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-2019-00814 **APPELLANTS' PREHEARING BRIEF**

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

TABLE OF CONTENTS

Van Ness Feldman LLP

719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

I. INTRODUCTION

Appellants Mr. Rory Veal and Mrs. Donna Veal (the "Veals") appeal the Administrative Interpretation Decision issued by the City of Redmond (the "City") Department of Planning and Community Development ("Planning Department") on October 17, 2019, under the proposal name "Veal Administrative Interpretation" (the "Code Interpretation"). The Veals submit this prehearing brief through undersigned counsel pursuant to the Hearing Examiner's Order Setting Hearing and Pre-Hearing Schedule.

It is undisputed that **today** a watercourse (the "Drainage Feature") flows across the Veals' three-acre parcel of vacant land in the City of Redmond, King County tax parcel number 352605-9123 (the "Veal Parcel"). It is also undisputed that a significant portion of the water in the Drainage Feature has been artificially channeled onto the Veal Parcel from upstream developments and a road. What is in dispute in this case is whether the Drainage Feature meets the definition of "Class IV stream," such that it is regulated under the Redmond Zoning Code ("RZC"). Substantial, direct evidence demonstrates that no channel existed on the Veal Parcel prior to the introduction of artificial sources of water. Instead, the Drainage Feature only formed on the Veal Parcel after enormous quantities of water were diverted onto the Veal Parcel. This artificial direction of water onto the Veal Parcel began in the early 1900s, when State Road 202 ("SR-202," also known as Redmond Woodville Road NE or Red-Wood Road) was built. At that time, a culvert was placed under SR-202 ("Subject Culvert") that collects water and directs such water onto the Veal Parcel. Over the course of the ensuing 110 years, the properties upstream of the

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Veal Parcel were converted from forested land to residential developments. As a result of the Redwood Manor development in the late 1990s—which is directly upstream of the Veal Parcel—, the corresponding widening of SR-202, and the redirection of surface and groundwater from other upstream properties, the two-year flow over the Veal Parcel has increased by of 646 percent.

Despite the vast amount of evidence that the Drainage Feature was created by artificial influences, the City asserts that the Drainage Feature is a Class IV stream, which by definition is a *natural stream*—i.e. a channel with a bed and bank, the formation of which was caused by the flow of naturally occurring water. The City's Code Interpretation was not supported by affirmative or direct evidence, or any meaningful and reliable indirect evidence, that demonstrates that the Drainage Feature was formed by the flow of naturally occurring water or existed prior to development. The Code Interpretation disregards direct evidence that demonstrates that the Drainage Feature was not naturally formed. Therefore, the City's Code Interpretation was clearly erroneous and unsupported by the preponderance of the evidence. For these reasons, as more fully explained below, the Veals respectfully request that the Hearing Examiner grant this appeal, reverse the City's decision, and order the Planning Department to issue a new administrative interpretation consistent with the Veals' original interpretation request.

II. FACTS

The Veals own the Veal Parcel, a property located in the City of Redmond between SR-202 and the Sammamish River. The Veal Parcel slopes gently to the southwest, toward the Sammamish River. The Drainage Feature is a watercourse

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

originating at the Subject Culvert on the eastern edge of the Veal Parcel. The nature of the Drainage Feature gives rise to this dispute.

A. History of the Veal Parcel and the Drainage Feature.

Early maps of the Veal Parcel from 1897 and 1907 do not identify any stream or channel on the Veal Parcel. Exs. V-70, V-71, V-73. SR-202, which borders the eastern side of the Veal Parcel, was constructed by the State of Washington Department of Transportation ("WSDOT") some time before 1914. Ex. V-8 at 1. When SR-202 was constructed, the Subject Culvert was built under SR-202. *Id.* at 1–2. The Subject Culvert discharges onto the Veal Parcel at approximately Station 71+50 PL. *Id.* Since that time, the Subject Culvert has collected and discharged surface water and groundwater from the roadway surfaces, as well as undeveloped uplands and partially developed uplands, onto the Veal Parcel. *Id.* at 2.

The Veal Parcel was actively farmed during the 1930s. Aerial photographs from the mid-1930s show farm buildings and areas of agricultural activity in the same location where the Drainage Feature now exists, with no indication of any ditch, stream, or other water body. Exs. V-30, V-31. Aerial photographs from the 1940s through the 1970s continued to show no indication of any ditch, stream, or channel where the Drainage Feature now exists. Exs. V-32–V-39; V-9 at 4–5.

In 1978, the owner of the property directly upslope (to the east) of the Veal Parcel and SR-202 (the "Redwood Manor property") filed a short plat application (Short Plat 78-41) with the City for a four-lot subdivision of that property. Ex. V-66. In 1979, the City approved the short plat with standard conditions of approval, including conditions

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

requiring lot drainage and storm drainage improvements, but no conditions related to the protection of a "stream" or other drainage way. *Id.* at 6–10.

In 1984, the Veals purchased their single family home at 9859 Redmond Woodinville Road NE, which is immediately adjacent to the Veal Parcel. Ex. V-6 ¶ 4. At the time, the Veals observed that the Veal Parcel was an open pasture with no indication of a ditch, stream, or wetland. *Id.*

In 1985, WSDOT made improvements to SR-202 and constructed drainage facilities in the right-of-way for SR-202 that collected additional stormwater and groundwater seepage around the right-of-way and discharged it via the Subject Culvert onto the Veal Parcel. Ex.V-8 at 2. Subsequent drainage work re-routed that water into a stream located on an adjacent parcel, leaving the Veal Parcel in essentially the same condition as before the 1985 work. *Id.* at 4. Aerial photographs confirm that, until the late 1990s, there was still no indication of any ditch, stream, or other water body near where the Drainage Feature now exists.

During the 1990s, a developer named Ron Kluger began pursuing approvals for a 12-lot subdivision on the Redwood Manor property. Ex. V-18 ¶ 6. Mr. Kluger has signed an affidavit confirming that no streams were present on the Redwood Manor property during his ownership. *Id.* ¶ 8. The City was designated as the lead agency for the environmental review of the proposed Redwood Manor plat, and issued a Determination of Non-Significance under the State Environmental Policy Act ("SEPA"). *Id.* ¶ 7; Ex. V-59 (Technical Committee Report at 2; PDF page 29). In September 1991, a Technical Committee Report was issued by the City, which does not mention a stream or wetland on

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

the Redwood Manor property. Exs. V-18 ¶ 8, V-59. At the time, the City's land use codes and policies required streams on a development site to be identified. Ex. V-18 ¶ 9. Significantly, as part of the plat approval process, a site inspection was conducted by a City Hearing Examiner. Ex. V-59 (Hr'g Exam'rs Decision at 7; PDF page 13). The Hearing Examiner later approved the plat application without conditions that would have been required had there been any critical areas, demonstrating that the Hearing Examiner did not find streams or wetlands on the Redwood Manor property. *Id.*

In 1994, Keith Litchfield, a professional engineer, prepared a drainage report ("Litchfield Report") on the Redwood Manor property. Ex. V-11. The Litchfield Report indicated the presence of a swale on a property downstream of the Redwood Manor property. *Id.* at 2. The Litchfield Report did not directly identify the swale as occurring on the Veal Parcel. *Id.* at 2. At the time (1994), the Veal Parcel was larger than it is today. The Veal Parcel was split-off from the larger parcel a few years later by a Lot Line Adjustment recorded on July 8, 1997.

Construction of Redwood Manor began in the late 1990s and continued through the early 2000s. Exs. C-6 at B-5, V-6 ¶ 10. The final plat for Redwood Manor was recorded in 1997, and the plat was accepted by the City in June 2003. Ex. V-6 ¶ 10. In 1998, the Veals purchased the Veal Parcel. *Id.* ¶ 11. At the time, the Veals observed that there was still no indication of any ditch, stream, or other water body on the Veal Parcel. *Id.* Storm water from the Subject Culvert simply dispersed and filtered through the thick field grasses. *Id.*

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

The storm drainage design for Redwood Manor directed all of the storm water, roof drains, foundation drains, and yard drains into the Subject Culvert. Ex. V-8 at 5. An interceptor swale routed water from upslope properties around Redwood Manor and directed it, without retention, into the Subject Culvert. *Id.* Several diversion ditches intercepted ground water, which was also re-directed into the Subject Culvert. *Id.*; Ex. V-6 ¶ 18. Moreover, when Redwood Manor was constructed, SR-202 was widened, increasing the amount of water dumped onto the Veal Parcel. Ex. V-8 at 4. An additional catch basin was installed to the north of the Veal Parcel, which was intended to drain stormwater flowing from a 1.25 acre upland area[1] to SR-202 into a stream well to the north of the Veal Parcel. *Id.* Due to the faulty construction of this catch basin, water in fact bypasses the catch basin and is directed into the Subject Culvert. *Id.*; Ex. V-81 (video showing water originating from Basin D and bypassing the catch basin). Relative to pre-1998 conditions, the two-year storm peak flow rate is predicted to have increased by 65.4 percent and the average annual runoff volume has increased by 37.2 percent from this misdirected water alone. Ex. V-14 at 2.

