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BEFORE THE HEARING EXAMINER
FOR THE CITY OF REDMOND

In the Matter of the Appeal of

Rory and Donna Veal

Of the October 17, 2019 Administrative
Decision File Number LAND-2019-00814
Regarding Their Real Property Known as
Tax Parcel Number 352605-9123

No. APL LAND-_____

**APPELLANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

MOTION

Appellants Mr. Rory Veal and Mrs. Donna Veal (the "Veals") appeal the Administrative Interpretation Decision issued by the City of Redmond Department of Planning and Community Development on October 17, 2019, under the Proposal Name "Veal Administrative Interpretation" ("Code Interpretation"). The Veals submit this motion for partial summary judgment through their undersigned counsel pursuant to the Hearing Examiner's Order Rescheduling Hearing issued on December 16, 2019, to resolve two pure questions of law:

1. Whether a watercourse is excluded from regulation as a Class IV stream if the naturally occurring water was insufficient to create a bed and bank, even if the watercourse conveys some naturally occurring water?
2. Whether unintentionally artificial watercourses are excluded from regulation as Class IV streams?

1 For the reasons explained below, the Veals respectfully request that the Hearing Examiner
2 grant partial summary judgment with respect to the limited legal questions raised in this
3 motion.

4 I. INTRODUCTION

5 The basic question to be resolved in this appeal is whether a drainage feature (the
6 “Drainage Feature”) that is currently located on the Veals’ property, King County Tax
7 Parcel 352605-9123 (“Veal Parcel”), is regulated as a Class IV stream under the City of
8 Redmond’s (“City”) Critical Areas Ordinance, Redmond Zoning Code (“RZC”) Chapter
9 21.64 (the “CAO”). The Veals and the City—as demonstrated in its Code
10 Interpretation—disagree not only on whether evidence supports that the Drainage Feature
11 on the Veal Parcel is a Class IV stream, but more fundamentally over what types of
12 watercourses are regulated, as a matter of law, as Class IV streams under the RZC.

13 The City’s application of the Class IV stream definition to the Drainage Feature
14 was based, at least in part, on the erroneous legal position that if a watercourse conveys
15 even a drop of natural water, the watercourse is a regulated stream. The City also
16 incorrectly posits that to be excluded from the definition of a Class IV stream, an artificial
17 watercourse must be intentionally created. These interpretations are contrary to the plain
18 language of the RZC, rules of statutory construction, and the legislative history
19 surrounding the relevant RZC provisions, and they would lead to absurd results such that
20 almost no watercourse would be excluded from regulation as a stream.

21 When the RZC is interpreted correctly, for a stream to be regulated as a Class IV
22 stream, it must be a natural stream, *i.e.*, have a bed and a bank that was created by water

1 put there by mother nature, not by man. If, instead, the channel is caused by the artificial
2 placement of water at that location, it is not a natural stream. The evidence in this case
3 will show that the naturally occurring water on the Veal Parcel did not cause a channel;
4 instead the Drainage Feature on the Veal Parcel was caused by artificial water. The City's
5 CAO, by its plain terms, does not regulate such a watercourse.

6 Therefore, the Veals and the City disagree regarding two questions of
7 interpretation of the RZC:

- 8 1. Whether a watercourse is excluded from regulation as a Class IV stream if the
9 naturally occurring water was insufficient to create a bed and bank, even if the
10 watercourse conveys some naturally occurring water?
- 11 2. Whether unintentional artificial watercourses are excluded from regulation as
12 Class IV streams?

13 Resolution of these purely legal questions now is appropriate in this case, as it will narrow
14 the evidence to be presented and issues to be resolved during the hearing. As explained
15 below, these issues must be decided in the Veals' favor, as their interpretation of the RZC
16 is the only interpretation that is consistent with the plain language and intent of the RZC.

17 II. BACKGROUND

18 A. Legal Background.

19 Prior to 1990, development activities in and around water bodies were regulated
20 primarily by state laws and regulations addressing the protection of fish life and forestry
21 practices, including a state law called "Protection of Fish Life," which is commonly
22 referred to as the "Hydraulic Code." Ch. 77.55 RCW. The Hydraulic Code gave the

1 Washington Department of Fish and Wildlife (“WDFW”) the responsibility to preserve,
2 protect, and perpetuate all fish and shellfish resources of the state. WDFW promulgated
3 regulations implementing the Hydraulic Code, which are now codified at chapter 220-660
4 WAC (“Hydraulic Code Rules”).

