

**WEST LINN CITY COUNCIL**  
**FINAL DECISION AND ORDER**  
**AP-23-01**

**IN THE MATTER OF AN APPEAL OF THE PLANNING MANAGER APPROVAL OF A  
WATER RESOURCE AREA PERMIT AT 19679 WILDWOOD DRIVE (WAP-22-02)**

**I. Overview**

Alex Kalmanson (Applicant) filed a land use application on October 6, 2022, and it was deemed complete on October 31, 2022. The proposal was for an Alternate Review of the required water resource area (WRA) buffer on a portion of Robinwood Creek contained within their property. The approval criteria for the application are West Linn Community Development Code (CDC) Chapters 32 and 99. Public notice was mailed December 13, 2022 and provided a 20-day comment period before the Planning Manager decision.

The proposal was based on the CDC 32.070 which provides for use of the Alternate Review process where “there is reason to believe that the width of the WRA prescribed under the standard process (CDC 32.060(D)) is larger than necessary to protect the functions of the water resource at a particular site.” The Applicant has lived on his property for 17 years. In his 17 years on the property, he had not seen evidence that the watercourse on his property was a perennial stream. The City’s “standard process” had yielded a 100-foot setback on either side of the watercourse on the basis that the watercourse was perennial. Therefore, the Applicant had reason to believe that the WRA was wider than necessary to protect the “functions of the water resource” at the particular site – his residential lot. Accordingly, the Applicant obtained a professional evaluation of the WRA and that professional evaluation demonstrated that the associated stream within the property met the CDC definition of an ephemeral stream and that a 15-foot buffer with proposed mitigation would better protect the functions of the water resource on the subject site than the 100-foot buffer in its degraded state. The proposal included mitigation and plantings in compliance with CDC requirements to enhance the degraded stream corridor and improve its ecological function. The Applicant indicated he may pursue future development on the property with the additional buildable area created by the WRA reduction, but no development was proposed as part of the application. Fourteen public comments were submitted prior to the deadline, and included the following general concerns:

- Future development may not match the character of their neighborhood
- Future development may not be adequately maintained
- The Applicant did not meet the intent or application of CDC Chapter 32
- Future development may adversely affect drainage
- Future development may make the neighborhood more crowded and less attractive to buyers
- Future development may adversely affect the water resource
- Future development may increase traffic in the area

- Future development that increases population density will adversely affect property values
- Future development may adversely affect neighborhood infrastructure quality
- Future development may lead to tree removals that detract from neighborhood character
- Future development may adversely impact views and nearby hiking trails

While some of the comments provided reference to certain provisions within CDC Chapter 32, none of them identified any applicable criteria the application, as presented, failed to meet. The Planning Manager approved the application on January 17, 2023, based on the applicable CDC criteria and the evidence submitted by the Applicant.

On January 31, 2023, Russell Axelrod (Appellant) filed a timely appeal of the Planning Manager decision. A 30-day extension to the 120-day period was granted by the Applicant on January 31, 2023, in light of the appeal.

The appeal hearing was held by the City Council on March 13, 2023. Written testimony was submitted prior to the comment deadline by the Applicant, Appellant, and the public. The meeting commenced with the legal proceedings read by Mayor Bialostosky and the City Attorney, Bill Monahan. After the legal proceedings were complete, Assistant Planner Ben Gardner presented as the staff planner, followed by oral argument from the Appellant. This was followed by oral argument from the Applicant and then public testimony. Members of the public expressed general opposition to the application, and support for the appeal. The Applicant then had an opportunity for rebuttal, followed by a sur-rebuttal by the Appellant. The Applicant then had an opportunity for a final rebuttal.

During the public testimony portion of the hearing, a member of the public in attendance requested a continuance of the hearing. Council passed a motion of continuance that established:

1. The public hearing is closed, but the record will remain open for the following:
  - a. Additional written testimony in response to what was heard at the public hearing would be accepted by Council by the deadline of noon on March 20, 2023;
  - b. Written rebuttal in response to additional written testimony received by March 20<sup>th</sup> would be accepted by Council with a deadline of noon on March 27, 2023 (with the restriction of it containing no new evidence); and
  - c. Council would accept the Applicant final written argument with a deadline of noon on April 3, 2023.
2. Council deliberations continued to a date-certain of April 10, 2023, at 6:00pm.

Council also requested an extension of the 120-day clock to May 10, 2023, from the Applicant. The Applicant agreed and provided an extension in writing on March 14, 2023.

Additional written testimony and written rebuttal (items 1a and 1b above) were submitted by the Applicant, Appellant, and the public within the established deadlines. The Applicant final

written argument (item 1c) was subsequently submitted within the established deadline. The information was provided to Council and entered into the record.