By the early 2000s, all of the additional water from SR-202, Redwood Manor, and other uphill development was beginning to cause visible changes to the Veal Parcel. Exs. V-48, V-49, V-50, V-51, V-52.

In January 2016, the Veals identified an additional source of water flowing onto the Veal Parcel. V-6 ¶ 18. Large amounts of water were being directed onto the Veal Parcel because of the failure or "slump" of SR-202. *Id.*; Ex. V-79 (video of water on the

[1] This drainage basin is referred to in a report prepared by Dr. McCarthy in 2020 as Basin D. Ex. V-14.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Veal Parcel due to the slump). Preliminary studies showed that approximately 53,000 gallons of water per week were being diverted and discharged onto the Veal Parcel. V-6 ¶ 18. This water had the effect of greatly increasing soil saturation levels. The "slump" situation was serious enough that the City conducted an investigation and concluded that the roadway could collapse if the situation worsened. The road slump is being carefully monitored to this day. *Id.*

B. History of Regulation of the Drainage Feature.

The City adopted its first Critical Areas Ordinance ("CAO") in 1992. In 1993 and 1997, the City adopted updates to the CAO and its "Stream Classification Map." The 1993 map did not depict a stream in the vicinity of the Drainage Feature. The 1997 map depicted a channel only on the lower/western portion of the Veal Parcel. Ex. C-9.

In 2002, five years after the discharges from Redwood Manor began, the City adopted another update to its CAO and Stream Classification Map. Ex. V-6 ¶ 12. This update was prepared using "LiDAR," a technology that was much less reliable at the time and often produced "false positives" when identifying streams and other water bodies.[2] The 2002 Stream Classification Map showed a Class IV stream on the lower/western portion of the Veal Parcel. Ex. V-6 ¶ 12.

[2] *See, e.g.*, BCC Research, *Brief History of LiDAR, Its Evolution and Market Definition*, (Mar. 8, 2018, 11:00:00 AM), http://blog.bccresearch.com/brief-history-of-lidar-evolution-and-market-definition (describing LIDAR technology from the mid-1990s as "primitive by today's standards"); Neil Olson, *Extraction of Previously Unmapped Headwater Streams from LiDAR in New Hampshire*, https://www.des.nh.gov/organization/commissioner/gsu/nhhdp/documents/r-co-15-1.pdf (more recent study confirming that, even using more modern LIDAR technology, and [e]ven after filtering and overlaying the BotHat layers, some number of isolated false positive cells remained").

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

In April 2014—approximately 15 years after the discharges from Redwood Manor began and 100 years after the Subject Culvert started collecting and directing water onto the Veal Parcel—Tom Hardy, City of Redmond Stream and Habitat Planner, conducted a site visit and made a preliminary determination that streams and wetlands may be present on the Veal Parcel. *Id.* ¶ 13. In 2015, the Veals were made aware that the City was again updating the CAO and Stream Classification Map. *Id.* ¶ 15. This amendment proposed to extend the "stream" across the rest of the Veal Parcel. The Veals met with City staff to request that the extension of the "stream" depicted on the Veal Parcel be removed from the proposed update of the Stream Classification Map. *Id.* The Veals presented information supporting their conclusion that the "stream" was not regulated, and staff suggested that the Veals hire a hydrologist. *Id.*

The Veals then retained Ed McCarthy, a hydrologist and water resource engineer with more than 25 years of experience, to perform an "upstream" analysis (the "McCarthy 2015 Report"), which was completed in August 2015. *Id.* ¶ 16; Ex. V-13. Dr. McCarthy concluded that the development of Redwood Manor, the widening of SR-202, and the redirection of surface water and groundwater from other upstream properties had resulted in an average increase of 447 percent in the amount of surface water flowing through the Subject Culvert. Ex. V-13 at 6. Dr. McCarthy further concluded that, as a result of these increases in flow, an "incised" and "artificial" channel had formed—the manmade feature that the Veals have identified as the Drainage Feature. *Id.* at 7. The McCarthy 2015 Report also concluded that the City should have required that the water from Redwood Manor be piped across the Veal Parcel at the time the subdivision was approved. *Id.*

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

In late 2015, the Veals were informed that the Staff Report for the pending update to the Stream Classification Map was being modified so that the "stream" on the Veal Parcel would not be extended. Ex. V-6 ¶ 17. In October 2015, a Technical Committee Report was issued in advance of the Planning Commission Report on the map update. Ex. V-20. The Technical Committee Report mentioned the Veal Parcel, stating that "staff does not recommend a modification to the Stream Classification Map for this property because there is not compelling evidence to warrant a classification change." *Id.* at 2. In December 2015, the Planning Commission published the Planning Commission Report to the City Council. Ex. V-21. The Planning Commission Report included a lengthy discussion about the Veals' public comments and concluded that the upper/eastern segment of the Drainage Feature is not a regulated "stream." *Id.* at 2–3. In March of 2016, the City Council adopted an ordinance that incorporated the updated Stream Classification Map—which showed no "stream" in the upper/eastern portion of the Drainage Feature—into the RZC. Ex. V-6 ¶ 17.

As of September 2017, the City's GIS maps depicted the Drainage Feature in two segments: first, as a ditch on the upper/eastern portion of the Veal Parcel (shown in black), and second, as a stream on the lower/western portion of the Veal Parcel (shown in blue). Ex. V-4, Appendix A, at 1; *see also* Ex. 70 (2014 field notes map).

The Veals attempted to sell their property in 2017. Ex. V-6 ¶ 22. In 2017, as part of their preparations for a potential sale of the Veal Parcel, the Veals engaged professional wetland and stream biologists and civil engineers to analyze current conditions and provide reports. *Id.* ¶ 22. In September 2017, Beaver Creek Environmental Services

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

("Beaver Creek") issued a "Stream Assessment Report" for the Veal Parcel. *Id.*; Ex.V-15. The Stream Assessment Report states that "[t]he drainage on this site does not meet the criteria for a categorization as a City of Redmond 'stream.'" Ex. V-15 (executive summary). Beaver Creek also prepared a "Wetland Evaluation and Delineation Report," which concluded that the "wetland" identified on the Veal Parcel was artificially created. Ex. V-16 at 16.

The Veals then initiated marketing efforts to sell the Veal Parcel. Ex. V-6 ¶ 23. Because of the desirable location, the interest was very high. However, a series of purchase agreements and other arrangements with buyers were terminated after the City insisted that the upper/eastern portion of the Drainage Feature is a regulated "stream." *Id.*

In May 2018, City staff member Emily Flanagan issued a memo titled "City Review of Stream Assessment Report" (the "2018 Staff Memo"), in which City staff opined that "the entire watercourse downstream from Red-Wood Road is a Class IV stream." *Id.* ¶ 24; Ex. V-3 at 1. The conclusions in the 2018 Staff Memo are based at least in part on City staff's consultation with the Washington Department of Fish and Wildlife ("WDFW") "for an interpretation of what is a regulated watercourse and what isn't." Ex. V-3 at 3. According to City staff, under WDFW's interpretation, "if any portion of the watercourse is derived from natural sources (i.e. rainwater, groundwater, sub-surface recharge) this makes it a regulated watercourse." *Id.* at 3–4; *see also* Ex. 76. No RZC provision, statute, or regulation is cited to support this interpretation. Ex. V-3 at 3–4.

In the 2018 Staff Memo, staff admitted it was "likely true," as indicated in the McCarthy 2015 Report, that "Redwood Manor has increased the amount of water being

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

conveyed across Red-Wood Road," and staff did not disagree with Dr. McCarthy's model that predicted "a small amount of runoff" under the pre-developed condition. *Id.* at 4. Nevertheless, staff rejected the conclusions in the McCarthy 2015 Report for a single reason: "[t]he definition of a stream is not dependent on how much flow there is in the stream. If any portion is from a natural source it is a stream." *Id.* Staff also rejected the conclusions in the Beaver Creek reports for "two primary reasons": first, "the watercourse was not originally constructed," but instead was, according to staff, "created by natural flow patterns, not constructed as a stormwater runoff device"; and second, "the hydrology, though altered by the development of Redwood Manor, contains a portion of naturally occurring flow." *Id.* at 5–6. The Staff Memo also stated that "illegally clearing and grading a natural drainage does not turn it into an artificially created stormwater ditch"—but the Veals never made any such claim, and their position that the Drainage Feature is artificial is not in any way dependent upon the drainage work they performed in 2016 in response to the "slump" of SR-202. *Id.* at 5.