5 In 1974, the state legislature passed the Forest Practices Act (“FPA”). Ch. 76.09
6 RCW. Under the FPA, the legislature declared it “to be in the public interest of this state
7 to create and maintain through the adoption of this chapter a comprehensive statewide
8 system of laws and forest practices rules” to achieve a variety of forestry-related purposes
9 and policies. RCW 76.09.010(2). The Forest Practices Board promulgated regulations
10 implementing the FPA at chapter 222-16 WAC (the “Forest Practices Rules”). The
11 legislature linked the FPA to the Hydraulic Code by requiring the Forest Practices Board
12 to incorporate fish protection standards from the Hydraulic Code Rules into the Forest
13 Practices Rules, and by requiring WDFW’s “concurrence review” of any hydraulic project
14 that requires a forest practice application. RCW 76.09.040 (3)(a); WAC 222-16-025;
15 RCW 76.09.490.

16 In 1990, the legislature passed the Growth Management Act (“GMA”), chapter
17 36.70A RCW, which requires local governments to adopt regulations to designate and
18 protect certain kinds of environmentally “critical areas,” including fish and wildlife
19 habitat conservation areas. RCW 36.70A.030(5). The Department of Community Trade
20 and Economic Development (“CTED”) promulgated regulations, which are now codified
21 at chapter 365-190 WAC, that provide guidance to local governments for complying with
22 the GMA’s requirements, including the requirement to protect critical areas. The

1 regulations give local governments the option of using the classification system
2 established in WAC 222-16-030 of the Forest Practices Rules to classify waters of the
3 state. WAC 365-190-130(4)(f)(i). CTED later published a “Critical Areas Assistance
4 Handbook” that included a model critical areas ordinance, which local governments could
5 adopt verbatim or use as a guide for a more customized local critical areas ordinance (the
6 “CTED Model CAO”). RCW 36.70A.172(1); Mandell-Rice Decl. Ex. A.

7 Pursuant to the GMA, the City adopted its CAO in 1992. City of Redmond
8 Ordinance 1693 (1992). At that time, the City Council chose not to adopt the stream
9 classification approach in the Forest Practices Rules or the definition of stream in the
10 Hydraulic Code Rules. In 2005, the Redmond Planning Commission explicitly
11 considered, but decided against, recommending the adoption of the classification scheme
12 in the Forest Practices Rules. Mandell-Rice Decl. Ex. B. Although the CAO has been
13 amended since the time the CTED Model Ordinance was developed, the City Council
14 chose not to adopt the CTED Model Ordinance provisions. *See, e.g.* City of Redmond
15 Ordinance 2968 (2019) (amending RZC 21.64).

16 **B. Factual Background.**

17 In May of 2018, City Staff member Emily Flanagan issued a memo titled “City
18 Review of Stream Assessment Report” (the “2018 Staff Memo”) in which City Staff
19 opined that “the entire watercourse downstream from Red-Wood Road is a Class IV
20 stream.” Mandell-Rice Decl. Ex. C, at 1. In reaching this conclusion, the 2018 Staff
21 Memo first relied on WDFW’s purported interpretation, which City Staff explains as
22 follows: “Their interpretation is if all the water in the watercourse is generated from a

1 stormwater system it is not regulated, but if any portion of the watercourse is derived from
2 natural sources (i.e. rainwater, groundwater, sub-surface recharge) this makes it a
3 regulated watercourse.” *Id.* at 4. Therefore, the 2018 Staff Memo evaluated whether “the
4 watercourse flow includes natural *sources*,” and concluded that the hydrology contains a
5 portion of naturally occurring water. *Id.* (emphasis added). Second, the 2018 Staff Memo
6 concluded that the Drainage Feature was a Class IV stream because it was not “originally
7 constructed.” *Id.* at 5.

8 Subsequently, the Veals requested a Code Interpretation from the City regarding
9 whether the Drainage Feature is regulated by the City’s CAO. Mandell-Rice Decl. Ex. D.
10 The City issued the Code Interpretation on October 17, 2019, concluding that the
11 Drainage Feature is a Class IV stream under the City’s CAO. Mandell-Rice Decl. Ex. E.
12 The City’s Code Interpretation relies on and agrees with the 2018 Staff Memo, providing
13 that “City staff rightly concluded that the ‘watercourse on parcel 3526059123 meets the
14 criteria of a Class IV Stream....” *Id.* at 10.

