



CITY OF West Linn

Memorandum

Date: March 27, 2023
To: Mayor Bialostosky and City Council
From: Darren Wyss, Planning Manager
Subject: AP-23-01 Appellant Testimony

Between the March 20, 2023 noon deadline to submit comments and the March 27, 2023 noon deadline to submit comments, staff received additional testimony (attached) from Russell Axelrod, Appellant, 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.

Interim Mayor Biaolostosky, and Councilors Baumgardner and Relyea,

I am providing a few Final Comments in accordance with the process/schedule you established at the March 13 initial public hearing on WAP-22-02 /AP-23-01. This information supplements my prior written testimony dated March 10, oral testimony at the March 13 hearing, and my Additional Comments submitted on March 20.

To be honest I was not intending to submit any Final Comments, as I have already spent considerable time explaining problems with the flawed approach and assumptions underlying the findings and conclusions of the City's permit action, including violations of Chapter 32 code criteria. However, after seeing the March 20 comments from the Applicant and their Consultant, I'm compelled to make just a few Final Comments to clarify the record on certain aspects addressed previously, and to address a few other related misrepresentations directed toward me and certain facts on the record by the Applicant. These Final Comments further support why Council must deny WAP-22-02, and my recommendations for Council's findings on this matter are provided in my final section of this submission.

Flawed Stream/Drainage Characterization by Consultant

The Consultant continues to rely on the qualitative SDAM model applied to a highly disturbed and limited segment of the creek to reach their conclusions. In their assessment they failed to perform even the most basic field characterization tasks to ground truth their assumptions and objectively assess the hydrologic features and conditions of the Robin Creek drainage. Such drainage aspects are also critical to any use of the SDAM model as an interpretive tool. Models have their application under certain conditions, but they don't replace the need for basic field investigation practice. In this regard any conclusions from models are only as good as the information input to achieve them, and in true scientific work the old saying "garbage in – garbage out" definitely applies in this case.

As described in my March 20 Additional Comments, the reason Robin Creek flows much less frequently along the drainage between the houses is because the hydrology of this lower portion of the reach has been highly altered by the City's past storm line construction projects, and to some degree from previous home (foundation related) construction in this area. This includes the City's past damming of the drainage by rip-rap just upstream from the property, and the installation of subsurface storm drain piping and fill in the lower drainage above the main storm drain outlet area on the south side of Wildwood Drive. The typically low base flow in the upper drainage is fed by springs/seeps and precipitation, but this base flow moves underground above the rip-rap impoundment. From there the base flow migrates below ground surface along the subject property between the houses until it ultimately returns back to the drainage as surface flow on the north (downstream) side of Wildwood Drive. Such hydrology demonstrates intermittent, not ephemeral stream flow conditions.

So while the creek flow at the surface is less frequent between the homes where the drainage is so highly disturbed, Robin Creek is by character and definition not an ephemeral stream! In my prior comments and testimony I have documented how Robin Creek is without question intermittent in this upper reach and by definition in our Community Development Code (CDC) (CDC Chapter 2). Council must uphold these defining criteria which are fundamental to our WRA protection program, including the official WRA Map (CDC 32.120) where actual "ephemeral" stream segments are delineated by code and can only be changed through a legislative hearing process by our Planning Commission in accordance with CDC Chapters 98 and 99 (CDC

32.120 (B)). Because the Consultant has focused its evaluation only on an approximate 150 ft segment of the highly disturbed drainage between the existing homes where creek flow is mostly subsurface, it simply does not account for the character, value and function of the upper reach of Robin Creek.

Attempts to declare streams ephemeral to avoid regulation is the oldest ploy in developers' playbook. I mention this concern here because the Consultant continues to focus only on the disturbed area which supports their flawed model approach, while ignoring the actual hydrologic characteristics and features of the drainage system. It's also troubling that the City does not have a more rudimentary understanding of the limitations of the Applicant/Consultant's approach and conclusions. This narrow perspective is then compounded by the fact that the City did not recognize and address in the record its own infrastructure and the implications it poses to the drainage system in its review of the Applicant/Consultant submittals and in its own decision making. It is further problematic that the Consultant, and the City, are determined to use this flawed interpretation to avoid critical slope and setback criteria/protections for this *Riparian Corridor/Ravine*, which are independent features in our WRA Protection Program – notably violating CDC 32.060(D) and Table 32-2 and Figures 32-4 thru 32-6).