In mid-2018, Cathy Beam, Senior Planner, proposed that the Veals allow WDFW to make a binding determination as to the regulated status of the "stream." Ex. V-6 ¶ 25. The Veals rejected that proposal because it would have denied any right of appeal and negated their due process rights. *Id.* As part of this exchange, City staff initiated contact with WDFW, which investigated all of the historic records at its disposal to see if there had ever been a stream in this location. The Veals also conducted their own research into historical maps of the Veal Parcel. This research by WDFW and the Veals confirmed that there was nothing in the historic records showing that a stream existed in this location. *Id.*

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

In July 2019, the parties entered into a process agreement under which the Veals would request an administrative interpretation from the City, and the City would make a formal determination regarding the regulated status of the Drainage Feature. *Id.* ¶ 29. The City hired Herrera Environmental Consultants, Inc. ("Herrera") to assess the Drainage Feature on the Veal Parcel. On October 17, 2019, the City issued its Code Interpretation, concluding that the Drainage Feature is a Class IV perennial stream. Ex. C-1.

The Veals timely appealed. Since that time, the Veals have retained additional expert witnesses to evaluate the Drainage Feature, including an aerial photo expert and a geologist and fluvial geomorphologist.

III. STANDARD OF REVIEW

The Veals' administrative interpretation request was a Type I process and the Code Interpretation was a Type I decision. Ex. C-1. The Hearing Examiner may grant the appeal or grant the appeal with modifications if the Hearing Examiner determines that the Veals have carried the burden of proving that the Type I decision is not supported by a preponderance of the evidence or was clearly erroneous. RZC 21.76.060(I)(4). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948): *see also Ancheta v. Daly*, 77 Wn.2d 255, 259, 461 P.2d 531 (1969).

The clearly erroneous standard "mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision." *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council,* 87 Wn.2d

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

267, 274, 552 P.2d 674 (1976). Consistent with the standard of review, appeals of Type I decisions are made to the Hearing Examiner in an open record hearing, RZC 21.76.050(F), in which the Hearing Examiner may consider evidence that was not before the City when it rendered its decision to determine if the preponderance of the evidence supports the City's decision.

IV. ARGUMENT

The City's determination that the Drainage Feature is a Class IV stream is clearly erroneous for four primary reasons: (1) the City applied the wrong legal definition of Class IV stream; (2) the evidence that the City relies upon does not support the City's conclusion that the Drainage Feature was formed by natural flow; (3) the City improperly disregarded evidence submitted by the Veals; and (4) the weight of the evidence demonstrates that the Drainage Feature was formed by the channeling of artificial water onto the Veal Parcel. Assuming—for the sake of argument—that the City's conclusion that the Drainage Feature is a Class IV stream is not clearly erroneous, the evidence does not support the premise that the Drainage Feature is a perennial, as opposed to a seasonal, stream.

A. The City's Determination that the Drainage Feature is a Class IV Stream Is Premised on an Incorrect Legal Interpretation.

The RZC regulates Class IV streams as critical areas. RZC 21.64. Class IV streams are "those *natural* streams that are not Class I, Class II, or Class III. They are either perennial or intermittent, do not have fish or the potential for fish, and are non-headwater streams." RZC 21.64.020(A)(2)(d)(iv) (emphasis added). The RZC further defines "stream" as:

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

> Those areas where surface waters produce a defined channel or bed. A defined channel or bed is an area which demonstrates clear evidence of the passage of water and includes, but is not limited to, bedrock, channels, gravel beds, sand and silt beds, and defined-channel swales. The channel or bed need not contain 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.

RZC 21.78 (definition of stream; emphasis added).

As fully briefed in Appellants' Motion for Partial Summary Judgment, the City's Code Interpretation is premised on two fundamental legal errors pertaining to the definition of Class IV stream. First, the City relied on an erroneous and unsupported legal interpretation that a Class IV stream is any watercourse that conveys any natural water, regardless of whether the channel itself was formed naturally. When the RZC is interpreted correctly, for a stream to be regulated as a Class IV stream, it must be a *natural* stream, i.e., have a bed and a bank that was formed by water put there by mother nature, not by man. If, instead, the channelization is caused by the artificial placement of water at that location, it is not a natural stream and, thus, not a Class IV stream.

The City's improper reliance on the premise that a Class IV stream is any watercourse that conveys any natural water is demonstrated by the City's agreement with the 2018 Staff Memo (Ex.V-3) and reliance on the memorandum prepared by Herrera ("Herrera Memo") (Ex. C-6). Those documents clearly show that the City applied an incorrect legal interpretation. The 2018 Staff Memo reached the conclusion that "the entire watercourse downstream from Red-Wood Road is a Class IV stream," Ex. V-3 at 1, by relying on WDFW's purported interpretation, which City staff explains as follows: "Their interpretation is if all the water in the watercourse is generated from a stormwater

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

system it is not regulated, but if any portion of the watercourse is derived from natural sources (i.e. rainwater, groundwater, sub-surface recharge) this makes it a regulated watercourse." *Id.* at 3–4. The 2018 Staff Memo concluded that "[t]he definition of a stream is not dependent on how much flow there is in the stream. If any portion is from a natural source it is a stream." *Id.* at 4.

Likewise, the Herrera Memo appears to have relied on WDFW's interpretation as set forth in the 2018 Staff Memo. Ex. C-6 at 13–14. The Herrera Memo determined that there was some water naturally occurring on the Veal Parcel from the presumed existence of a perched aquifer. *Id.* at 12. Without evaluating whether the flow from the perched aquifer would have historically been sufficient to carve a bed and a bank, the Herrera Memo concludes that "[t]he watercourse on the Subject Property is a stream and fits the definition of a stream laid out in RZC 21.78. The stream formed naturally from springs on the upper areas of the hillslope where it defined a watercourse." *Id.* at 14.

The City contends in its Opposition to Appellants' Motion for Partial Summary Judgment that it did not in fact rely on this interpretation, and instead determined that the Drainage Feature was created by natural surface flows. Opp. to Appl. Mot. for Partial Summ. J. at 10. The City's argument is belied by the evidence upon which the City relies. The City's determination that the Drainage Feature is a Class IV stream is *only* supported by evidence insofar as a Class IV stream is one that includes *any* natural water. This is not a "gray" case, as the City suggests in its Opposition to Appellants' Motion for Partial Summary Judgment. Appellants are not arguing that a channel formed by natural flow should be considered artificial because artificial water sources expanded the channel or

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

caused the channel to move. Instead, this is a case where there is *no evidence* of a channel on the Veal Parcel pre-development and no channel on the Veal Parcel until after significant quantities of water were routed onto the Veal Parcel through the Subject Culvert. As explained below, when the correct legal interpretation of Class IV stream is applied, the evidence does not support the conclusion that the Drainage Feature is a Class IV stream. Instead, the Drainage Feature is an artificial storm or surface water runoff device, expressly exempt from regulation as a stream under the RZC's definition of stream.

Second, the City incorrectly bases its conclusion the Drainage Feature is a Class IV stream on the lack of evidence that the Drainage Feature was "intentionally created." Ex. C-1 at 5 ("Streams fall into three categories which include shorelines of the state, natural streams and manmade streams"); *id.* at 6 ("The watercourse located on the Subject Property is not an Intentionally Created Stream and is determined by the Department to be a Class IV Perennial Stream . . ."). As fully briefed in the Motion for Partial Summary Judgment, intentionally created streams are not the only type of stream excluded from regulation as Class IV streams; artificially created streams are also excluded. Therefore, lack of evidence of "intentional" creation of the Drainage Feature (i.e., evidence that the Drainage Feature was dug with a backhoe) alone cannot justify the conclusion that the Drainage Feature is a Class IV stream. The City failed to consider whether the Drainage Feature was merely an artificial, but inadvertently or accidentally created, watercourse.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

B. The City's Evidence Fails to Demonstrate that the Drainage Feature is a Class IV Stream.

The RZC specifies the factors to be considered in determining whether an area should be classified as a fish and wildlife habitat conservation area, including a Class IV stream. RZC 21.64.020(A)(2)(e). Those factors include: (1) maps adopted pursuant to this chapter, including the fish and wildlife habitat conservation area core preservation areas map, Critical Area Wildlife Habitat Willows/Rose Hill Neighborhood Map, and stream classification map; (2) WDFW priority habitat and species maps; (3) anadromous and resident salmonid distribution maps contained in the habitat-limiting factors reports published by the Washington State Conservation Commission; (4) federal and state information and maps related to species of concern; (5) application of the criteria contained in these regulations; and (6) consideration of the technical reports submitted by qualified consultants in connection with the applications subject to these regulations. *Id.* The City admits that:

> [a] review of the Department of Fish and Wildlife priority habitat and species maps, anadromous and resident salmonid distribution maps contained in the habitat-limiting factors reports published by the Washington State Conservation Commission, and federal and state information and maps related to species of concern do not indicate the presence of a stream on the Subject Property.