15 In addition, the Code Interpretation relies on a memorandum produced by the
16 City’s consultant, Herrera Environmental Consultants, Inc. (“Herrera Memo”). *Id.* The
17 Herrera Memo makes factual assumptions regarding the Drainage Feature, and applies a
18 legal interpretation of the CAO to such assumptions to classify the Drainage Feature.
19 Mandell-Rice Decl. Ex. F, at 13-14. The Herrera Memo appears to have relied on
20 WDFW’s interpretation as set forth in the 2018 Staff Memo. *See id.* The Herrera Memo
21 determined that there was some water naturally occurring on the Veal Parcel from a
22 perched aquifer. *Id.* at 12. Based solely on the presence of such water on the Veal Parcel,

1 and without evaluating whether the flow from the perched aquifer would have historically
2 been sufficient to carve a bed and a bank, the Herrera Memo concludes that “[t]he
3 watercourse on the Subject Property is a stream and fits the definition of a stream laid out
4 in RZC 21.78. The stream formed naturally from springs on the upper areas of the
5 hillslope where it defined a watercourse.” *Id.* at 14.

6 Relying on the Herrera Memo, and agreeing with the 2018 Staff Memo, the City
7 concluded in the Code Interpretation that the Drainage Feature is a Class IV stream. The
8 Veals timely appealed the Code Interpretation.

9 III. STANDARD OF REVIEW

10 Summary judgment is proper if “the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with the affidavits, if any, show that there
12 is no genuine issue as to any material fact and that the moving party is entitled to a
13 judgment as a matter of law.” Washington State Court Rules: Superior Court Rules
14 (“CR”) 56(c).

15 The Hearing Examiner has the authority to resolve certain issues in the case, while
16 leaving the rest of the issues to be determined at trial. *See City of Redmond Hearing*
17 *Examiner Rules, Sections V.A, VI.A.2.g* (authorizing the Hearing Examiner to rule on
18 motions); CR 56(a); CR 56(d) (authorizing partial summary judgment orders); *see also*
19 *The Bedford LLC v. Safeco Ins. Co. of Am.*, No. 02-2-16575-3SEA, 2002 WL 34594431
20 (Wash.Super. Dec. 13, 2002)(“Under CR 56(d), it is appropriate to narrow the issues for
21 trial.”).

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IV. ARGUMENT

The City’s interpretation raises two purely legal questions:

1. Whether a watercourse is excluded from regulation as a Class IV stream if the naturally occurring water was insufficient to create a bed and bank, even if the watercourse conveys some naturally occurring water?
2. Whether unintentional artificial watercourses are excluded from regulation as Class IV streams?

The resolution of these pure questions of law requires the Hearing Examiner to interpret the RZC. “The primary objective of administrative interpretation is to ascertain the intent of the code provision at issue and to give effect to that intent. Administrative interpretation shall not be used to amend or change the code.” RZC 21.76.070(D)(1). RZC 21.76.070(D)(5) provides that “[a]dministrative interpretation shall utilize generally recognized principles of statutory and ordinance interpretation adopted by the courts of this state.” This provision is consistent with case law in Washington State, where the rules of statutory construction apply equally to municipal ordinances and state statutes. *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 829 (2017) (“State statutes and local ordinances are subject to the same interpretive rules.”).

When interpreting a local ordinance, reviewing bodies must “seek to ascertain and give effect” to the legislative body’s intent, and when the legislative language is clear, the reviewing body assumes that the legislature “meant exactly what it said” and apply the “plain language” of the statute. *Stroh Brewery Co. v. State, Dep’t of Revenue*, 104 Wn. App. 235, 239–40 (2001). The reviewing body must give effect to *all* of the language in

1 an ordinance, rendering no portion meaningless or superfluous. *Id.* Similarly, the
2 reviewing body may not add words to an ordinance where the legislative body has chosen
3 not to include them. *State v. Arlene’s Flowers, Inc.*, 187 Wn.2d 804, 829 (2017), *vacated*
4 *on other grounds in Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018). The
5 legislative body is deemed to intend a different meaning when it uses different terms.
6 *State v. Roggenkamp*, 153 Wn.2d 614, 625 (2005). Reviewing bodies apply the traditional
7 rules of grammar. *State v. Bunker*, 169 Wn.2d 571, 578 (2010). Finally, reviewing bodies
8 avoid interpretations that produce “absurd results.” *State v. Engel*, 166 Wn.2d 572, 579
9 (2009).

10 Applying these principles of statutory interpretation to the RZC unequivocally
11 demonstrates that naturally occurring water must be the cause of the formation of the
12 watercourse’s bed and bank for such watercourse to be a regulated stream. The mere
13 presence of some amount of natural water in a watercourse does not render the
14 watercourse a regulated stream. In addition, artificial watercourses are excluded from
15 regulation as Class IV streams, whether created purposefully or unintentionally.