Clarification of Applicant Statements/Claims

In his March 20 "statement from the applicant," Mr. Kalmanson makes several inaccurate or untrue statements and allegations of the Appellant's comments and testimony, including the comparison of his property to the Appellant's property intended to justify his land development approach. Because of this I feel compelled to rebut certain of these Applicant claims to clarify the record.

1. Applicant Statement, page 2: *"The issues raised by the opponents are simply not relevant to the decision in front of you and, most importantly, the objections find no support in the city's code. I wish to respond to some of these claims that either find no support in the fact or the city code."*

Appellant Clarification: Throughout this appeal process I have attempted to focus only on relevant WRA protection program elements and code criteria and violations of code as they pertain to the Applicant's application materials and intended property development plan. I have also shared factual information and technical reasoning underlying our WRA code as an author and technical expert that helped revise our WRA program codified in Chapter 32, along with senior planning staff and other WRA Committee members from the community about 10 years ago.

2. Applicant Statement, page 2: *"Below is a photo of Kim my Naturalist putting all her weight on top of the shovel inside the stream's path. One can easily see that the shovel digs in about 1 inch or so – that is because there is a rock bed under this stream and under most of the property in question. In contrast an opponent Mr Axelrod relies upon a single photo after we had major snow melt and rain. The evidence makes clear that his single day image is not representative of daily or even weekly or monthly conditions. You have my photos for 17 days showing only one day of water in the stream being present – that same day after significant rain and snow melt. Yet, Mr. Axelrod still says this is not an ephemeral stream – That is a misrepresentation and worse it is DIS-INFORMATION!"*

Appellant Clarification: The location shown for the "Naturalist" is a highly disturbed area of the drainage bottom that has been backfilled with cobble-sized fill related to previous City storm drain/line construction projects. It's close to impossible to dig in angular-basalt ballast of this size with a hand shovel. In my previous submission's I have described for the City and the Applicant (and their Consultant "Naturalist") the reasons

why the creek does not flow at the surface for many months of the year along the subject property and between the two homes. Except for generally higher flow periods, the creek is underground in this limited segment because of alterations I've described previously: the rip-rap impoundment across the drainage immediately upstream of the property and the nature of the fill beneath and along the drain lines downstream from the City's previous construction projects. These disturbances and associated backfill materials are more than capable of causing the lower flows to go underground and be transmitted in the subsurface to and beneath Wildwood Drive where it discharges at lower elevations in the *Riparian Corridor* north of the roadway. My recognition of the hydrology and drainage characteristics is based on observed physical features and attributes of the *Riparian Corridor/Ravine*, and my professional understanding of the hydrogeologic influences in the drainage from seeps/springs and rainfall during the year. My observations on March 16 showing creek flow above the impoundment and no flow in the impacted area at the same time between the houses is proof of the conditions I have described. It also illustrates the failure of the Applicant/Consultant's model approach (SDAM) to characterize complex stream flow at the reach scale when applied to a limited, highly disturbed area. Robin Creek is without question not an ephemeral stream by its hydrologic attributes and functions, by definition in our code, by delineation on our official WRA Map, or by map delineation established by the U.S. Geological Survey.

3. Applicant Statement, Page 4: *"Mr. Axelrod has said that is OK with me building an ADU – when he was on my property, he said that he would be OK for me to build an ADU in approximately the same area that I have plans to build a small home... He never answered why one was OK and the other was not – if he was truly worried about damaging the area, he would be against ADU as well. Towards the end of the city council meeting, Mr. Axelrod said he would be ok with me building an ADU on the other side of my property away from the stream – but he is aware that there is no space on the other side to build anything... But the point that he is ok with an ADU that is not much different in size with a home I would eventually to build, demonstrates that even Mr. Axelrod does not truly believe that residential use, of this residential lot as the city code contemplates to be possible, is deleterious."*