Ex. C-1 at 6. Therefore, factors 2-4 (outlined above) do not support the City's classification of the Drainage Feature as a Class IV stream, and—in fact—support the opposite conclusion. Instead, the City's determination that the Drainage Feature is a Class IV stream was based solely on: (1) the conclusions in the Herrera Memo; and (2) evidence

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

from the mid-1990s that suggests the presence of a drainage swale or wetland on the lower/western portion of the Veal Parcel at that time.

As explained below, the City erred in relying on such information. The Herrera Memo's analysis is incomplete and unsubstantiated, and evidence suggesting the presence of a channel during the mid-1990s does not prove that the Drainage Feature was naturally formed. Moreover, the City dismissed, often without explanation, substantial evidence provided by the Veals that refutes the Herrera Memo and other evidence relied upon by the City, and that demonstrates affirmatively that the Drainage Feature does not meet the criteria of a regulated Class IV stream. The testimony at the hearing will demonstrate that the City's decision to rely on the evidence it relied upon, and to reject the Veals' evidence, was clearly erroneous.

1. The City's Reliance on the Herrera Memo Was Clearly Erroneous.

The City's reliance on the Herrera Memo was clearly erroneous. The Herrera Memo does not provide the analysis necessary to conclude that the Drainage Feature was formed by natural sources of water and is largely unsubstantiated. The Herrera Memo's conclusion that "[t]he stream formed naturally from springs on the upper areas of the hillslope where it defined a watercourse" (Ex. C-6 at 14) is based on Herrera's untested hypothesis of the formation of the channel:

> The geologic and hydrogeologic history of the area indicate how the watercourse formed naturally over time. Springs discharging from the perched aquifer formed the headwaters on the upper hillslope. These waters were joined by additional water emanating from the perched aquifer and eroded a watercourse into the hillslope. As the watercourse traveled downstream, water from the shallow aquifer flowed into the channel and further defined the stream channel and provided perennial flow. As the flow accumulated in the downhill direction, the saturated area and

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

> watercourse become larger and had a greater influence on topography and area vegetation.

Id. at 5. This hypothesis is purely speculative. The Herrera Memo does not identify the amount of water flowing over the property naturally—information necessary to form the conclusion that the Drainage Feature was formed by naturally flowing water because a channel's bankfull width and depth reflects the amount of flow the drainage basin contributes to that channel. Ex. V-7 at 4. The Herrera Memo does not analyze whether such water flowed in quantities sufficient to create a watercourse based on the soil conditions and slope of the property through modeling or other quantitative analysis. Nor does the Herrera Memo map the historical stream channel to show that the channel existed historically, or come forward with affirmative evidence that the channel existed historically, such as aerial photographs.

Instead, the Herrera Memo makes unsupported assertions regarding the existence of a natural stream. First, the Herrera Memo speculates that a channel formed upslope of SR-202 because springs were present historically on the hillside upslope of SR-202. Ex. C-6 at 5. Herrera provides no evidence for the existence of these springs. The Herrera Memo further asserts that these "springs…formed the headwaters on the upper hillslope," but provides no evidence for the existence of a stream or streams upslope of SR-202. *Id.*

Second, the Herrera Memo relies on topographic maps to support its assertion that there was a stream on the Veal Parcel pre-development. Because the cited topographic maps do not show any channels on the hillslope, the Herrera Memo instead claims that any lateral topographic concavity (shown by contour lines on a topographic map)

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

necessarily indicates the presence of a stream. *Id.* at 7. As will be established through the expert report and testimony of Brian Collins at the hearing, this assumption cannot be made without further information and analysis. Ex. V-7 at 8. Although channels typically initiate in lateral topographic concavities, channels *only* form at locations when there is a sufficient upslope drainage area to generate a critical volume of water, in combination with the necessary slope angle, to overcome the erosional resistance of the land surface. *Id.* The Herrera Memo, however, does not assess or quantify the volume of water historically flowing from the upslope property or evaluate the slope angle or the erosional resistance of the land surface, to substantiate its assertion that the lateral topographic concavities on the topographic maps are evidence of a channel.

Third, the Herrera Memo concludes that "[t]he stream channel was defined prior to construction of SR 202, between 1902 and 1913," relying on unsubstantiated assertions regarding the placement of the Subject Culvert to support its conclusion. Ex. C-6 at 15. The Herrera Memo assumes culverts are only necessary to convey an existing watercourse under the road, and that the Subject Culvert would have been built to convey an existing watercourse under SR-202 so that the road remains dry. Ex. C-6 at 15, B-1. Herrera provides no citation for this assertion. Moreover, Herrera's experts claim no expertise in road engineering, road construction, or any field that would qualify them to make assertions regarding the placement of culverts and drains in highways.

Furthermore, the Herrera Memo's assumptions about SR-202 are directly contradicted by the report of Bruce Dodds, a civil engineer with extensive experience in surface water management and the design and construction of highways. Ex. V-8 at 1. Mr.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Dodds produced an expert report ("Dodds Report") regarding the nature of the drainage of the Subject Culvert. *Id.* The Dodds Report explains that "[d]rainage of the ditches is normally provided by the installation of culverts at intervals determined by uphill drainage conditions, roadway slope, ditch cross sections, roadway width, superelevation, and other hydraulic considerations. All these elements existed and were incorporated into the original design and construction for SR 202." *Id.* at 1–2. Mr. Dodds goes on to explain the precise reason why the Subject Culvert would have been located at its current location:

> The nearest culvert north of the subject culvert discharging stream/roadway flows across SR 202 is approximately at station 79+50 and the next similar culvert is at station 60+75, a ditch distance of almost 2000 feet, a distance hydraulically unacceptably long for the roadway surface to be drained, a culvert approximately halfway between these stations would be essential.

Id. at 3. Moreover, although the Herrera Memo asserts—again, without citation—that the Subject Culvert was placed to drain an existing stream, there are specific engineering methods that are used when a culvert is placed to drain a stream. The Dodds Report explains that when a culvert is placed to drain a stream, WSDOT must provide a connection from the upslope hill to the culvert. On as-built plans, WSDOT shows doing so in other locations, but not at the location of the Subject Culvert, demonstrating that there was no upslope stream. *Id.* at 3. The City had the Dodds Report in its possession when it hired Herrera to prepare the Herrera Memo, but the Herrera Memo completely disregards the Dodds Report.

Fourth, the Herrera Memo relies on the Litchfield Report, which was prepared in connection with the development of the Redwood Manor property. The Herrera Memo interprets the Litchfield Report as identifying a swale on the Veal Parcel prior to the

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

building of Redwood Manor in the late 1990s. The Herrera Memo relies on such swale as proof of a "natural channel." Ex. C-6 at 12. The presence of a swale on the Veal Parcel prior to the construction of Redwood Manor does not demonstrate that there was a stream with a bed and a bank. A swale is merely a depression; it does not necessarily have a bed or a bank.[3] Additionally, the presence of a swale in the 1990s is not evidence that the Drainage Feature on the Veal Parcel was *naturally formed*. The Dodds Report, as well as expert testimony and other evidence introduced at the hearing, will establish that there were significant sources of artificial water on the Veal Parcel prior to the building of Redwood Manor.

Moreover, the evidence will establish that the swale identified in the Litchfield Report was not located on the Veal Parcel. The Litchfield Report does not identify the location of the swale by parcel number. When the Litchfield Report was completed in December 1995, the Veal Parcel was part of a larger parcel that was subdivided a few years later by a lot line adjustment. Ex. V-19. Thus, the Litchfield Report's finding of a swale on the property downstream of the Redwood Manor property may only indicate the presence of a swale on the property that has since been split from the Veal Parcel.