16 **A. A Watercourse Is Not Regulated as a Class IV Stream If It Was Not Created**
17 **by Natural Water.**

18 A watercourse is not regulated as a Class IV stream if the channel formation was
19 not caused by naturally occurring water, even if the watercourse conveys natural *sources*
20 of water. The CAO regulates four classes of streams: “Class I, Class II, Class III, and
21 Class IV.” RZC 21.64.020(A)(2)(d). Class IV streams—the classification at issue in this
22 case—are “those *natural* streams that are not Class I, Class II, or Class III.” *Id.* (emphasis
added). Whether a watercourse is regulated as a Class IV stream, therefore, is informed,

1 both by the meaning of “stream,” as well as the word “natural” in the Class IV
2 designation.

3 The RZC defines “stream” as:

4 Those areas where surface waters produce a defined channel or bed. A defined
5 channel or bed is an area which demonstrates clear evidence of the passage of
6 water and includes, but is not limited to, bedrock, channels, gravel beds, sand
7 and silt beds, and defined-channel swales. The channel or bed need not contain
8 water year-round. This definition is not meant to include *artificially created
irrigation ditches, canals, storm, or surface water runoff devices* or other
entirely artificial watercourses unless they are used by salmonid or created for
the purposes of stream mitigation.

9 RZC 21.78 (emphasis added). Pursuant to the plain language of this definition, a stream is
10 defined by whether it has a bed and a bank—characteristics of a *watercourse* (i.e., the
11 land), not the origin of the water *source*. When the legislative language is clear, the
12 reviewing body assumes that the legislature “meant exactly what it said” and applies the
13 “plain language” of the statute. *Stroh Brewery Co.*, 104 Wn. App. at 239–40.

14 The definition of stream excludes two general categories of watercourses. The
15 first category contains specifically enumerated types of watercourses: “artificially created
16 irrigation ditches, canals, storm, or surface water runoff devices.” RZC 21.78
17 (definitions). The second category—“other entirely artificial watercourses”—is a catch-
18 all category that broadly excludes watercourses not enumerated in the first category, but
19 only if they are *entirely* artificial. *Id.* The exclusion from the definition of stream, again,
20 focuses on the nature of the watercourse, excluding both specifically enumerated
21 watercourses and entirely artificial “watercourses.” The exclusion is not dependent on
22 whether the water in the watercourse comes from entirely artificial water “sources.”

1 Both the definition of stream and the exclusion for artificial watercourses focus on
2 the nature of the *watercourse*. Thus, to determine whether a watercourse is a stream or an
3 excluded artificial watercourse, the appropriate inquiry is whether the watercourse was
4 naturally or artificially created. If water naturally flowing over the property was
5 insufficient to create a bed and a bank, and the bed and the bank instead resulted from the
6 addition of artificial water sources onto the property, the watercourse is artificial,
7 regardless of whether natural sources of water contribute a portion of the flow.

8 Moreover, Class IV streams are only “natural” streams. As “natural” is not
9 defined in the RZC, we look to the dictionary definition of the word to inform its
10 meaning. *Cornu-Labat v. Hosp. Dist. No. 2 Grant Cty.*, 177 Wash. 2d 221, 231 (2013).
11 Natural means: “as found in nature and not involving anything made or done by people.”¹
12 The plain meaning of the Class IV stream criteria is, therefore, that only watercourses
13 with beds and banks that would exist without artificial influences are regulated streams.

14 This interpretation is also consistent with treatment of watercourses under
15 Washington law, generally. In evaluating whether municipalities are liable for damages
16 resulting from water entering downstream properties, case law distinguishes between
17 where a municipality collects water and directs it into a natural waterway, as in *Strickland*
18 *v. Seattle*, 62 Wash.2d 912 (1963), and where water is “collected and deposited upon the
19 land in a different manner” than before development. *Phillips v. King Cty.*, 136 Wash. 2d
20 946, 959 (1998). Courts have consistently found that where water would ordinarily run

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22 ¹ *Natural*, Cambridge Dictionary, available at
<https://dictionary.cambridge.org/dictionary/english/natural>.

1 across a property, but would not be channeled on the property, a municipality creates an
2 “artificial” watercourse by collecting and depositing the water upon the land in a different
3 manner. For example, in *Burton v. Douglas County*, 14 Wash.App. 151 (Wash. Ct. App.
4 Div. III 1975), the court found that the city had created an artificial drain by constructing a
5 road because water, “in the absence of the crown in the road, would have continued to run
6 across the road instead of being channeled by it.” *Id.* at 154. Therefore, consistent with
7 the Veals’ interpretation, courts have found that watercourses may be artificial even if
8 they convey natural *sources* of water.