Appellant Clarification: The Applicant's permit application is premised on a plan to build a large new home on the steep hillside portion of his property within the protected *Riparian Corridor*. When I ran into the Applicant at the property on March 3, he said that he thought he would build something smaller. I commented that I thought he could build a smaller ADU type structure on either side of his current home if placed against the home, thus not requiring development further into the protected *Ravine*. I never said or implied that he could put an ADU or any building on the protected steep hillside portion of his property in the *Ravine*. I also have a witness to our conversation that day in Mr. Mike Bonoff, a water quality and habitat expert whom is very trustworthy and he also served as a technical expert on the Committee which wrote our WRA code about 10 years ago. An ADU under our code has a 1,000 square ft size limitation which is in strong contrast to the large home the Applicant is seeking approval for in his permit application. If the Applicant really intends to build something smaller it makes no sense to submit an application for a much larger project. It's clear from his comments, and his permit application, his intent to get approval to build a larger home on the overly-steep slopes in the protected *Ravine*. See further clarification on the home size issue below.

4. Applicant Statement, page 4: *"Opponents keep talking about some 4000+ sq ft. house. To repeat what the evidence only shows: even if a dwelling is eventually approved on my property, I have never proposed nor sought to do a 4,000 square foot house. I have studied cults and brainwashing extensively – when someone repeats the same thing over and over again, it is very difficult to get it out of their minds. My hope is that you are not persuaded by this repeated and wholly false claim."*

Appellant Clarification: The Applicant’s permit application shows a future development plan with a home to be built on the overly-steep (greater than 40%!) slope in the protected area of the *Riparian Corridor*. The Applicants development plan shows a 3,500 square foot area or footprint for the future development, with approximately 1,200 square feet for the driveway and approximately 2,300 square feet for the first floor of the home. Every home in this neighborhood is either two- or three-stories tall. If only a two-story home is built it would be a home of 4,600 square ft (2 x 2,300), or certainly more than the 4,000 square feet which I less onerously offered in my characterization. My comments on his home size are based entirely on the Applicants information he has included in his permit application approved by the City. Such development, if approved, would be a massive, out-of-character and hazardous intrusion on the steep *Riparian* landscape in clear violation of our WRA code.

5. Applicant Statement, page 4: *“My current home has living space in the front lower level of the home and has the beginning of the slope under the back side of the home. By way of example, Mr. Axelrod’s home is also on a significant slope and has a garage tucked-in on the right side of the property, which is the lower portion of the slope. My intent if eventually approved in a much later application, was to do the same with my smaller home as well – the photo below shows a fairly flat area where the main level of a potential home would be. We would make a small cut into the slope below to tuck-in a garage underneath. There is simply nothing relevant to my application about slope. Claims to the contrary are an irrelevant distraction.”*

Appellant Clarification: My home is built on a significantly lower (13%) slope and the foundation is built into solid basalt bedrock that actually required blasting for construction – because of this my home construction represents the safest (slope stability) and most secure (seismically) type of residential structure you could build in the entire Portland area, and with no water issues or environmental disturbances involved. In terms of comparable home size, my entire two-story home is 2,850 square ft (including garage space) which is only slightly larger than only the first-story of the Applicant’s proposed home. My home also fronts the street and is not in an environmentally sensitive area, in strong contrast to the Applicants’ plan to build on unstable steep slopes (greater than 40%) in a protected WRA *Riparian Corridor/Ravine*.

Because the Applicant indicates in his March 20 comments the plan to build the lower portion of his future home by digging into the steep slope, it’s quite relevant to understand the conditions encountered when his own home was built in 1994 by a prior owner. There was so much water in the subsurface when they tried to build his home that they had to raise the first floor approximately 1-story so they could build a livable home out of the water problems. This is why the front of his home has such an unusual entry – an approximate 1-story flight of stairs to get to the first floor from the street/driveway entrance level. Mr. Kalmanson was not around when this occurred so he may or may not know this, but many of us in the neighborhood were living here and watched the construction fiasco. The reason for all the water in the subsurface is because of the proximity of his existing home to the *Riparian Corridor/Ravine* where substantial springs, seeps and drainage flow occur below ground level. Based on these known conditions, allowing any building construction further into the steep *Ravine*, as proposed and approved by the City, would experience even worse conditions, greater hazards, and lead to further adverse environmental impacts.