Furthermore, the description of the swale in the Litchfield Report is at odds with the existing conditions of the Veal Parcel. Ex. V-11 at 2. The Litchfield Report describes the downslope drainage as a "natural drainage swale" that "descends at a slope ranging from 15% to 35%." *Id.* The Drainage Feature's slope is a relatively constant 15 percent in

[3] The RZC recognizes that not all swales are streams. Under the RZC, only "defined-channel swales" are streams. RZC 21.78 (definition of stream).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

contrast to the Litchfield Report's characterization of the slope of the swale. Ex. V-7 at 6. The Litchfield Report describes the swale as 3 feet deep and 3 feet wide (Ex. V-11 at 2), while the Herrera Memo describes the "channel" downstream of the Subject Culvert as having a maximum top width of 2.6 feet (Ex. C-6 at 13) and Herrera's measurements of the Drainage Feature show a much narrower "channel" downstream of the Subject Culvert (Ex. V-26). The Herrera Memo provides no explanation for why the channel would have *become smaller* over time. Indeed, the discharge to the Drainage Feature has increased several-fold as a result of the upslope development of Redwood Manor. Ex. V-7 at 6. The expert testimony of Brian Collins will establish that, given the 646 percent post-development increase in flow, it is implausible that the Drainage Feature could have substantially diminished in size from the dimensions reported by the Litchfield Report. Ex. V-7 at 6. Therefore, the Herrera Memo's assumption that the Drainage Feature is the same feature as that described in the Litchfield Report is contrary to Herrera's own findings.

Finally, the Herrera Memo relies on the presence of "natural" water in the Drainage Feature after it had not rained for weeks as an indication that the Drainage Feature formed through natural erosional processes over time. Ex. C-6 at 12. The Herrera Memo ignores the fact that the Redwood Manor added foundation drains and French drains that collect groundwater from below existing grade and direct this water into the Subject Culvert. Although the groundwater itself may be "natural," the collection, concentration, and release of the groundwater is not. Courts have consistently found that where water would ordinarily run across a property, but would not be channeled on the

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

property, a municipality creates an "artificial" watercourse by collecting and depositing the water upon the land in a different manner. For example, in *Burton v. Douglas County*, 14 Wash.App. 151, 154 (Wash. Ct. App. Div. III 1975), the court found that the county had created an artificial drain by constructing a road because water, "in the absence of the crown in the road, would have continued to run across the road instead of being channeled by it."

In summary, without any supporting qualitative or quantitative analysis to support the hypothesis that the naturally occurring water on the Veal Parcel formed the Drainage Feature, the Hearing Examiner must give no weight to Herrera's conclusion that the Drainage Feature is a Class IV stream.

The Herrera Memo also ignores important and persuasive evidence that the Drainage Feature was not naturally formed, rendering the conclusions in the Herrera Memo unreliable. The Herrera Memo rejects aerial photographic evidence that affirmatively demonstrates that the Drainage Feature did not exist pre-development. The Herrera Memo acknowledges that aerial photographs are a key part of geomorphic investigations (Ex. C-6 at 7), but asserts that the aerial photographs showing no watercourse on the Veal Parcel dating from the 1930s were not of sufficient quality to affirmatively demonstrate that there was not a natural watercourse on the Veal Parcel prior to the development of Redwood Manor. *Id.* Neither of the authors of the Herrera Memo claim expertise in aerial photograph interpretation. As discussed below, the Veals' aerial photograph expert's interpretative findings disprove the Herrera Memo's assertions and confirm the Veals' position that there was never any "natural" channel on the property.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Moreover, the Herrera Memo's only findings regarding the size of the Drainage Feature undermine Herrera's assertions regarding the needed resolution of the photos to identify the Drainage Feature. The Herrera Memo asserts that photos with a "photo resolution of less than 2 feet" are required to see a watercourse of this size. *Id.* at 7. However, Herrera found that the "channel immediately downstream of the culvert had a top width of 2.6 feet," indicating that the Drainage Feature should have been visible from photos with a resolution of greater than 2 feet. *Id.* at 12. Although Herrera asserts that the Drainage Feature would not have been identifiable in the photos because the larger "Willow Creek" was not visible in the photos, there is no stream by that name adjacent to the Veal Parcel that would have been depicted in the aerial photographs.[4] Regardless of what stream the Herrera Memo is referencing, the expert report of Dr. Collins confirms that similarly sized channels were, in fact, visible in the aerial photographs, whereas the Drainage Feature was not. Indeed, Dr. Collins explains that a nearby channel (identified in his report as Channel 4) is visible in aerial photographs with less than half of the resolution of the 1930s aerial photos. Ex. V-7 at 18.

2. The City's Position is not Supported by Evidence of a Channel Before the Redwood Manor Development.

Aside from the Herrera Memo, the only other evidence of a Class IV stream that the City relies upon are: (1) the City's 1997 sensitive areas stream classification map identifying a stream on the lower/western portion of the Veal Parcel; (2) the City's 1993

[4] According to the 2012 Citywide Watershed Management Plan and current City "Map 64.3 Streams Classification", "Willows Creek" is in a different location west of the Sammamish River. To the extent that the Herrera Memo refers to a creek other than Willows Creek, it is not clear to what creek the Herrera Memo is referring.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

sensitive areas wetland map identifying wetlands on the Veal Parcel; and (3) the Litchfield Report's vague reference to a swale on a property downstream of Redwood Manor.

None of these pieces of evidence demonstrate that the Drainage Feature is naturally formed, which is the key question to be determined by the Hearing Examiner. The presence of a channel on part of the Veal Parcel before the construction of Redwood Manor is not determinative of whether the channel formed naturally. Significant development in the area occurred prior to the Redwood Manor development, including the construction of SR-202 prior to 1914. Ex. V-8 at 1. In 1914, the Subject Culvert was placed under the road. *Id.* Since that time, the Subject Culvert has artificially conveyed surface water and groundwater from both the roadway surfaces and undeveloped and partially developed uplands after being collected by the roadside ditch and thereafter concentrated in the eastern end inlet of the Subject Culvert. *Id.* at 2. All waters draining off the surfaces of SR-202 from approximately the catch basin at station 71+70 north to 76+00 were from impervious surfaces, diverted to and concentrated at, the inlet to the Subject Culvert. Therefore, to the extent that evidence relied upon by the City shows that there was a channel present on the lower/western portion of the property before Redwood Manor was constructed, the evidence also shows it was formed by artificial water sources routed onto the Veal Parcel. There is no evidence of a channel for at least eight decades after the construction or SR-202, much less before the construction of SR-202, which would indicate that the channel was formed by natural water flow.

In addition, as explained below, the evidence cited by the City is unhelpful for additional reasons that relate to each individual piece of evidence.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

i. 1997 Stream Map.

The City relies on a sensitive areas stream map adopted in 1997 under Ordinance No. 1955, which identifies a critical area only on the lower/western portion of the Veal Parcel, not on the upper/eastern portion. On the 1997 map, the Class IV stream appears to start in the lower/western one-third of the Veal Parcel, and does not connect to SR-202. The presence of the stream segment on the lower/western portion of the Veal Parcel, but not the upper/eastern portion of the Veal Parcel, is evidence that there was no channel on the upper/eastern portion of the property through 1997. Ex. C-9. If there had been a stream on that portion of the Veal Parcel, it would have been noted on the 1997 steam map.

To the extent the City relies on this limited evidence of the presence of a channel on the lower/western portion of the Veal Parcel prior to the construction of Redwood Manor to assert that the entire Drainage Feature must be regulated as a Class IV stream, this argument is factually and legally flawed. First, the presence of such a channel prior to the construction of Redwood Manor does not indicate that the channel is a Class IV stream because numerous artificial water sources were channeled onto the Veal Parcel starting in the early-1900s when SR-202 was constructed.

Second, even if the Hearing Examiner finds that the lower/western portion of the Drainage Feature is a Class IV stream, the upper/eastern segment of the Drainage Feature cannot be classified as a Class IV stream under the principle that "[w]hen more than one classification is present in short, alternating segments on the property in question, it will be classified according to the stream class which is more restrictive." RZC 21.64.020(A)(2)(d). The plain meaning of the term "alternating" does not support the

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

application of this principle to two segments of a channel that have different classifications, where the pattern does not repeat. "Alternating" means "to interchange repeatedly and regularly with one another in time or place."[5] For an alternating pattern to be established, there would have to be a Class IV stream both above and below the upper/eastern segment—i.e. Class IV stream, artificial stream, Class IV stream.