9 Despite the plain meaning of the Class IV criteria, as well as the definition of
10 stream, the City interprets the CAO to regulate a watercourse as a Class IV stream if a
11 single drop of water would have naturally occurred in the vicinity of the watercourse. The
12 City suggests that a watercourse must be *entirely* artificial to be excluded from the
13 definition of stream. As further explained below, this interpretation must be rejected
14 because it is contrary to the plain definition of stream in the RZC and contravenes
15 numerous rules of statutory construction, ignores the requirement in the Class IV stream
16 criteria that the stream be “natural,” would lead to absurd results, and ignores the
17 deliberate decision by the City Council not to regulate artificial streams more broadly.

18 **1. The City’s Interpretation Is Contrary to the Plain Definition of**
19 **Stream.**

20 Despite the plain meaning of the Class IV stream criteria, as well as the definition
21 of stream, the City interprets the CAO to regulate a watercourse as a Class IV stream if a
22 single drop of water would have naturally occurred in the watercourse. The City suggests
that a watercourse must be *entirely* artificial to be excluded from the definition of stream.

1 This interpretation must be rejected because it is contrary to the plain text of the RZC and
2 contravenes numerous rules of statutory construction.

3 The City reads a new word into the exclusion from the definition of stream. The
4 City would have the Hearing Examiner read the exclusion as: this definition is not meant
5 to include “**entirely**” artificially created irrigation ditches, canals, storm, or surface
6 water runoff devices or other entirely artificial watercourses unless they are used
7 by salmonid or created for the purposes of stream mitigation. However, the first use of
8 entirely does not appear in the RZC. Instead, the RZC excludes “artificially created
9 irrigation ditches, canals, storm, or surface water runoff devices,” and “other entirely
10 artificial watercourses.”

11 Rules of grammar and statutory construction dictate that the word “entirely” only
12 modifies the general reference to “other” artificial watercourses, and does not modify the
13 specific types of artificial watercourses referenced earlier in the sentence—i.e., irrigation
14 ditches, canals, and storm or surface water runoff devices. If the City Council had
15 intended only to exclude from the definition of stream entirely artificial watercourses, it
16 would have modified the specifically enumerated list of excluded watercourses with the
17 phrase “entirely” artificial. By assuming that all watercourses must be “entirely” artificial
18 to be excluded from the definition of stream, the City’s interpretation violates the rule that
19 a “court cannot read into a statute that which it may believe the legislature has omitted, be
20 it an intentional or inadvertent omission,” as the word “entirely” does not appear before
21 the specifically enumerated list. *Auto. Drivers & Demonstrators Union Local No. 882 v.*
22 *Dep’t of Ret. Sys.*, 92 Wn.2d 415, 421 (1979) (citations omitted); *see also Vita Food*

1 *Prods., Inc. v. State*, 91 Wn. 2d 132 (1978); *Arlene’s Flowers, Inc.*, 187 Wn.2d at 829.
2 Moreover, the RZC’s use of the phrase “entirely artificial” later in the same definition
3 demonstrates that the City Council knew how to limit its exclusion to only “entirely
4 artificial watercourses,” but chose not to do so. *Roggenkamp*, 153 Wn.2d at 625
5 (2005)(the legislative body is deemed to intend a different meaning when it uses different
6 terms).

7 **2. Only “Natural” Streams Are Regulated as Class IV Streams.**

8 The City’s interpretation ignores the requirement in the Class IV stream criteria
9 that the stream be “natural.” Regardless of whether the definition of “stream” only
10 excludes “entirely artificial” watercourses, the CAO only regulates “*natural* streams” as
11 Class IV streams. RZC 21.64.020(A)(2)(d). Class IV streams—the classification at issue
12 in this case—are “those *natural* streams that are not Class I, Class II, or Class III.” *Id.* As
13 explained above, a “stream” by definition is a water body that is not “artificial” or
14 “entirely artificial.” Because Class IV streams are not just “streams,” but “natural
15 streams,” the use of the word “natural” in RZC 21.64.020(A)(2)(d) must be given some
16 additional meaning beyond merely excluding “entirely artificial” streams.

17 To give meaning to each of the words chosen by the Redmond City Council, the
18 phrase “natural streams” in RZC 21.64.020(A)(2)(d) must be interpreted to mean areas
19 that were naturally *created* from natural water sources. Under this reading, “natural
20 streams” does not include topographic depressions or even “drainage swales” that have
21 been artificially transformed into streams as a result of human activities, nor does it
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1 include watercourses that have a bed and bank due to water artificially channeled and
2 thrust onto that location.