Council held the continued appeal hearing on April 10, 2023. The meeting commenced with the legal proceedings read by Mayor Bialostosky and the City Attorney, Bill Monahan. As part of the legal proceedings, there is an opportunity for anyone to challenge the impartiality of any member of the City Council. A member of the public, Ms. Karie Oakes, challenged Mayor Bialostosky's impartiality, based on his disclosure that during the period that the hearing was continued he asked the Planning Manager some questions about the application. Following Mayor Bialostosky's explanation, Ms. Oakes challenged his impartiality. The Council then followed Council Rules Section D.4, Ex-parte Contacts and Disqualifications to address the challenge. Council President Baumgardner took over as presiding officer and allowed Mayor Bialostosky to explain the contact. Mayor Bialostosky explained that he was seeking clarity on portions of the involved code, as this was a highly technical application, and his discussions did not affect his impartiality on the matter. Council President Mary Baumgardner put forth a motion to deny the challenge, and it was seconded by Councilor Relyea. The motion passed 2-0 with both voting to deny the challenge. Council President Baumgardner then gave control of the meeting back to Mayor Bialostosky. Deliberation then proceeded, and after a brief discussion, Council President Baumgardner made a motion to tentatively deny the appeal, thus upholding the Planning Manager decision, and for staff to return with final findings on April 17, 2023, for adoption. Mayor Bialostosky seconded the motion and the motion passed with two votes in favor (Baumgardner, Bialostosky) and one opposed (Relyea).

## **II. The Record**

The record was finalized with the submittal of the Applicant's final written rebuttal on April 3, 2023. The record includes the entire file for WAP-22-02 and AP-23-01.

## **III. 120-Day Period**

The Applicant extended the 120-day period in ORS 227.178(1) from February 28, 2023, to March 30, 2023, in writing on January 31, 2023. The Applicant extended the 120-day period in ORS 227.178(1) from March 30, 2023, to May 10, 2023, in writing on March 14, 2023. The City Council final decision was issued within the extended 120-day period.

## **IV. Scope of Review**

The Appellant and Applicant agreed that the scope of the hearing was de novo.

## **V. Findings of Fact**

- 1) The Overview set forth above is true and correct.
- 2) The Applicant is Alex Kalmanson.
- 3) The Appellant is Russell Axelrod.

- 4) The Council finds that it has received all information necessary to make a decision based on the agenda reports, appeal application, the Appellant’s oral argument, the Applicant’s oral argument, oral argument by the public, and evidence in the whole record.

**1. Procedural issues raised in public comment and City Council hearings**

- A. The Hidden Springs Neighborhood Association and The Appellant claimed that the Association did not receive written notice of the original staff decision (WAP-22-02). Contrary to this claim, a Class A written notice was prepared and mailed via the United States Postal Service (USPS) to the Hidden Springs Neighborhood Association on December 13, 2022, along with all other required parties. A signed affidavit of mailing was produced and is included in the original decision. Per CDC 99.100(B-C), personal notice is deemed given when the notice is deposited with the USPS. Regardless, the City Council conducted a de novo review and no person argued that notice of the de novo review was inadequate. All persons were provided a full and fair opportunity to submit evidence and argument to the City Council. Therefore, even if the notice of the original staff decision was inadequate, the subsequent de novo council review cured any such issue.
- B. The impartiality of Mayor Bialostosky was challenged by a resident during the continued hearing on April 10, 2023. Councilors found that the challenge had no merit and the Mayor acted as allowed by both applicable standards and direction from the City Attorney. The challenge was denied.

**2. City Council Findings of Fact Approving the Application and Rejecting the Appeal**

City Council hereby adopts the following Findings supporting approval of the Application and rejecting the Appeal based on the Incorporated Findings and the Application’s Substantial Evidence.

- A. The City Council incorporates the Staff Report to the City Council (the “City Council Staff Report”) prepared in advance of the March 13, 2023, appeal hearing and the Planning Department Power Point presentation (the “Power Point”) presented at the March 13, 2023, appeal hearing.
- B. The City Council incorporates the Planning Manager decision dated January 17, 2023.
- C. The City Council incorporates the Applicant Final Written Argument, as well as the three reports of the Applicant’s consultant, as its supplemental findings of approval.
- D. The staff report, Planning Manager Decision and Applicant Final Written Argument are referred to in these supplemental findings as “Incorporated Findings”.

If there is a conflict between these Supplemental Findings and the Incorporated Findings, these findings shall control.

**E. Supplemental Findings in Response to the Substantive Appeal Issues**

**1. The “Site”**

Some objectors claimed that the CDC 32.070 and 080 analysis was required to evaluate an entire water shed and some argued for greater consideration beyond the Applicant’s property. The Council finds that both are mistaken. CDC 32.070 provides an “Alternate Review process” to determine the appropriate width of a WRA “at a particular site.” The Council finds that the reference to “particular site” refers to the applicant’s property. This is evident from the express words used as well as the surrounding context. The standard may only be invoked by an “applicant.” CDC 99.030 requires applicants to be the property owners or property owner’s agent to file applications. This demonstrates that the standard refers only to the applicant’s property. Further, the applicant only has authority to enter his own property to undertake the required evaluations. Moreover, the applicant can only offer mitigation that he has authority to carry out and to maintain over time, which means the mitigation must be on the applicant’s property.

**2. Degraded WRA**

The Council finds that the WRA on the subject property is significantly degraded.