Here, there is no repeating pattern or alternating segment because there is no stream upstream of the Veal Parcel. No stream was ever mapped on the Redwood Manor property upstream of the Veal Parcel. The Redwood Manor property was previously owned by Ronald Kluger, who has provided a declaration confirming that he visited the property repeatedly and there was no stream on the property at any time during his ownership from 1980-1998. Ex. V-18 ¶ 11. Moreover, the Redwood Manor property went through two plat processes, and no stream was identified in either such process. In 1979, when the City approved a short plat application for the property, it imposed conditions based on the status of the property at the time. Ex. V-66. The short plat approval neither mentions a stream on the property, nor conditions the short plat application on mitigation of impacts to any such stream. *Id.*

In 1990, Mr. Kluger filed a subdivision application for Redwood Manor. Ex.V-59. Mr. Kluger hired Geotech Consultants to prepare a geotechnical engineering report for the short plat, the purpose of which was to explore site surface and subsurface conditions. Ex. V-25, at 1. Geotech Consultants dug test pits and observed groundwater seepage at a depth of one to ten feet below ground. Ex. V-25 at 3. The Geotech Consultant report

[5] Alternating, Dictionary.com (last accessed Jan. 29, 2020).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

makes no mention of surface water, springs, or streams located on the Redwood Manor property. In addition, Litchfield Engineering was hired to prepare a stormwater report, which included analysis of existing site conditions. The Litchfield Report contains no mention of a stream, wetlands or springs. Ex. V-11. The City issued a SEPA Determination of Non-Significance for the preliminary plat approval, which did not identify any streams on the Redwood Manor property or require mitigation for impacts to streams. Ex.V-59. A preliminary plat hearing for Redwood Manor was held on September 16, 1991. The neighbors to the south of the proposed plat testified that standing water used to be present on lots 2 and 3 of the proposed plat (lots 12 and 11 of the recorded plat), suggesting that such water was the result of faulty drainage. Ex. V-59 (Hr'g Exam'rs Decision at 5). In response, the City indicated that "no wetlands or springs were on the site, but if they were found during field engineering for the storm drainage system, they would have to be identified and classified, and measures taken to protect them." *Id.* at 5 ¶ 22. Prior to rendering his decision, the Hearing Examiner made a site visit to the Redwood Manor property. He issued his determination regarding the preliminary plat based in part on his impressions at the site visit. Ex. V-59 (Hr'g Exam'rs Decision at 7). No measures were imposed in the Hearing Examiner's decision to protect streams, springs, or wetlands, demonstrating that the Hearing Examiner also did not observe any streams, springs, or wetlands on the Redwood Manor property during the site visit. *Id.* at 5 § 22. Even the Herrera Memo notes that it is not clear when the standing water on the hillside was observed, and admits that "[i]t is possible . . . that the water was observed on the surface

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

only after large storms when spring flow from the perched aquifer would have been at its greatest." Ex. C-6 at B-3.

Therefore, there is evidence in the form of first-hand observations that a stream did not exist on the upslope property, and no compelling evidence to the contrary. Without such evidence, the Class IV stream classification cannot be applied to the upper/eastern segment of the Drainage Feature on the basis that it is an alternating segment of the lower/western segment.

ii. 1993 Wetland Map.

The City also relies on a 1993 wetlands map to support its position that water existed on the Veal Parcel prior to the building of Redwood Manor. Ex. C-1 at 6–8. The City's reliance on the wetlands map is misplaced for four primary reasons. First, the presence of a wetland does not demonstrate the existence of a channel. Second, the wetland map does not conclusively demonstrate the presence of a wetland because it was not a formal wetland delineation, and therefore, lacks reliability and certainty. Third, regardless of whether the wetland map could be used to suggest the presence of a stream (which it does not), the Veals' expert and other environmental consultants agree that the wetland on the Veal Parcel is the result of artificial placement of water on the Veal Parcel. The Wetland Evaluation and Delineation Report prepared by Beaver Creek concluded that the hydrology for the wetland "was provided by surface runoff directed by the roadside ditch at Redmond – Woodinville Rd." Ex. V-16, at 5. This conclusion is consistent with a 1996 report from Terra Associates, Inc. (the "Terra Report"), which stated that "the long term impact of storm drainage improvements has resulted in the creation of the small

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

wetland." Ex. V-17 at 4. Fourth, the wetland map indicates that it was developed based on "field reconnaissance." Ex. C-10. Despite having boots on the ground at the time the Veal Parcel was surveyed for wetlands, a stream was not identified.

In short, there is no basis on which the City can extrapolate that a natural stream exists based on the presence of an artificial wetland.

iii. Litchfield Report.

The City relies on the Litchfield Report, which suggests that there was a 3-foot by 3-foot swale on a property near the Redwood Manor property. As explained above, the swale identified in the Litchfield Report was not on the Veal Parcel, nor does the presence of a swale demonstrate either that there was a channel or that the channel was naturally formed.

3. The City Failed to Give Proper Weight to the Veals' Evidence.

In determining that the Drainage Feature is a Class IV stream, the City dismissed relevant and persuasive evidence provided by the Veals demonstrating that the Drainage Feature is artificially created. The City's dismissal of the Veals' evidence was clearly erroneous.

i. The City Erred When It Disregarded the Aerial Photographs.

The Code Interpretation asserts that the aerial photographs submitted by the Veals were not of sufficient resolution to determine the presence or absence of a channel, which the City's own experts claim is 2.6-feet wide, on the Veal Parcel pre-development. Ex.C-1 at 6–7. The City did not hire an expert in aerial photograph interpretation; the City only consulted with Herrera. As explained above, Herrera lacks adequate expertise in the

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

subject area and Herrera's conclusions regarding the need for higher resolution aerial photography is plainly contradicted by Herrera's own statements regarding the size of the channel.

ii. The City Erred When It Disregarded Mr. Veal's Personal Observations.

The City disregarded Mr. Veal's personal observations in 1984 and 1998 that there was no stream on the Veal Parcel on the basis that "a narrow stream is difficult to detect visually even when standing right next to it." Ex. V-6 ¶ 4, 11. The City's characterization of the Drainage Feature as a narrow stream that would be difficult to detect when standing next to it is belied by the City's own characterizations of the Drainage Feature. Ex. C-1 at 7. The Herrera Memo, as well as the Code Interpretation, rely on an assumption that the Drainage Feature is the same swale identified in the Litchfield Report, which Litchfield described as a 3-foot by 3-foot swale. Ex. C-1 at 7. If the Hearing Examiner accepts the City's assertion that the swale is the same feature as the Drainage Feature—which the Veals contend it should not—the City's rejection of Mr. Veal's personal observations is based on the plainly absurd premise that a 3-foot by 3-foot swale is difficult to detect when standing next to it. *Id.* Regardless of whether the Litchfield swale is the same feature as the Drainage Feature, the Drainage Feature itself today is significant in size. To suggest that Mr. Veal would be unable to detect a water feature the width and depth of a couch is not credible.

The Code Interpretation also suggests that the Drainage Feature would have been difficult to detect given the *current* vegetation on the Veal Parcel. Ex. C-1 at 6–7. Aerial photographs from the time of Mr. Veal's observations as well as his testimony will

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

establish that similar vegetation was not present on the Veal Parcel at the time of his observations as under current conditions. A comparison of the 1985 aerial photographs to aerials from the present day demonstrates that the vegetation on the Veal Parcel in that location has substantially grown since 1985, and the conditions during Mr. Veal's observations would have been significantly different than the conditions on the Veal Parcel today. *Compare* Exs. V-41 & V-42 (1985 aerials), with V-58 (2018 aerial). In addition, Mr. Veal's observations are corroborated by other field studies conducted by the City that failed to detect any channel on the Veal Parcel in 1993, and failed to detect any channel on the upper/eastern two-thirds of the property in 1997. *See* Exs. C-9, C-10.

The Code Interpretation, while rejecting Mr. Veal's observation of no stream on the Veal Parcel, relies instead on Mr. Veal's observation of water running across the Veal Parcel as evidence of a stream. As Mr. Veal will testify, the water ran in sheets across his property without any channelization. Because a stream is defined in the RZC as having a bed and a bank, water flowing over the Veal Parcel in an unchannelized form is not a stream.

iii. The City Erred When It Disregarded the Dodds Report.

The City failed to give adequate weight to the Dodds Report. The Code Interpretation provides no discussion of the conclusions in the Dodds Report and no explanation for why the Dodds Report was not considered. The Dodds Report contains relevant evidence regarding the existence—or lack thereof—of a natural watercourse prior to the construction of SR-202. This evidence is relevant to the City's inquiry, as evidenced by the fact that the City's own expert relies on the history of SR-202 to draw conclusions

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

about whether a natural stream was located on the Veal Parcel historically. Ex. C-6 at 15. Dodds and Herrera come to opposite conclusions regarding what the placement of the Subject Culvert suggests about the presence of a natural stream. The City fails to discuss the Dodds Report's conclusions or explain why it accepts Herrera's contrary, unsupported assertion regarding the placement of the Subject Culvert. The City's decision to accept the Herrera Memo's conclusions was clearly erroneous because Herrera claims no expertise in road engineering and Dodds' analysis plainly refutes Herrera's conclusions.

iv. The City Erred When It Disregarded the McCarthy 2015 Report.

The City's only stated basis for disregarding the McCarthy 2015 Report is that the report was not prepared with the stated purpose of classifying the stream. The RZC does not direct the City to *only* consider reports prepared for the purpose of classifying a stream. It directs the City to consider "technical reports submitted by qualified consultants." RZC 21.64.020(A)(2)(e)(vi). Moreover, the RZC contemplates that the City will consider various forms of evidence, including maps, as well as documentation, photographs, statements, and/or other evidence. *Id.*; RZC 21.64.020(A)(2)(d)(v). The City's disregard of the McCarthy 2015 Report was also inappropriate because the City itself urged the Veals to hire a hydrologist. Ex. V-6 ¶ 15.