3 **3. The City's Interpretation Leads to Absurd Results.**

4 The City's interpretation that the RZC regulates as a stream every watercourse that
5 conveys any water from a natural source is an unreasonable interpretation that leads to
6 absurd results. The rules of statutory construction require that the Hearing Examiner
7 interpret the Code, to the greatest extent possible, to avoid absurd results and to avoid
8 interpretations that render particular words or phrases meaningless. *See Cooper's Mobile*
9 *Homes, Inc. v. Simmons*, 94 Wn.2d 321, 327 (1980) (“[W]e should not so interpret a
10 statute as to reach an absurd result”); *State v. J.P.*, 149 Wn.2d 444, 450 (2003) (statutes
11 should also not be read to render a portion meaningless or superfluous).

12 Every watercourse would be a natural watercourse under the City's interpretation.
13 Any water channeled through a halfpipe or any stormwater system would be considered a
14 stream as soon as it rains. The City's stormwater system includes both natural and
15 artificial components, including “363 miles of pipes, 23,500 catch basins and manholes,
16 940 vaults, 304 bioswales, 68 miles of streams, and 328 ponds throughout the City.”
17 Mandell-Rice Decl. Ex. G. Every unlined irrigation ditch into which groundwater may
18 mix would be a regulated stream. When a roadside ditch is dug and it intercepts
19 groundwater, it would now become a regulated stream. If the City rerouted “natural”
20 stormwater from a neighborhood a mile away from the Veal Parcel through a pipe and
21 then discharged the water from that pipe onto the Veal Parcel, the resulting watercourse
22 would be a regulated stream as soon as it rains. This would effectively include every

1 artificial watercourse in the definition of stream and would read out of the definition of
2 stream the exclusion of artificial watercourses, rendering it meaningless. This would
3 occur regardless of the conservation benefit or value as habitat (or lack thereof) of the
4 watercourse, even though the CAO's stream criteria were establish to protect their
5 characteristics, function and value as fish and wildlife habitat conservation areas. RZC
6 21.64.020(A)(2).

7 The City's interpretation must be rejected, particularly because there is reasonable
8 reading of the definition of "stream" that creates a meaningful distinction between
9 regulated streams and excluded watercourses and that harmonizes the exclusion with the
10 rest of the definition. In interpreting statutory terms, a reviewing body should "take into
11 consideration the meaning naturally attaching to them from the context, and [] adopt the
12 sense of the words which best harmonizes with the context." *McDermott v. Kaczmarek*, 2
13 Wash.App. 643, 648 (1970) (internal quotations omitted). As explained above, the focus
14 of the definition of stream is on the nature of the *watercourse*, not the *water source*.

15 **4. The City Council Rejected a Definition of "Stream" that Would Have**
16 **Regulated Artificial Watercourses that Convey Natural Water**
Sources.

17 In adopting the definition of stream (including the exclusion from the definition),
18 the Redmond City Council deliberately rejected language that would have more broadly
19 regulated artificial watercourses, including watercourses that are partially artificial and
20 partially natural. The City Council chose language that regulates artificial watercourses
21 *only* in the limited circumstance when they "are used by salmonid fish or created for the
22 purpose of stream mitigation." RZC 21.78 (definition of stream). The City Council

1 adopted its CAO against a backdrop of existing regulations, which provided model
2 language that regulated artificial watercourses more broadly and which the City was told it
3 could rely on in crafting its own CAO.

4 First, after the GMA was adopted, the CTED, through its regulations, gave local
5 governments the option of using the classification system established in WAC 222-16-030
6 of the Forest Practices Rules to classify waters of the state. WAC 365-190-130(4)(f)(i).
7 Such rules more broadly regulated artificial watercourses by limiting the types of
8 excluded artificial watercourses to “water conveyance systems which are artificially
9 *constructed and actively maintained* for irrigation.” WAC 222-16-030(5)(d)(emphasis
10 added). The City Council did not adopt this classification system when it adopted criteria
11 for stream designations.² In 2005, the Redmond Planning Commission explicitly
12 considered, but decided against, recommending the adoption of the classification scheme
13 in the Forest Practices Rules. Mandell-Rice Decl. Ex. B.

14 Second, at the time the CAO was adopted, WDFW’s Hydraulic Code Rules more
15 broadly regulated artificial watercourses by including artificial watercourses in the
16 definition of stream where they exist in “a natural watercourse that has been altered by
17 humans.” WAC 220-660-030(153). The City Council chose not to include the language
18 from the Hydraulic Code Rules, which would have included in the definition of streams
19 watercourses that are partially artificial and partially natural.

