



CITY OF West Linn

Memorandum

Date: March 27, 2023
To: Mayor Bialostosky and City Council
From: Darren Wyss, Planning Manager
Subject: AP-23-01 Applicant 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 Alex Kalmanson, 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.

March 27 “rebuttal” statement from applicant, Alex Kalmanson regarding WAP-22-02 permit approval

Dear Interim Mayor Bialostosky, Council President Baumgardner, and Councilor Relyea,

Thank you again for spending the time on this case – it seems to get more complicated each week with all the technical and legal data that is coming at you from all directions... Therefore, I will try to be as brief as possible this time. Below, I respond to the issues raised by opponents’ March 20 submittals, based upon the evidence in the record. I will submit my final written argument next Monday, April 3, 2023.

Robin Creek is not “ephemeral.”

As explained by my expert in her three evaluations of the property, the Stream Duration Assessment Method (SDAM) analysis performed for the site assessment on my property was not intended to nor was it required to and no would it be appropriate to, classify the entirety of Robin Creek or the drainage system. Rather, the purpose of the SDAM analysis was to evaluate what the city code standards require: the stream reach within the applicant’s property, starting at the southern property boundary and ending at the storm drain at the northern boundary. It would not make sense to choose another stream reach to represent the reach within the subject property. As she explained, a single stream may be composed of reaches with ephemeral, intermittent, and perennial flow. No stream channel was apparent upslope of the subject parcel as viewed from the property line. The drainage downstream of the subject parcel was 50-60 feet below the subject parcel in a very deep, steep-sided and broad canyon with very different hydrogeomorphic and biological characteristics. It was not practical or legal to access this area nor did it represent the stream reach within my property. As she explained, the SDAM Manual states that “For some purposes (e.g., regulatory) the reach in question will often be predetermined by property ownership or proposed activities; the above process for assessing the stream should be followed to the extent possible, and if the reach in question is generally uniform one assessment is appropriate. If the reach in question is not uniform, two or more assessments are recommended to fully describe the changes along the reach. Regardless of the number of reaches assessed, decisions should be made in conjunction with best professional judgment to reach a conclusion on flow duration as ephemeral, intermittent, or perennial.” She did exactly that.

She explained that based upon her professional judgment, which is based upon significant training and 12 years of directly relevant experience, that the “reach in question”, which is the reach within my subject parcel, is uniform and is an ephemeral flow duration...

She made clear that no groundwater discharge (springs or seeps) was observed upslope or within my property during the September 2022 or March 2023 site visits. It is also undisputed that excessive rainfall was documented in the days and weeks prior to the March site visit and yet no surface flow was present in the stream reach analyzed.

Opponent claims that Robin Creek was flowing in channel upstream of the subject property

My opponent's March 20, 2023 Photo's 1 and 2 do not show stream flow but rather some surface water pooling in lower gradient areas and/or in small impoundments made by rocks and vegetation. This is to be expected within ephemeral stream reaches following the excessive rainfall documented in the days and weeks prior to the site visit. Moreover, his photos are not particularly helpful or relevant because it was not possible to ascertain where he took these photos/videos or how the area they depict are connected to the stream reach on my property.

In my expert's March 15 field visit, she photographed the area upslope of my property and demonstrated that no surface water nor any defined channel with bed and bank, or indicator of ordinary high-water mark such as erosion, scour, substrate sorting, change in vegetation community, or other indicator used to determine the lateral extent of streams was present (my expert's Photo Point 3, facing south). For her analysis, she was clear that the stream reach began at this point.

Opponents' reference to an "old rock dam or impoundment type structure" is new evidence to which I have never had any chance to respond and I must object to it. Because if I were able to respond, I would point out that there is in fact **no such a structure on my property**. There is a manhole on my property as is plain to see from my photographs that are in the record that is near the stream as shown on my expert's Photo Point 2 facing north. It is also plain from the evidence in the record that there was no water or seepage or evidence of subsurface flow present during my expert's March 15 site visit. Further, the stream substrate is composed mostly of cobbles and small boulders which prohibited the excavation of a small pit to observe for any subsurface flow. A small pit was excavated by my expert in softer sediments adjacent to the stream on my property to observe for hyporheic flow or high ground water table and the evidence only shows that there was no groundwater observed.