Dr. McCarthy is a qualified hydrologist and water resource engineer. The McCarthy 2015 Report contains relevant information and evidence, which should have been weighed and considered by the City. For example, in 2015, Dr. McCarthy concluded that the development of Redwood Manor, the widening of SR-202, and the redirection of surface and groundwater from other upstream properties has resulted in an average

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

increase of 447 percent in the amount of surface water flowing through the Subject Culvert. Ex. V-13 at 6. Dr. McCarthy further concluded that, as a result of these increases in flow, an "incised" and "artificial" channel was formed—the manmade feature identified as the Drainage Feature. *Id.* at 7.

The Code Interpretation provides no discussion or weighing of the evidence that Dr. McCarthy provided regarding the amount of artificial water on the Veal Parcel. It was clearly erroneous for the City to disregard a report prepared by a qualified consultant that provided evidence regarding the amount and the sources of water and the effects of such water on channelization.

v. The City Erred When It Disregarded the Beaver Creek Reports.

The City disregarded the Beaver Creek reports—technical reports from qualified experts that contradict the Herrera analysis. The City's asserted reason for disregarding Beaver Creek's analysis was that the conclusions reached were "made based on limited analysis and field observations that include unsubstantiated conclusions about the origin of the water flowing onto the Subject Property." Ex. C-1 at 9. As explained above, the Herrera Memo suffers from the same deficiencies, lacking in any quantitative analysis and making unsubstantiated and uncited assertions regarding how the Drainage Feature formed, as well as indirect evidence of a channel prior to the construction of SR-202. The City's reliance on the Herrera Memo and disregard of the Beaver Creek reports was clearly erroneous.

In sum, because the City's reliance on the Herrera Memo was misplaced, and because the City disregarded substantial and compelling evidence that the Drainage

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Feature was not naturally formed, the City's determination that the Drainage Feature is a Class IV stream is clearly erroneous.

C. A Preponderance of the Evidence Demonstrates that the Drainage Feature Was Created by Artificial Water.

Testimony at the hearing will establish that the Drainage Feature did not exist on the Veal Parcel pre-development (i.e., under "natural" conditions) and that the Drainage Feature formed as a result of artificial discharges of water onto the Veal Parcel. The Drainage Feature is a storm or surface water runoff device, expressly excluded from the RZC's definition of stream. RZC 21.78.

1. The Drainage Feature Did Not Exist on the Property Pre-Development.

Historic maps pre-dating the building of SR-202 and the routing of artificial water onto the Veal Parcel identify streams in other locations, but not on the Veal Parcel. Exs. V-70–73. As the City acknowledges:

> [a] review of the Department of Fish and Wildlife priority habitat and species maps, anadromous and resident salmonid distribution maps contained in the habitat-limiting factors reports published by the Washington State Conservation Commission, and federal and state information and maps related to species of concern do not indicate the presence of a stream on the Subject Property.[6]

Ex. C-1 at 6.

[6] In determining whether a watercourse is classified as a stream, the RZC directs the City to consider WDFW priority habitat and species maps; anadromous and resident salmonid distribution maps contained in the habitat-limiting factors reports published by the Washington State Conservation Commission; and Federal and state information and maps related to species of concern. RZC 21.64.020(A)(2)(e)(ii-iv).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Aerial photographs corroborate these maps, showing no channel on the Veal Parcel from 1936-2002. Terry Curtis,[7] a certified photogrammetric, and the former photogrammetry supervisor with the Washington State Department of Natural Resources, will testify that aerial photography of the Veal Parcel from 1936 to 2017 confirms that there was no watercourse on the property prior to 2002. The aerial photographs reviewed by Mr. Curtis, which will be presented during the hearing, show a level of detail and clarity sufficient to identify other streams on adjacent parcels (*see* Exs. V-27–28), paint striping on roads (Exs. V-36, 38, 40, 43, 46) and utility lines (Ex. V-39), but that do not show any channel on the Veal Parcel. Based on his extensive review of the aerial photographs, Mr. Curtis concluded that there were no indications in the imagery, data, and other information examined that there was a natural creek or stream entering or crossing the Veal Parcel, or indications of a stream on the Redwood Manor property.

Brian Collins, a geologist and fluvial geomorphologist with 40 years of experience, will testify regarding the formation of the Drainage Feature, and will rebut the assumptions and conclusions presented in the Herrera Memo that the Drainage Feature formed naturally. Dr. Collins will explain that due to the impact of grading and drainage changes associated with Redwood Manor on the Veal Parcel, whether the Drainage Feature formed "naturally" cannot be determined merely by observing the conditions of the Drainage Feature today. Ex. V-7 at 46. Instead, an answer to this question depends on historical observations. *Id.* Dr. Collins will testify regarding the significant historical

[7] In determining whether a watercourse is classified as a stream, the RZC directs the City to consider technical reports submitted by qualified consultants. RZC 21.64.020(A)(2)(e)(vi).

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

evidence that the Drainage Feature was not formed prior to the introduction of artificial water sources. For example, Dr. Collins reviewed aerial photographs of the Veal Parcel and identified photographs (primarily, 1936 and 1938 imagery) in which the vegetation on the Veal Parcel was maintained in a manner that would allow for the detection of a channel. To confirm the sufficiency of the resolution of the aerial photographs, he compared the quality of aerial photos in which nearby channels could be seen to the quality of the 1936 and 1938 aerial images. Ex. V-7 at 16. Although Dr. Collins was able to interpret the presence of an adjacent channel on an aerial photograph having a scale that is less than half that of the scale of the images in which the Drainage Feature would be visible based on vegetation conditions, he did not detect the Drainage Feature in the relevant aerial photographs. In summary, he concluded that if the Drainage Feature was present in the 1930s, it would be visible on the 1936 and 1938 imagery, but it was not visible in that imagery, so it was not historically present.

Bruce Dodds, a civil engineer with extensive experience in road and drainage system development, will present testimony that the placement of the Subject Culvert under SR-202 affirmatively establishes that there was no channel on the Veal Parcel prior to the construction of SR-202 and the artificial introduction of water onto the property. As the Dodds Report explains:

> [w]hen WSDOT installs culverts to convey existing stream flows below its highways, of necessity they lay the culvert in its existing bed. If this were the case at the subject culvert's location, there would have been a stream bed of the same depth extending off to the east beyond the ditch.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Ex.V-8 at 3. Dodds found that "there is no indication in any of the records available to this firm that such a topographic condition existed post construction." *Id.*

2. The Drainage Feature Was Created by Artificial Water.

In addition to evidence establishing that the Drainage Feature was not present on the Veal Parcel under natural conditions, evidence demonstrates that there are numerous artificial water sources that have been diverted onto the Veal Parcel for over a century. It is undisputed that much of the current flow in the Drainage Feature comes from artificial water sources, including stormwater and flows intercepted by the Redwood Manor stormwater system which discharges into the Subject Culvert. *See* City Opp. to Appl. Mot. for Partial Summ. J. at 3.

Prior to construction of SR-202, surface runoff from the upgradient basin area sheet flowed across the subject property. Ex. V-13 at 1. In the early 1900s, SR-202 was constructed to the east of the Veal Parcel. With construction of the road, the Subject Culvert was installed to convey drainage collected from the upgradient area onto the southeastern portion of the Veal Parcel. *Id.* Expert testimony will confirm that roads can initiate channels downslope. Ex. V-7 at 46.

Changes to SR-202 were completed during 1985 and 1986. Ex. C-6 at B-2, B-3. Consultants have repeatedly acknowledged that the changes to the drainage system altered downstream drainage patterns. A 1996 Terra Associates, Inc. wetland evaluation concluded that:

> [i]t is likely that this work has resulted in the collection of groundwater seepage in the ditches and the concentration of the surface water runoff

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

> into the drainages below the storm drain outfall … .The combined effects of the residential development and the storm drainage system along Woodinville-Redmond Road have likely altered drainage patterns and increased the volume of water which reaches the base of the slope.

Ex. V-17 at 4. Herrera, the City's own expert in this case, acknowledges that such changes increased the water flowing onto the Veal Parcel and would have impacted drainage on the Veal Parcel:

> [t]he installation of catch basins, interceptor systems, and stormwater vaults managed runoff from storm flows and released the water at rates no higher than prior to development, essentially maintaining a peak flow rate *for a longer period of time*. The installation of stormwater detention systems and catch basins marks the *first major structural stormwater management impacts on the watercours*e since installation of the 12-inch culvert pipe when SR 202 was built.

Ex. C-6 at B-4 (emphasis added).[8]

Additional changes to the basin flow paths and hydrology occurred with the development of the Redwood Manor property and the parcel adjacent to and south of Redwood Manor. Ex. V-13 at 1. Redwood Manor drainage water entering the Subject Culvert is combined surface runoff and groundwater from roofs, driveways, roads, sidewalks, residential drainage systems, foundation footing drains, rockery footing drains, and planned, installed groundwater interceptor drains. Ex. V-8. at 5. As the McCarthy 2015 Report explains, the stormwater collected on the Redwood Manor property is conveyed to the stormwater detention pipe and subsequently discharged to the Subject Culvert that crosses under SR-202 and then onto the Veal Parcel. Ex. V-13 at 4–5.

[8] The Veals dispute the Herrera Memo's conclusion that these changes released water at rates no higher than prior development. Evidence to the contrary is detailed in Exs. V-13 and V-14. Regardless, Herrera admits that these changes resulted in the peak flow being maintained for a longer period of time.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Groundwater collected by interceptor trenches at Redwood Manor, as well as excess irrigation contributions from the plat, extend flow durations onto the Veal Parcel during times that would ordinarily be dry. Ex. V-13 at 7. Dr. McCarthy presents hydrologic modeling results showing that runoff to the Subject Culvert at the head of the Drainage Feature increased by four to six times as a result of the Redwood Manor housing development. A flow increase of this magnitude would be expected to result in substantial downslope change. Ex. V-7 at 11. Email correspondence from City staff acknowledges that the majority of water flowing onto the Veal Parcel is from the Redwood Manor development. Ex. V-75. In the 2018 Staff Memo, staff admitted it was "likely true," as indicated in the McCarthy 2015 Report, that "Redwood Manor has increased the amount of water being conveyed across Red-Wood Road," and staff did not disagree with Dr. McCarthy's model that predicted "a small amount of runoff" under the pre-developed condition. Ex. V-3 at 4.

Moreover, although the property located south of Redwood Manor (identified as Basin C in the McCarthy 2015 Report) does not naturally drain onto the Veal Parcel, when this site was developed, runoff from the site's access driveway was routed to a catch basin that connects to the Subject Culvert. Ex. V-13 at 4.

After Redwood Manor was developed, SR-202 was widened at station 76+00 necessitating an additional catch basin. Ex. V-8 at 4. The catch basin—intended to drain an area of 1.25 acres (Basin D) that did not drain onto the Veal Parcel under natural conditions—was improperly installed in a position that is not directly adjacent to the gutter. *Id.* Therefore, the catchment tributary to SR-202 bypasses the catch basin along the

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

roadway and subsequently flows onto the Veal Parcel. Ex. V-14 at 1. This mistake allows all stormwater flows from Basin D and the increased impervious surfaces of SR-202 between City of Redmond CB 20881 and CB 20878 to bypass the catch basin, thereby increasing those diverted flows into the Subject Culvert. Due to this mistake, flows from Basin D alone have increased the two-year storm peak flow rate by a predicted 65.4 percent relative to pre-1998 conditions, and increased the average annual runoff volume by 37.2 percent relative to pre-1998 conditions. Ex. V-14. This increase is in addition to run-off from Redwood Manor, the property upslope of Redwood Manor (referred to as Basin B in the McCarthy 2015 Report), and the property located south of Redwood Manor (Basin C). When combined, the collection and channeling of stormwater from the upstream basins after the construction of Redwood Manor has resulted in an increase of the two-year storm peak flow rate of 646.15 percent. Ex. V-13, V-14.

In January of 2016, the Veals identified an additional source of water flowing onto the Veal Parcel. Ex. V-6 ¶ 18. Large amounts of water were being directed onto the Veal Parcel because of the failure or "slump" of SR-202. *Id.* Preliminary studies showed approximately 53,000 gallons of water per week were being diverted and discharged onto the Veal Parcel. *Id.*

These artificial water sources caused the formation of the Drainage Feature. The report and testimony of Brian Collins, a fluvial geomorphologist, corroborates this conclusion. Dr. Collins will explain that the Drainage Feature channel is not stable, indicating that it was formed recently, and is still being carved by the water currently entering the Veal Parcel. In particular, un-vegetated banks in two segments of the

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

channel—one characterized by the presence of alders and the other characterized by a ravine feature—show signs of active erosion. Ex. V-7 at 32. Dr. Collins will explain that the presence of alder roots in the channel bed indicate that the channel in the alders segment has been incising in the period since the trees were established, which occurred in approximately 2002 based on aerial photographs. Field observations of bed material sediment deposited on the Sammamish River valley suggests that at least some of the substantial channel widening and deepening in the ravine segment has happened within the last few years or the last months.

Therefore, the weight of the evidence demonstrates that the Drainage Feature did not exist on the Veal Parcel under natural conditions and that the Drainage Feature was recently formed as a result of artificial influences. The City's contrary conclusion is clearly erroneous.

D. The City's Determination that the Drainage Feature Is Perennial Is not Supported by Evidence.

To the extent that the Hearing Examiner determines that the Drainage Feature is a Class IV stream, the Hearing Examiner should reject the City's conclusion that the Drainage Feature is a perennial stream. The evidence will demonstrate that prior to the development of Redwood Manor, water was only present in the Drainage Feature intermittently, and that the presence of water in the Drainage Feature year-round is a result of artificial channeling of water.

In prior studies developed for the City, the City's own consultants have identified the Drainage Feature as "intermittent." For example, as part of planning for the 160th Ave NE road extension project, CH2M Hill made a "planning-level assessment" of wetlands

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

and streams on March 14, 2012 that included a stream assessment by a biologist. The assessment concluded that: "Stream 2 is a small, high gradient, intermittent, Class IV stream and is non-fish bearing." Ex. V-64, Appendix A-5, at 3. In an accompanying table, CH2M Hill describes the channel as "intermittent." *Id.* at 4. Moreover, a wetland evaluation provided for the property located north of Redmond City Hall in 1996 describes a report prepared by Parametrix on the preliminary design for the 160th Avenue NE extension. Ex. V-17 at 3. According to such report, Parametrix identified four "seasonal creeks."[9] Ex. V-17 at 3.

Water is currently in the channel year-round *only* because of the contribution of artificial water sources. Relying on the Herrera Memo, the City incorrectly concluded that the stream is perennial. Based on one day of observation in September 2019, Herrera concludes that the perched aquifer provides a perennial water supply to the Drainage Feature due to the lack of precipitation in the weeks before. Ex. C-6 at 12. Although the groundwater itself may be "natural," the collection and release of the groundwater is not. The Herrera Memo failed to consider the numerous sources of water that are artificially routed into the Subject Culvert and that contribute to the flow in the Subject Culvert. As explained above, artificial water sources have vastly increased the amount of water on the Veal Parcel since the construction of Redwood Manor. Indeed, the City's own documents indicate that year-round flow in the channel is caused by water intercepted in the upstream development. In an e-mail, a City staff member asserts that the Drainage Feature flows

[9] Notably, the Parametrix topographic mapping included a "field survey information" component and shows the subject channel heading about 245 feet in a line downslope of SR-202, not on the upper portion of the property.

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

year round, but acknowledges that this is "partly because of ground water intercepted in the development." Ex. V-75.

The City's conclusion that the Drainage Feature is a perennial stream is clearly erroneous where the year-round flow in the Drainage Feature is attributable to artificial sources.

V. CONCLUSION

For the reasons stated above, the Veals respectfully ask the Hearing Examiner to grant this appeal, reverse the City's decision, and order the Planning Department to issue a new administrative interpretation consistent with the Veals' original interpretation request.

DATED this 3rd day of February, 2020.

VAN NESS FELDMAN LLP

By: _____

Jenna Mandell-Rice, WSBA No. 49667
Duncan M. Greene, WSBA No. 36718

719 Second Avenue, Suite 1150
Seattle, WA 98104
Tel: (206) 623-9372
Fax: (206) 623-4986
Email: jrm@vnf.com; dmg@vnf.com

Attorneys for Rory and Donna Veal

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-2019-00814 **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. Appellants' Prehearing Brief;
2. Appellants' Exhibits; and this;
3. Certificate of Service;

and that on February 3, 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 Email & VNF Cloud Service link;
By UPS Overnight Delivery

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372

Counsel for the City of Redmond
Jim Haney
Ogden Murphy Wallace
901 5th Avenue, Suite 3500
Seattle, WA 98164
jhaney@omwlaw.com

By Email & VNF Cloud Service link;
By Hand Delivery

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 3rd day of February, 2020.

Antonia Gales, Declarant

Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
(206) 623-9372