20
21 ² The RZC’s definition of “waters of the state” includes watercourses as defined in WAC
22 222-16-031. The question at issue is not whether the Drainage Feature would be a “water
of the state,” but instead what watercourses are regulated as streams under the CAO—a
much narrower category of water than “waters of the state.” The City, in classifying
streams under the CAO, took a different approach than used in WAC 222-16-031.

1 Third, CTED later provided a model ordinance, which mirrored the language of
2 the Hydraulic Code Rules. Mandell-Rice Decl. Ex. A at A-133. Again, the City chose not
3 to amend its CAO to adopt this language in its definition of stream.

4 By rejecting language that would have regulated artificial watercourses when they
5 “exist in a natural watercourse that has been altered artificially,” the City Council chose
6 *not* to regulate watercourses that are partially artificial and partially natural—regardless of
7 whether some small amount of water was historically or naturally present in the area.
8 Instead, the City Council chose language that regulates artificial watercourses *only* when
9 they “are used by salmonid fish or created for the purpose of stream mitigation.” Under
10 the rules of statutory construction, that choice must be given some meaning—it cannot be
11 ignored or rendered meaningless. *Stroh Brewery Co.*, 104 Wn. App. at 239–40. The
12 Hearing Examiner cannot read words into the CAO to narrow the exclusion of artificial
13 watercourses that the City Council chose to omit. *Arlene’s Flowers, Inc.*, 187 Wn.2d at
14 829. This is particularly true here where the City Council clearly knew how to include
15 such language (through the examples provided by the CTED Model CAO and the
16 Hydraulic Code Rules), but chose not to do so.

17 Despite the City Council’s unequivocal decision to depart from WDFW’s
18 Hydraulic Code Rules, City Staff, in issuing the 2018 Staff Memo, requested and relied on
19 WDFW’s interpretation of regulated watercourses to interpret the RZC definition of
20 stream. According to the City, WDFW interprets a watercourse to be regulated “*if any*
21 *portion* of the watercourse is derived from natural sources (i.e. rainwater, groundwater,
22 sub-surface recharge).” Mandell-Rice Decl. Ex. C at 4. Even assuming WDFW’s

1 interpretation of its definition of watercourse in the Hydraulic Code Rules were a
2 reasonable interpretation of WDFW's regulation, such interpretation is not applicable to
3 the definition of "stream" in the RZC, which clearly and intentionally departs from that
4 definition.

5 **B. Streams Are Exempt From Regulation If They Are Either Intentionally**
6 **Created or Artificially Created.**

7 Artificial watercourses are excluded from regulation as Class IV streams, whether
8 they were purposefully created (constructed or dug) or inadvertently caused by the
9 presence of artificial water. The City incorrectly interprets the CAO as exempting from
10 regulation as streams *only* those watercourses that are *intentionally* created, *i.e.* where a
11 human has physically dug a channel or laid a pipe. For example, in the 2018 Staff Memo,
12 City Staff concluded that the Drainage Feature is a regulated stream because, according to
13 City Staff, it was "created by natural flow patterns, not constructed as a stormwater runoff
14 device"; in other words, it was not "originally constructed." Mandell-Rice Decl. Ex. C. at
15 5. The City's Code Interpretation relies on and affirms the City Staff interpretation, and
16 itself appears to find that the watercourse must be a stream based on the lack of evidence
17 demonstrating that the watercourse was intentionally created. Mandell-Rice Decl. Ex. D.
18 at 6.

19 The City's interpretation fails to accord each word in the RZC meaning, *State ex*
20 *rel. Schillberg v. Barnett*, 79 Wash.2d 578, 584 (1971) ("each word of a statute is to be
21 accorded meaning"), and violates the fundamental rule of statutory construction that the
22 legislature is deemed to intend a different meaning when it uses different terms. *State v.*
Beaver, 148 Wash.2d 338 (2002) ("[w]hen the legislature uses different words within the
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1 same statute, we recognize that a different meaning is intended.”); *Simpson Inv. Co. v.*
2 *Dep't of Revenue*, 141 Wash.2d 139, 160 (2000) (it is “well established that when
3 ‘different words are used in the same statute, it is presumed that a different meaning was
4 intended to attach to each word”).

5 The RZC removes watercourses from regulation as classified streams in two
6 distinct ways: (1) through the express exclusion within the definition of stream; and (2)
7 through the separate exemption from regulation of intentionally created streams. First, the
8 definition of “stream” explicitly excludes “irrigation ditches, canals, storm or surface
9 water runoff devices or other entirely artificial watercourses unless they are used by
10 salmonid or created for purposes of stream mitigation.” RZC 21.78. Second, the CAO
11 provides criteria for the designation of streams as “Class I, Class II, Class III, and Class
12 IV” in the sections (a), (b), (c), and (d) of the 1992 CAO’s “Stream Classification”
13 regulations. In subsection (e) of those regulations, the 1992 CAO included the following
14 language indicating that “Intentionally Created Streams” are not regulated by the RZC:

15 Intentionally Created Streams. These are manmade streams defined as such in
16 these regulations and do not include streams created as mitigation. Purposeful
17 creation must be demonstrated to the Committee through documentation,
18 photographs, statements, and/or other evidence. Intentionally created streams
19 may include **irrigation and drainage ditches, grass-lined swales, or other
20 artificial watercourses unless they are used by salmonid fish or created for
21 the purpose of stream mitigation.**

19 RZC 21.64.020(A)(2)(d). Because the RZC provides both an exclusion within the
20 definition of stream for certain types of watercourses, and an express exemption in a
21 separate section that uses different words than what is excluded in the definition, the City
22 Council intentionally created two separate categories of watercourses that are not

1 regulated as streams. The plain meaning of the exclusion within the definition of stream
2 does not require that the watercourse be intentionally created to be considered artificial.
3 Although “intentionally created streams” must be demonstrated through evidence of
4 “[p]urposeful creation,” the exclusion of artificial watercourses from the definition of
5 stream does not contain any qualifier regarding intentionality or require demonstration of
6 purposeful creation. *Compare* RZC 21.78 (definition of stream) *with* RZC
7 21.64.020(A)(2)(d). The City knew how to limit an exclusion based on intention, as
8 evidenced by the exemption for “Intentionally Created Streams,” but did not do so with
9 respect to artificial watercourses, choosing different language in the exclusion in the
10 definition of stream. A legislative body is deemed to intend a different meaning when it
11 uses different terms. *Roggenkamp*, 153 Wn.2d at 625. Therefore, an artificial
12 watercourse may be created intentionally or inadvertently through man’s actions.

13 Finally, the City’s zoning code acknowledges that critical areas may be
14 unintentionally created, but does not regulate all such areas. The CAO included the
15 following related definition for “Creation of Sensitive Areas,” which expressly
16 acknowledges that artificial watercourses may be purposeful or accidental. The term is
17 defined as: “The purposeful and legally authorized or accidental producing or forming of
18 a wetland or stream from an upland (non-wetland or dry) site through artificial means.”
19 City of Redmond Ordinance 1693 (1992); *see also* RZC 21.78 (definitions).

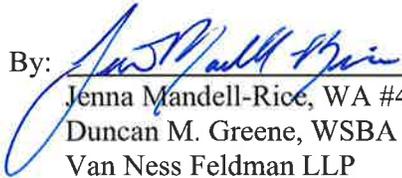
20 V. CONCLUSION

21 For the reasons stated above, the Veals respectfully ask the Hearing Examiner to
22 grant partial summary judgment with respect to the limited legal issues presented above.

1 In particular, the Veals request that the Hearing Examiner determine that, as a matter of
2 law under the RZC, (1) watercourses are not regulated as Class IV streams if the channel
3 was not formed by naturally occurring water, and (2) inadvertently created artificial
4 watercourses are not regulated as Class IV streams.

5 DATED this 10th day of January, 2020.

6 VAN NESS FELDMAN LLP

7
8 By: 

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13 *Attorneys for Rory and Donna Veal*

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BEFORE THE HEARING EXAMINER
FOR THE CITY OF REDMOND

In the Matter of the Appeal of)
)
)
Rory and Donna Veal)
)
Of the October 17, 2019)
Administrative Decision File Number)
LAND-2019-00814 Regarding Their Real)
Property Known as)
Tax Parcel Number 352605-9123)

No. APL LAND-_____

CERTIFICATE OF SERVICE

I, Antonia Gales, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as a legal assistant in the office of Van Ness Feldman, caused true and correct copies of the following documents to be delivered as set forth below:

- 1. Motion For Partial Summary Judgment;
- 2. Declaration of Jenna Mandell-Rice; and this;
- 3. Certificate of Service;

and that on January 10, 2020, I addressed said documents and deposited them for delivery as follows:

Deputy City Clerk
Cheryl Xanthos
Office of the Hearing Examiner
City Hall, 3rd Floor
15670 NE 85th Street
Redmond, WA 98052
cdxanthos@redmond.gov

- By U.S. Mail
- By Legal Messenger
- By Email
- By E-Service

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- By U.S. Mail
- By Legal Messenger
- By Email
- By E-Service

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on this 10th day of January, 2020.



Antonia Gales, Declarant