



DATE: April 6, 2020

MEMO TO: Parties to the Appeal

FROM: Office of the Hearing Examiner, 425-556-2191, cdxanthos@redmond.gov

SUBJECT: **Veal Appeal No. LAND-2019-01139**

Reconsideration of the Hearing Examiner's Decision

Enclosed is a copy of the Hearing Examiner's Decision on the Veal Appeal No. LAND-2019-01139. Pursuant to the Redmond Zoning Code, any party to the appeal may file a written request for reconsideration with the Hearing Examiner. To be considered, a request for reconsideration must explicitly set forth alleged errors of procedure or fact, and must be filed within ten business days of the Hearing Examiner's Decision in this matter. Reconsideration requests must be received by the Office of the Hearing Examiner of the City of Redmond and must be submitted via email prior to **5:00 p.m. on April 20, 2020.**

City of Redmond Office of the Hearing Examiner Contact Information: cdxanthos@redmond.gov

For your convenience, the Request for Reconsideration form is available online:
http://www.redmond.gov/Government/HearingExaminer/request_for_reconsideration_or_appeal/.

FURTHER PROCEEDINGS

Hearing Examiner decision on appeal may be appealed to Superior Court by filing a land use petition which meets the requirements set forth in RCW Chapter 36.70C. The petition must be filed and served upon all necessary parties as set forth in State law and within the 21-day time period as set forth in RCW Section 36.70C.040.

**BEFORE THE HEARING EXAMINER
FOR CITY OF REDMOND**

In the Matter of the Appeal of)	NO. APL LAND-2019-01139
)	
)	
Rory and Donna Veal)	
)	
)	
Of the October 17, 2019)	
Administrative Decision file number)	
LAND-2019-00814 regarding their Real)	FINDINGS, CONCLUSIONS,
Property known as)	AND DECISION
<u>Tax Parcel Number 352605-9123</u>)	

SUMMARY OF DECISION

The appeal of the City of Redmond’s administrative interpretation LAND-2019-00814 related to a watercourse on Tax Parcel Number 352605-9123 is **DENIED**.

SUMMARY OF RECORD

Request/Appeal:

Rory and Donna Veal (Appellants) requested an administrative interpretation pursuant to Redmond Zoning Code (RZC) 21.76.070.D to classify a drainage feature on vacant real property on Redmond-Woodinville Road (Tax Parcel Number 352605-9123). Carol Helland, Deputy Director of City of Redmond Planning and Community Development Department, issued the requested administrative interpretation on October 17, 2019 and the Appellants timely appealed on October 31, 2019.

Hearing Date:

An open record hearing on the appeal was conducted on February 10 and February 24, 2020. At the conclusion of the proceedings, the parties agreed to post-hearing schedule regarding submission of rebuttal statements and written closing argument. The record closed on March 18, 2020.

Testimony:

At the open record appeal hearing, the following individuals presented testimony under oath:

For Applicant/Appellants:

- Brian Collins, Consultant in Geomorphology
- Rory Veal, Appellant
- Terry Curtis, Certified Photogrammetrist (ASPRS)

Bruce Dodds, P.E., P.L.S., Civil Engineer, Dodds Consulting
Attorney Jenna Mandell-Rice represented the Appellants at hearing.

For the City:

Tom W. Hardy, Stream and Habitat Planner, City of Redmond

Cathy Beam, AICP, Principal Planner, City of Redmond

Emily Flanagan, Senior Surface Water Engineer, City of Redmond

Joanna Crowe Curran, Geomorphologist and Engineer, Herrera Environmental Consultants

Brianna Blaud, Fisheries Biologist, Herrera Environmental Consultants

Carol Helland, Interim Director of Planning and Community Development

James Haney from the City Attorney's Office represented the City.

Exhibits:

At the open record hearing the following exhibits were admitted in the record:¹

Appellants Exhibits

- V-1. Washington State Office of Community Development, Appendix A, Example Code Provisions for Designating and Protecting Critical Areas
- V-2. Excerpt from Redmond Planning Commission Minutes, dated January 19, 2005
- V-3. City Review of Stream Assessment Report to Rory Veal from Emily Flanagan, dated May 8, 2018
- V-4. Letter from Van Ness Feldman LLP to Erika Vandenbrande, City of Redmond Development Services re: Request for Administrative Interpretation, dated August 19, 2019
- V-5. City of Redmond, Stormwater Utility, <https://www.redmond.gov/392/Stormwater-Utility>, last accessed January 10, 2020
- V-6. Declaration of Rory Veal, dated August 12, 2019
- V-7. Brian Collins, Geomorphological Assessment of Watercourse on Rory and Donna Veal Property (Parcel 3526059123), in City of Redmond, January 2020 (“Collins Report”)
- V-8. Dodds Consulting Engineers, Inc., History of Surface Water Drainage through WSDOT SP202 Culvert @ Station 71+70, dated August 16, 2019 (“Dodds Report”)
- V-9. Report of Terry A. Curtis, Certified Photogrammetrist, dated January 24, 2020

¹ At the outset of the hearing, counsel for both parties stipulated to admission of all exhibits exchanged before the hearing, which included Exhibits V1 through V87 and C1 through C26. At hearing, Appellants offered additional Exhibits V88 and V89, and the City offered additional Exhibits C27 through C28. Counsel for both parties objected to the other side’s hearing-offered documents, citing timeliness and relevance. All four were admitted over such objections.

- V-10. Keith Litchfield, P.E., Revised Drainage Calculations, File No. PL-90-06, dated December 11, 1995 (“Litchfield Report”)
- V-11. Keith Litchfield, P.E., Drainage Report Redwood Manor, dated March 1994
- V-12. Redwood Manor Grading and Drainage Plan, dated July 1, 1999 (Annotated)
- V-13. Ed McCarthy, Veal Residence – Hydrology Assessment, 9859 Woodinville Road NE, dated August 11, 2015 (“McCarthy 2015 Report”)
- V-14. Ed McCarthy, Veal Residence – Hydrology Assessment – Basin D, 9859 Woodinville-Redmond Road NE, dated January 20, 2020 (“McCarthy 2020 Report”).
- V-15. Beaver Creek Environmental Services, Stream Assessment Report, Parcel #3526059123, dated September 22, 2017
- V-16. Beaver Creek Environmental Services, Wetland Evaluation & Delineation Report, Parcels # 3526059123 & 0225059135, dated November 10, 2017
- V-17. Terra Associates, Inc., Preliminary Report Wetland Evaluation Riverpoint Project, Redmond, Washington, dated June 26, 1996
- V-18. Affidavit of Ronald D. Kluger, dated July 8, 2019
- V-19. City of Redmond, Lot Line Adjustment No. LLR 97-003, dated May 24, 1997
- V-20. City of Redmond, Technical Committee Report, to Planning Commission from Technical Committee, re: LAND-20165-01851; SEPA-2015-01852, dated October 23, 2015
- V-21. City of Redmond, Planning Commission Report, to City Council from Planning Commission, dated December 2, 2015
- V-22. City of Redmond, Stream Classification Map, dated 1993
- V-23. City of Redmond, Sensitive Areas Map: Streams, dated 1997
- V-24. 2016 stream classification and map.
- V-25. Geotech Consultants, Geotechnical Engineering Study, dated April 8, 1991
- V-26. Herrera Environmental Consultants, Inc., