



CITY OF West Linn

Memorandum

Date: March 20, 2023
To: Mayor Bialostosky and City Council
From: Darren Wyss, Planning Manager
Subject: AP-23-01 Public Comments

Between the City Council Public Hearing on March 13, 2023 and the March 20, 2023 noon deadline to submit comments, staff received three public comments for the appeal of an approved Water Resource Area Permit at 19679 Wildwood Drive. Comments are attached.

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

March 20, 2023

Subject: Additional Written Comments provided pursuant to the Continuance of the Council Hearing for Appeal AP-23-01, Regarding the Planning Manager Decision for WAP-22-02, a Water Resource Area Permit for 19679 Wildwood Drive

Interim Mayor Bialostosky, and Councilors Baumgardner and Relyea:

As a resident of West Linn, I have taken an interest in our City's government and, in particular, our land use process and decisions. I have been a member of the City's Planning Commission for over eight years, including six years as its Chair. That said, I am providing written comments regarding Appeal AP-23-01 as a City resident, not as a member of the Planning Commission. Also, my statement does not represent any consideration of AP-23-01 or WAP-22-02 by the Planning Commission. Further, my comments are provided in light of the City Attorney's determination (during the March 13, 2023 hearing) that the Council will be the final decisionmaking body for AP-23-01 in accordance with Community Development Code (CDC) Chapter 99.240(A) and, therefore, cannot remand Appeal AP-23-01 or the underlying application WAP-22-02 to the Planning Commission. Bearing this in mind, my comments present no conflict with my role as a Planning Commissioner.

I am professionally qualified to comment on AP-23-01 as an Oregon Registered Geologist (R.G.), a Washington Licensed Geologist (L.G.), and a California Professional Geologist (P.G.). I have worked for over 35 years as an environmental consultant and practicing geologist, with substantial experience with groundwater and stormwater that is applicable to and supportive of my comments below. I also serve on the Steering Committee of the Washington Hydrogeology Symposium (2005 to present) and have previously served on the planning committee, as well as a moderator, for the NEBC's Managing Stormwater in Oregon Conference. In addition, I have a solid grounding in West Linn's Community Development Code, which I will reference in my comments.

CDC 32.120, Water Resource Area (WRA) Map

For easy reference, the applicable code from the City's website is provided below. Bolding and underlining of text were added.

32.120 WRA MAP

A. The WRA Map, dated May 2014, is adopted as the official WRA Map. **It is intended to identify WRA water features (wetlands, streams, ephemeral streams and riparian corridors).** It is not intended to delineate the exact WRA boundaries or water feature alignment. That task will be carried out by staff in the course of site visits where the provisions of Table 32-2 shall apply.

B. **Amendments to the WRA Map may be made in accordance with the provisions of Chapters 98 and 99 CDC.** Copies of all map amendments shall be dated with the effective date of the document adopting the map amendment and shall be maintained without change, together with the adopting documents, on file in the Planning Department.

C. The Planning Director shall maintain in their office, and available for public inspection, an up-to-date copy of the WRA Map. (Ord. [1623](#) § 1, 2014)

As the above code indicates, the City WRA Map identifies water features per CDC 32.120(A). Further, the WRA Map itself is part and parcel of the WRA code in CDC Chapter 32 and can only be amended through a legislative hearing before the Planning Commission per CDC 32.120(B). These points are very clear and cannot be misconstrued. Robin Creek is identified as a “Stream” on the WRA Map and cannot be changed to an “Ephemeral Stream” without a legislative hearing in accordance with CDC Chapter 98 before the Planning Commission. Consequently, the Planning Manager Decision does not have the authority to revise the water feature classification of Robin Creek.

As the WRA Map “is not intended to delineate the exact WRA boundaries or water feature alignment” per CDC 32.120(A), the Planning Manager may approve changes in the WRA boundary and alignment. However, since Robin Creek may not be reclassified as an ephemeral stream without legislative due process, the Planning Manager Decision may not approve a change in the WRA boundary that is contingent upon any change in stream classification.

As required under CDC 32.120(C), the WRA Map shall be up-to-date and available for the public inspection. The City has been served well by the May 2014 WRA Map, as required by Ordinance 1623, and there have been no legislative hearings since its initial development to alter the identification of Goal 5 Significant Riparian Corridors and Goal 5 Wetland Inventory.

CDC 32.060, Approval Criteria (Standard Process)

Without a legislative hearing to reclassify the subject reach of Robin Creek as ephemeral, the Applicant has not demonstrated the applicability of the Alternate Review Process under CDC 32.070. Accordingly, the Applicant must address the standard approval criteria per CDC 32.060.

The WRA Map indicates that Robin Creek is a “Significant Riparian Corridor.” Whatever the applicant proposes must be as good as the WRA boundary for a riparian corridor listed in CDC 32, Table 32-2, Line D, which requires having a 100-foot width on each side of the water resource. To determine equivalency to the riparian corridor boundary, the Applicant must consider the ecological functions listed in CDC 32, Table 32-4.

The Applicant indicated the ecological functions were considered for equivalency in Table 1 of the Natural Resource Assessment. The text on pages 6-7 of the Natural Resource Assessment recognized steep slopes and hazardous conditions, but Table 1 does not address the steep slope conditions. In the paragraph just prior to Table 1 (page 6), the Natural Resource

Assessment states: *“Stormwater runoff from steep slopes and development above is unmitigated.”* At the bottom of page 7, the Assessment discusses site design that is contingent upon a 15-foot WRA boundary and states: *“Site design utilized the only developable area onsite that avoided steep, hazardous slopes and avoided impacts to the 15-foot WRA.”* Table 1 and the quoted text have not demonstrated ecological function equivalency for steep slope conditions that would support a 15-foot WRA boundary, but rather suggest that the water resource should meet the WRA width for a Ravine that includes the slope plus an additional 50 feet (CDC 32, Table 32-2, Line B).

Also, the Natural Resource Assessment states (page 7) *“the applicant proposes voluntary enhancement of the WRA along the west side of the stream,”* which indicates that no enhancement will occur on the neighboring property to the east. By their application to reduce the WRA from 100 feet on each side of Robin Creek to only 15 feet, apparently on both sides of the stream, they provide no assessment of or proposed mitigation in the WRA on the east side of the stream, i.e., on the neighboring property. The Planning Manager Decision does not account for this discrepancy, thereby reducing the WRA on the neighboring property without supporting evidence.

Existing Upstream City Storm Infrastructure

The Natural Resource Assessment addressed the recent stormwater infrastructure construction at the Applicant’s property, adjacent to Wildwood Drive, but it does not address storm lateral discharge structures located upstream of the Applicant’s property. The as-built drawing sets for Hidden Springs Ranch No. 6 and Hidden Springs Summit No. 1 show the stormwater from Derby Court, Carriage Way, and Lexington Terrace are conveyed for discharge into Robin Creek. The as-built drawing sets may be viewed at these links to the City’s website:

<https://westlinnoregon.gov/sites/default/files/gis/asbuilts/HiddenSpringsRanch6.pdf>

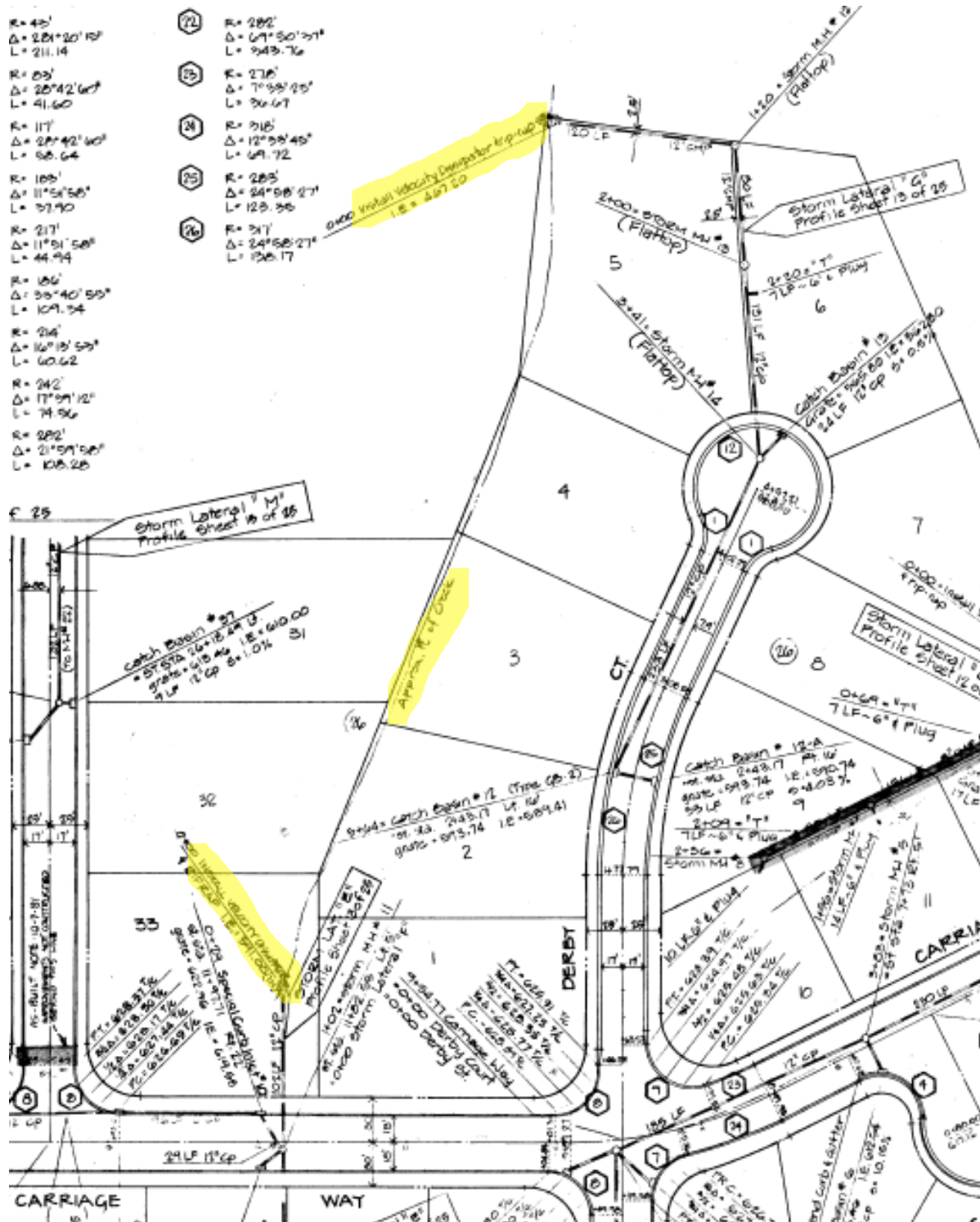
<https://westlinnoregon.gov/sites/default/files/gis/asbuilts/HiddenSpringsSummit.pdf>

Below is a screenshot of a portion of Sheet 3/25 from the Hidden Springs Ranch No. 6 as-built drawing set. The storm lateral from the end of Derby Court runs along the east and north sides of Lot 5 to Robin Creek. The approximate centerline of the creek is illustrated on the as-built drawing. The highlighted note on the upper left-hand portion of the screenshot references the installation of the velocity dissipator and rip-rap at the northwest corner of Lot 5. This location also corresponds to the southeast corner of the Applicant’s property.

Further upstream on Robin Creek (i.e., to the south), a second velocity dissipator and rip-rap structure was installed for the discharge of stormwater from Carriage Way and Lexington Terrace. See the highlighted note on the lower left-hand portion of the figure below.

Neither the Natural Resource Assessment or the Planning Manager Decision presented information regarding these velocity dissipators and rip-rap structures, either as site visit observations or as references to the as-built drawing sets. Consequently, the impact of heavy

stormwater discharge from Derby Court, Carriage Way, and Lexington Terrace to the reach of Robin Creek running through the Applicant's property has not been considered.



Screenshot of a portion of Sheet 3/25, As-Built Drawing Set, Hidden Springs Ranch No. 6, 1981.

Planning Manager Decision

The Planning Manager Decision for WAP-22-02 does not clearly provide the identity of the Planning Manager, nor does it clearly indicate that the Planning Manager has provided express approval of the Decision. Assistant Planner Ben Gardner is clearly identified and even provides his signature on page 5; however, his signature does not provide approval of the Planning Manager Decision. As I have pointed out to City staff previously, a Planning Manager Decision should clearly identify the individual who has the authority to approve said Decision. Under current practice, applying initials to the document does not identify the Planning Manager nor do the initials, as presented, convey approval of the Decision.

I respectfully submit the above comments to the West Linn City Council.

Gary Walvatne, RG, LG, PG
West Linn, Oregon

Gardner, Benjamin

From: Karie Oakes [REDACTED]
Sent: Monday, March 20, 2023 12:01 PM
To: Gardner, Benjamin
Subject: WAP-23-01 testimony

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Karie Oakes
1125 Marylhurst DR
West Linn, OR 97068
March 13, 2023

Re: Testimony for Project ID AP-23-01, 19679 Wildwood DR, Appeal of WAP-22-02 Water Resource Area Protection Permit.

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

After a great deal of consideration of the applicant submittals, the staff report, the public testimonies, and applicable code, I concluded that the City Council (CC) by its authority should reverse the Planning Manager decision (99.290.B) (99.110.D).

Conclusion

The Alternate Review process is being misused. Chapter 32 provides two options to review development of a property with a Water Resource Area (WRA) as identified by the West Linn Water Resource Area Map. A decision of approval or with or without conditions, results in a development permit for the WRA. This application is not a development application and therefore a WRA permit cannot be approved that reduces the WRA area protections. The applicant does not need a WRA permit for the proposed enhancement plan.

32.040 EXEMPTIONS

The following development, activities or uses are exempt from a WRA permit but must conform to any applicable requirements of this section.

- A. Vegetation maintenance, planting and removal.
2. Removal of plants identified as nuisance, invasive or prohibited plants; provided, that after plant removal, re-vegetation of disturbed areas is performed pursuant to CDC [32.100](#).

The Planning Manager designee (PM) review of the application and decision for the Water Resource Area Protection (WAP) was seriously flawed. The PM determined the application was complete although it lacked the necessary information to render a decision. 99.040(A)(2) and 99.040(A)(3)

99.040 DUTIES OF DIRECTOR

- A. The Director shall:
 2. Accept all development applications that comply with the provisions of CDC [99.030](#);
 3. After accepting an application pursuant to this chapter:
 - a. Determine whether an application is complete, and comply with State statutes governing the completeness determination for applications. ***The determination of the Director is subject to review by the approval authority in its deliberation on the application;*** (emphasis added)

The CC can and should review the PM determination that the application was complete. If CC determines the application was incomplete (due to the four conditions of approval and other insufficiently met criteria), CC should seek legal advice from the City Attorney for options to proceed.

The applicant did not meet his burden of proof that the application fully complies with the standards of Chapter 32. Consequently, the decision is based on staff findings to supplement the insufficient applicant findings and the

addition of four conditions of approval (COA). The conditions are 1) Mitigation Plan, 2) Site Plan and Narrative, 3) Stormwater Plan and 4) Construction Management Plan.

The applicant believes the Water Resource Area (WRA) is larger than necessary to protect the functions of Robin Creek. The applicant utilized the alternative review process. The applicant did not submit a mitigation plan as required for the PM to determine if the proposed WRA reduction to 15' width will be equal or superior to the standard *prescribed* 100' width. CDC 32.080(A) and (B).

32.080 APPROVAL CRITERIA (ALTERNATE REVIEW PROCESS)

Applications reviewed under the alternate review process shall meet the following approval criteria:

A. The **proposed WRA** shall be, at minimum, qualitatively equal, in terms of maintaining the level of functions allowed by the WRA standards of CDC [32.060\(D\)](#).

B. If a WRA is already significantly degraded (e.g., native forest and ground cover have been removed or the site dominated by invasive plants, debris, or development), the approval authority **may allow a reduced WRA in exchange for mitigation**, if:

1. The proposed reduction in WRA width, coupled with the proposed mitigation, would result in better performance of functions than the standard WRA without such mitigation. **The approval authority shall make this determination based on the applicant's proposed mitigation plan and a comparative analysis of ecological functions under existing and enhanced conditions (see Table 32-4).** (*emphasis added*)

This application will precipitate a middle housing (MH) application. I believe staff interpretation of criteria of the Chapter 32 Water Resource Area Protection is inconsistent with requirements for public review of a site plan, mitigation plan and revegetation plan required to determine the proposed reduction of the WRA width is appropriate. The PM decision made these plans a condition of approval, putting them off for the City Building Official to approve later.

The homeowner-applicant seeks the WRA width reduction to increase the buildable area of his property where he lives in a 4000-ft plus single-family home. **If CC affirms the PM decision**, it will allow the applicant to apply for **a building permit** to build another home and driveway as the second unit of a detached duplex under the MH code, the other unit being the existing single-family home. A building permit is approved by a city employee without the public review, testimony and appeal opportunities of the quasi-judicial decision process for a WRA permit.

The applicant may or may not file a MH expedited land division application. If not divided, he will have to rent the units or establish a condominium. He indicated at the pre-application conference that he would live in the new unit and desires to divide his property. Expedited land division is decided by the Planning Commission through a public review process that considers public written testimony and opportunity to appeal. CDC 99.060(E).

This application subverts public review of the protections of WRA required by Chapter 32.

Additional Comments/Testimony of Michael B. Bonoff
Requesting Denial of WAP-22-02
West Linn City Council
April 10, 2023

Thank you. I'm Mike Bonoff, 5115 Linn Lane, West Linn. I testified requesting denial of WAP-22-02 at the hearing on March 13th, 2023. I'm an aquatic scientist with over 30 years of experience as a consultant specializing in stream and river water quality and watershed management, also a former West Linn Planning Commissioner from 2005-2007 and later a member of the committee led by Peter Spir that reviewed and revised Chapter 32 of the CDC. I'm testifying again tonight to urge you to deny WAP-22-02.

The City's initial approval of WAP-22-02 was largely dependent on a field survey employing a method recently developed by the U.S. EPA, the Streamflow Duration Assessment Methodology (SDAM) (Nadieu, 2015). The finding of the survey as we know was that Robin Creek was ephemeral and therefore subject to a reduction in setback to a width that would accommodate an infill structure (15 feet). For reasons clearly presented by Mr. Axelrod at the March 13 hearing, CDC 32.070 has been misapplied and any conclusion using the Alternate Process is unsupportable. But let's assume for the sake of argument that evaluation of flow duration and potential reclassification of Robin Creek was valid. Given the high stakes involved— possible removal of a headwater reach from one of the most sensitive drainages in the City – SDAM field data, methods, and findings should have been unassailable. Observations noted in Appendix D suggest otherwise. Specifically:

1) *SDAM Guidance states that "Assessments should begin by first walking the length of the channel, to the extent feasible, from the stream origin to the downstream confluence with a larger stream."*

The assessment made no reference to either upstream or downstream conditions, except the stated assumption in the Applicant's report (Photo point #4, Appendix B) that the drainage continued on the north side of Wildwood drive. If access was prevented there was no mention on the Form (the "Notes" block was blank); and there was no mention in the Schott-prepared NRA about such issues, and more importantly what alternatives to upstream or downstream observations were pursued; e.g., LiDAR or other aerial imagery. Had there been efforts to gain a better understanding of the reach it is likely that the SDAM survey would have found the rock dam just upstream, which I just learned Mr. Axelrod discovered on a drainage visit just a few days ago. Per the SDAM Guidance (Nadieu, 2015) this is the type of hydrologic alteration upstream of the assessment area that must be considered in any finding of flow duration.

2) *Regarding antecedent rainfall "Evaluators should note recent rainfall events on the assessment form, and consider the timing of field evaluations in assessing the applicability of individual indicators."*

While the first page of the Assessment Form depicts the chart leading to the flow classification, the second page encourages notes and observations critical to any of the findings. The second

page of the Assessment Form was blank. There were no entries with regard to rainfall, natural or anthropogenic disturbances, or ancillary information on the riparian corridor, erosion/deposition, and floodplain connectivity; all supporting information relied on for the determination of flow duration.

3) *Length of Survey*

The SDAM Guidance (Nadieu, 2015) recommends that assessments be made for a representative reach, rather than at one point of a stream. *A representative reach for stream assessments is equivalent to 35 – 40 channel widths of the stream.* There were no notes indicating whether information for the SDAM assessment was from a single point or multiple points along this reach.

Summary

In summary with regard to SDAM, timing of the survey was not representative of conditions during the growing season and should not have been the basis for a decision to reclassify Robin Creek to ephemeral. I trust any objective reviewer of this Application would come to a similar conclusion.

But flow duration is moot. As presented at the March 13, 2023 hearing, approval of this Application ignored applicable slope driven setback and mitigation requirements in upper Robin Creek and skirted 32.060(D) through misapplication of 32.070. Approval would allow any Applicant, with a cursory survey conducted in drought conditions, to reclassify a stream to ephemeral, drastically cutting the buffer width in a protected Riparian Corridor/Ravine, and degrading the function of the watershed in the process. With climate change, capacity and protection of these upper reaches has never been more critical. I urge the Council to deny this Application.

Thank you.

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References

Nadieu, Tracie-Lynn. 2015. Streamflow Duration Assessment Method for the Pacific Northwest. EPA 910-K-14-001, U.S. Environmental Protection Agency, Region 10, Seattle, WA.