There are two small underground stormwater pipes that discharge stormwater runoff from my subject property into the storm drain as shown in my expert's Photo Point 1 facing north. These pipes discharging into the storm drain following excessive rainfall documented in the days and weeks prior to my expert's site visit explains the reason why "reasonably substantial water flow moving below ground level between the houses in this area next to the City culvert" was allegedly heard by the opponent-appellant

We also note that there was no stream flow or evidence of subsurface flow that was shown at all in Appellants Photo's 3 or 4 which allegedly depicts the stream reach within my property. There is no "rip rap impoundment across the creek" evident in the photos.

Opponent made various complaints about the evidence at the March 13 initial hearing

a. My expert is credible and has a background of professional training, credentialing, and experience. She properly evaluated the stream, drainage, and watershed characteristics on my property, as the city standards require.

There is no requirement in the city code to apply the SDAM analysis to any property other than the reach on my property. The SDAM manual is clear that streams can have, and this one has after proper evaluation, multiple characteristics throughout its length. The only evidence is that the reach on my property is indisputably ephemeral. Per the city's code, this case is limited to properly classifying the reach *on my property*.

b. My expert properly accounted for all influences on the hydrology of the lower reach drainage on the subject property.

City/stormwater infrastructure within the subject parcel was described in the natural resource assessment report submitted with the initial application. The focus of the assessment was to document existing conditions on my property, as required. Any impacts to hydrology on my property from the past construction on the subject property is necessarily accounted for in the observance and evaluation of existing conditions – to the extent that past activities affect those conditions. However, nothing in the City code makes it relevant or necessary to determine the proper WRA width, to undertake a forensic evaluation of past construction on this or any other property. Moreover, doing so would produce no relevant information. This is because the standards to modify the WRA width ask simply for an evaluation of existing conditions on particular property (mine). Such an evaluation was performed here and yielded the conclusion that the reach on my property is ephemeral only and that a setback of 15 feet is all that is required or makes any sense. Any larger setback is not about WRA values but rather is about prohibiting residential development on my residential subdivision lot in the City.

c. Clean Water Act and BMPs for Storm Management

Opponent/appellant took the position that my expert should have evaluated the federal Clean Water Act or potential Best Management Practice (BMP) for the City's stormwater management program. Apparently, my opponent is of the opinion that determining the proper WRA for a reach on a particular city property requires a city-wide or perhaps watershed wide analysis of impacts from a variety of sources. There are two responses. First, nothing in the city code includes any such requirement and the city decision here must be based upon the codified standards in the city code. Second, such an analysis would not produce anything relevant to answer the question posed by my application – what is the proper WRA on my property? The WRA on my property needs only to be the width that is appropriate on my property to protect the particular values *on my property*. The city code acknowledges that for reaches where a stream is ephemeral, 15-feet is plenty. My expert concluded that based upon her professional evaluation,

that a WRA on my property of 15 feet is more than adequate. There is no evidence whatsoever otherwise.

Opponent falsely claimed that my expert did not understand geologic and hydrogeologic characteristics of the area and asserted that her drainage system/watershed evaluation and interpretations must be wrong.

There are three responses to the unwarranted attacks on my expert. First, there is no evidence that my expert was not qualified to make the assessments that she made regarding the proper WRA on my property and the suggestion otherwise is an unwarranted personal attack on her and offensive. Second, the geology and hydrology of the “area” beyond my property is irrelevant; nothing in the City code requires an evaluation of it. Third, there can be no dispute that that my expert provided a proper evaluation of the characteristics of the reach on my property in light of the standards in the city code and that she came to the supported and scientifically reinforced conclusion that the stream on my property is ephemeral and that a 15-foot WRA is what is appropriate.

Opponents asserted that my expert should have evaluated potential downstream flooding impacts of increased impervious surface area and reducing vegetation for a new building and “defensible space” for i wildfire hazards.