6. Applicant Statement, page 9: *“It is also important to understand that the city alternate review process is required by Metro because Metro understands that the region and city-wide water course mapping was not necessarily site specific. Moreover, there was never any ground truthing when the current mapping was applied to my property. Had the original drafters actually done any ground truthing at my property, the setback would have been 15 feet for an ephemeral stream.”*

Appellant Clarification: I explained in my earlier testimony and submissions why the City added the Alternate Review Process (CDC 32.070) section to our WRA code. It had nothing to do with Metro and Metro does not oversee our WRA protection Program or code. For the Applicant to also state that there was no ground truthing in our WRA code preparations is simply erroneous. I actually participated in some of the ground-truthing and field control checks (e.g., WRA boundaries and setbacks) performed to support the WRA code we prepared under the direction of Senior Planner Peter Spir, and following Goal 5 State procedures. Mr. Bonoff also participated in some of the ground-truthing and can confirm this fact. I also explained in earlier testimony how the “minimum” 15 ft setback was derived for the WRA program and code for ephemeral streams only – this minimum setback was based on field conditions the Committee assessed, such as at Oppenlander Field on Rosemont Rd. Please again review the official WRA Map to see and understand these features considered ephemeral under West Linn’s WRA Protection Program.

My Final Comments/Recommendations

As I have noted in my previous testimony and comment submissions, this permit application is technically flawed and does not meet sufficient technical rigor and due diligence to demonstrate compliance with key provisions of our WRA Protection Program under Chapter 32. Contributing to this deficient application, the City failed to recognize critical influences on the hydrology of the upper Robin Creek drainage resulting from its own stormwater management infrastructure. Collectively, these factors led to a flawed permit approach and an incomplete and unacceptable interpretation/use of the Alternate Review Process (CDC 32.070), especially violating the protective slope and setbacks for our *Riparian Corridors* and the non-degradation code criteria fundamental to our WRA Program – notably CDC 32.010 (B thru H, F and I), 32.020 (A and B), 32.060 (A, B and D) and Table 32-2 and Figures 32-4 thru 32-6, 32.080 (A and B), and 32.120 (B).

The following items are recommended for inclusion in the Council’s findings on the record to deny WRA-22-02:

- Robin Creek is not an ephemeral stream by its hydrologic attributes and functions, by definition in our WRA code (CDC Chapter 2), and by delineation of WRA features on the City’s official WRA Map (CDC 32.120).
- Robin Creek is an intermittent stream in its upper reach above Wildwood Drive and flows within a *Significant Riparian Corridor* designated on the City’s official WRA Map (CDC 32.120). Future development in or along this *Corridor/Ravine* shall address compliance with the slope, setback and other protective standards of West Linn’s WRA Protection Program in Chapter 32.
- Should the Applicant wish to propose a different development plan in the future, they shall apply for a WRA permit at the same time as their property development/construction plan application so the project, together with any proposed mitigation, can be appropriately assessed collectively by the City’s full code provisions and authorities under Chapters 32, 98, and 99, and any other applicable code provisions if applicable.
- Council shall direct the Planning Manager that future WRA permit applications involving property development be submitted and processed at the same time as the construction permit application and other development applications so that the City’s full code provisions and authorities can be appropriately addressed under Chapters 32, 98 and 99, and any other applicable code provisions if applicable.
- Council shall invoke a temporary ban on further uses of the Alternate Review Process (CDC 32.070) pending review by the Planning Commission to recommend minimal code revisions to eliminate or

minimize unintended uses of the WRA protection standards as they were originally envisioned and established.

- The Planning Commission review shall also assess past uses of the Alternate Review Process approved by the Planning Manager and Planning Commission to assess adequacy of code application and processing, and to incorporate any findings or recommendations proposed to update our code to improve the City's future performance and compliance with the CDC overall.
- Council shall direct that planning Staff receive additional training in the foundation and administration of our WRA Protection Program, so that future permit applicants and Staff can minimize plan disruptions and reduce costs and inconveniences in application review and processing.

As a follow-up to this decision, Council should consider if the City should assess the potential benefits and feasibility of restoring Robin Creek base flow to the channel reach between Wildwood Drive and the City's rip-rap impoundment damaged by its previous construction projects. This would involve channel and vegetation restoration, and require further discussion with Staff, collaboration with adjacent property owners and community/advisory groups, and other experts.

Finally, I would like to remind Council of my earlier request that the City reimburse me the appeal fee of \$400 that I had to pay because of flawed noticing involving the City and our NA leadership during the holiday which resulted in my having to file this appeal independently.

Respectfully Submitted,

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