**3. All standards are met**

The Council finds that:

- a. The application meets all required standards to include that the reduced WRA together with the proposed mitigation will result in better performance of WRA functions than the standard WRA without mitigation.
- b. CDC 32.060(D) and its associated Table 32-2 does not apply as a relevant approval standard to the alternate approval process.

**4. WRA Reductions**

The City Council finds that the record demonstrates compliance with the CDC applicable criteria and the Metro Urban Growth Management Functional Plan it implements. Both expressly contemplate WRA reductions in such circumstances as presented in the application.

**5. No Map Change is Necessary**

The City Council finds the Applicant pursued the correct process allowed by the Community Development Code based on the plain language of CDC Chapter 32. The Council finds that a legislative map change process is not required to be approved for a WRA reduction under CDC 32.070 and 080. City Council also finds that substantial evidence in the record demonstrates the stream on the property classifies as ephemeral and there was reason to believe that the default 100-foot

width of the WRA was larger than necessary to protect the functions of the water resource at the site in question. The Council finds that the WRA on the Applicant's property was demonstrated to be significantly degraded, and the CDC expressly contemplates that the property owner, the Applicant, could apply for a WRA reduction in such circumstances and have a reasonable expectation that an application will be approved where all standards are met.

**6. After the fact recollections**

The City Council also finds that per ORS 227.173(1) only the City's codified standards may be applied to the application. The Council also finds that the after the fact statements of persons involved in the adoption of CDC 32 provisions is not legislative history that is persuasive or capable of undermining the proper interpretation of the meaning of CDC 32.070 and 080.

**7. The Applicant properly evaluated the functions of the stream**

The City Council finds that CDC 32.070 and 080 only require a functional evaluation of the WRA be performed for the reach of the water course on the Applicant's subject property. The City Council also finds that substantial evidence in the record demonstrates the functional evaluation submitted by the Applicant, prepared by a professional wetland specialist, establishes that the default 100-foot WRA on either side of the watercourse is far larger than necessary to protect WRA functional values.

**8. The stream is correctly classified as ephemeral**

The City Council finds that the reach of stream on the Applicant's property is ephemeral as the CDC defines an ephemeral stream as one that only flows in response to precipitation and is above groundwater or water table levels.

**9. The Applicant's natural resource assessment was appropriate**

The City Council finds that the Applicant's natural resource assessment, including the functional analysis, prepared by a professional wetland specialist, is the most credible and persuasive evidence in the record. The Council finds that the most credible and persuasive evidence in the record demonstrates that a 15-foot buffer with the proposed mitigation plantings will improve the function of the WRA as opposed to the existing conditions on site with the 100-foot WRA. City Council also finds the record demonstrates that the evidence submitted by the Applicant contains adequate information as required by the Alternate Review process in CDC Chapter 32 to make a decision.

**10. The Planning Manager and Council decisions do not defer a determination of compliance with any relevant standard**

The City Council finds that all standards are met and that no findings of compliance have been deferred. The Council further finds the Planning Manager and Council have authority under the CDC to approve the application (CDC 99.060.A.1.r) and can

impose reasonable conditions of approval to assure compliance. Here, the first condition of approval for a mitigation plan submittal has already been met. In this regard, the Council finds that the Applicant submitted an adequate mitigation plan in the open record period. The Council finds that the only remaining task under Condition 1 is for the Applicant to submit to the City a final report documenting completion of the required mitigation. Condition 2 requires that the plantings on the property comply with that mitigation plan – as it was expressed in the Applicant’s expert’s narrative Exhibit PD-1 Table 2 and Figure 2. Conditions 3 and 4 are informational only and require what the code already requires; (i.e.) that the Applicant will be required to submit a stormwater and construction management plan if and when development is proposed in the future.

## **VI. Conclusion.**

For the reasons contained herein, the City Council hereby rejects the appeal, affirms the Planning Manager decision, and approves the Application.

- 1. Mitigation Plan. The applicant has submitted a mitigation and planting plan that conforms to the provisions of CDC Chapter 32. The applicant shall submit a final report documenting the mitigation measures were completed within 30 days following completion of the measures.**
- 2. Site Plan and Narrative. Planting and mitigation shall conform to applicant’s mitigation plan (Table 2 and Figure 2, Exhibit PD-1, Planning Manager Decision WAP-22-02 dated January 17, 2023).**
- 3. Stormwater Plan. The applicant shall submit a stormwater management plan at time of permit submittal for future development that demonstrates its compliance with the 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.**

**VII. Order**

The Council concludes that AP-23-01 is denied. The Council upholds the Planning Manager approval of WAP-22-02 based upon consideration of the entire Record, Findings of Fact, and Findings above.



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RORY BIALOSTOSKY, INTERIM MAYOR  
WEST LINN CITY COUNCIL

April 17th, 2023

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DATE

This decision may be appealed to the Land Use Board of Appeals in accordance with the applicable rules and statutes.

Mailed this 18 day of April, 2023.

Therefore, this decision becomes effective 21 days from the date of approval at 5 p.m.,  
May 9, 2023.