There are two responses. First, these issues relate to approval of a development application. However, this application does not approve any development. This application is simply about determining the appropriate WRA for water and riparian values on the particular reach, on my property. This application has nothing to do with impervious building areas or wildfire “defensible space.” Second, these objections demonstrate that opponents’ objections in reality have nothing to do with applicable city standards; rather they are about objecting to residential development, in a residential subdivision, in a city, of a type that is just like the development on their own property. If the city allows such objections, it will never meet its housing objectives and obligations. The city must and should as a matter of policy consider my application in light of the standards required by City code for a WRA permit. If the city does so, the staff decision must be affirmed.

Opponents apparently assert that anytime that there is a steep gully/Ravine that the maximum WRA must be applied.

This is not what the city’s codified standards state. Nothing in the city standards requires that the presence of a “steep gully” or “ravine” anywhere always equate to the maximum 100-foot setback. And, as I stated in my previous verbal and written testimony, the area in question on my property has limited slope - a much smaller angle than some of the properties being developed throughout our city - so unlike some areas to the south or north of my property, I would not characterize my property as a "ravine" or a "steep gully" - it's just a sloped area - extremely common to our neighborhood.

Opponent objections to my expert’s SDAM analysis and assertion that a single site visit was inadequate.

These objections find no support in the record. My expert performed a second site visit on March 15, 2023, during a water year of near-normal precipitation and following two weeks of above-normal precipitation to verify site conditions and stream classification. No surface flow was present in the onsite stream reach and no subsurface flow was evident. The reach analyzed was the reach within the subject parcel and it was appropriate to apply SDAM to this reach alone for regulatory/project purposes and based on hydrogeomorphic and biological characteristics. Upstream and downstream areas could not be accessed legally (private property) or physically due to extremely steep slopes on those properties. It is most often the case that only the subject property can be physically assessed for these reasons. Offsite areas are assessed based on available data and information and onsite vantage point. No defined channel or indicator of water flow was present above (south) of the subject parcel. The area downstream of Wildwood Drive (to the north) included a very deep, steep-sided canyon, the bottom of which was 50-60 feet below the road and could not be physically or legally accessed, nor would this area accurately represent the very different conditions present within the stream reach on the subject parcel.

In sum, the following are relevant facts I hope that you will keep in mind:

- The most important fact in your decision is that throughout the process, I followed the law and the code 100%. There is no evidence otherwise. Your professional city staff decision in this case that actually applies your code as it is written, should stand...
- As stated by my expert in her three reports in the record – from a technical point of view, this is a simple case of an ephemeral stream and an appropriate 15-foot setback for it that your city code properly requires. Everything brought up on top of that is irrelevant and mis-leading...
- I think it is important to point out again that, as someone that cares very much about our environment, my plan from the beginning was to create a safe and beautiful addition to our neighborhood – improve the existing space visually as well as protect it environmentally. I plan to work very closely with the city to achieve this goal throughout this project. There is no evidence that my proposal will do anything other than significantly improve existing riparian conditions.
- Your professional staff provided a list of previous 6 projects approving a reduction in the WRA. There is nothing out of order, alarming or “precedential” about my application. My application is certainly far less impactful than others the city has properly approved applying the same standards as apply here. Why didn’t the project for a 25-home subdivision on Solano rd. (WAP-19-02 – same ephemeral stream 15-foot set back) ever generate such push-back? I have the same question about the project on Weatherhill Rd for an 11-home subdivision. These are significant projects for the size of our city, and the Solano project is in a such a visible location – city residents must have known

about it... And these were large homes – 3000+ sq ft. each. The environmental impact of those projects combined are 100 times larger than my potential small home... And if some in the Hidden Springs neighborhood have such objections to my application then what about the project on Carriage way that is about a 5-minute walk from my home or Mr. Axelrod's? Finally, I must also point out that 5 of the 6 projects listed in your staff's letter (including the 3 I mentioned above) **were approved during the time Mr. Axelrod was the Major of our city....**

I urge you to please focus on the facts of the case and your codified rules. If you do so, it is respectfully submitted that you must uphold the permit and the decision approved by your professional staff. I understand that people do not often like the prospect of changes in their neighborhoods. But that opposition does not and respectfully cannot translate into an abandonment of the city's codified rules. Even Mr. Axelrod when he was mayor did not do so. Applying those rules here can only lead to affirming your staff's decision. Thank you again for all the time you have spent evaluating this case.

Sincerely

Alex Kalmanson

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