table 32-1 that is triggered by the proposal concerns the “removal of existing vegetation or planting new vegetation”.

<i>Type of Development or Activity</i>	<i>In Water Resource</i>	<i>Water Resource Area</i>
<i>Removal of existing vegetation or planting new vegetation</i>	<i>No, except invasive plants and hazard trees per CDC <u>32.040(A)(2)</u> or per CDC <u>32.100</u>.</i>	<i>Yes, if it is replaced by native vegetation. Exemption CDC <u>32.040(A)(3)</u> applies.</i>

- The proposed WRA Enhancement Plan implements exactly what Table 32-1 allows & requires – the removal of invasive plants and replacement by native vegetation.
- The evidence only shows that the proposed planting plan will enhance the ecological function of the WRA area.



- Table 32-2 shows the required width of WRA buffers based on the type of water resource present.
- The Shott & Associates Report's Streamflow Duration Field Assessment (SDM) establishes that the water resource on the property is an ephemeral stream as defined by the CDC.
- The setback for an ephemeral stream is a 15-foot buffer on each side of the stream.

Table 32-2. Required Width of WRA

<i>Protected WRA Resource (see Chapter 2 CDC, Definitions)</i>	<i>Slope Adjacent to Protected Water Resource</i>	<i>Starting Point for Measurements from Water Resource</i>	<i>Width of WRA on Each Side of the Water Resource</i>
<i>F. Ephemeral Stream</i>	<i>Any</i>	<i>Stream thread or centerline</i>	<i>15 feet with treatment or vegetation (see CDC 32.050(G)(1))</i>

- All future development on the site will be located outside the 15-foot buffer, outside the WRA area, as shown by the conceptual development footprint on the application's Figure 2, Existing and Proposed Conditions.

Appeal Issue #8: The Hidden Springs Neighborhood Association did not receive proper notice in line with CDC Chapter 99.

- The City provided notice to the Hidden Springs Neighborhood Association consistent with the requirements set forth in CDC 99.080.1 and CDC 99.100.

MAILED NOTICE

Notice of Upcoming Hearing was mailed at least 20 days before the hearing, per Section 99.080 of the CDC to:

Alex Kalmanson, applicant / property owner	2/17/23	<i>Lynn Schroder</i>
Schott & Associates, applicant consultant	2/17/23	<i>Lynn Schroder</i>
Russell Axelrod, Appellant	2/17/23	<i>Lynn Schroder</i>
Parties of Record for WAP-22-02	2/17/23	<i>Lynn Schroder</i>
Property owners within 500ft of the site perimeter	2/17/23	<i>Lynn Schroder</i>
All Neighborhood Associations	2/17/23	<i>Lynn Schroder</i>

- Regardless, the Hidden Springs Neighborhood Association and any other Neighborhood Association have an opportunity to participate in the *de novo* hearing for this appeal.



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Appeal Issue #9: The approved Planning Manager decision establishes a new development precedent that threatens the safety and welfare of the citizens of West Linn(the appellant does not specify how the proposal threatens the safety and welfare of any citizens).

- The Planning Manager's decision in WAP-20-02 simply applies the express language of CDC Chapter 32 as adopted by the City Council.
- Applying the City's code does not set a new precedent and does not establish a new City policy.
- WAP-20-02 authorizes the required proper CDC WRA buffer per CDC 32.070 based upon unrefuted site-specific evidence regarding the actual characteristics of the resource.
- The only precedent WAP-20-02 sets is that if an application is submitted and is supported by evidence that demonstrates that all CDC mandatory approval criteria is met, that the City will approve the application as the CDC says.

DECISION

The Planning Manager (designee) approves this application (WAP-22-02), based on: 1) the findings submitted by the applicant, which are incorporated by this reference, 2) supplementary staff findings included in the Addendum below, and 3) the addition of conditions of approval below. With these findings, the applicable approval criteria are met.



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Appeal Issue #10: The Planning Manager decision should have been denied based on the West Linn City Charter (the appellant does not specify what section of the City Charter is relevant, or why it would apply).

- ORS 227.173(1) requires that approval or denial of a discretionary permit application be based on standards and criteria set forth in the adopted development ordinance.
- Decision makers may not require compliance with standards not adopted in the code, or standards that apply to other types of applications.
- Nothing in CDC Chapter 32 requires compliance with the West Linn City Charter, in whole or in part.
- Compliance with the West Linn City Charter is not a mandatory approval criteria or standard in this proceeding and cannot be used as a basis to deny the application.
- Regardless, there is nothing in the Charter that would compel denial of the proposal and nothing has been cited to that effect either.



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Conclusion

- Staff got it right.
- Robin Creek is an ephemeral stream at the subject property. The correct CDC required WRA buffer is 15 feet and the re-vegetation plan proposed by the applicant improves the WRA from how it is now.
- The Planning Manager properly applied the mandatory approval criteria for the WRA Adjustment application. No other standards can or should be applied.
- The appeal asks the City Council to do what Oregon law forbids – to apply criteria not adopted in the CDC, make decisions about applications not before the City Council, and to make a decision contrary to the weight of the evidence.
- All future development must and will comply with all relevant CDC provisions.
- The applicant respectfully requests the City Council deny the appeal and affirm the Planning Manager's approval of the application.





THURSDAY
2 16 2023



THURSDAY
2/16/2023



FRIDAY
2/17/2023



FRIDAY
2 17 2023



SUNDAY
2-19-2023



SUNDAY
2/19/2023



MONDAY
2 20 2023



MONDAY
2 20 2023



TUESDAY
2 21 2023



TUESDAY
2 21 2023



WEDNESDAY
2 22 2023



WEDNESDAY
2/22/2023



THURSDAY
3 2 2023



THURSDAY
3 2 2023



march 3



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SATURDAY
3 4 2023



SATURDAY
3 4 2023



SUNDAY
3 5 2023



SUNDAY
3 5 2023



MONDAY
3 6 2023



MONDAY
3 6 2023



march 7



march 7



WEDNESDAY
3 8 2023



WEDNESDAY
3 8 2023



FRIDAY
3 10 2023



FRIDAY
3 10 2023



march 11



march 11



SUNDAY
3 12 2023



SUNDAY
3-12-2023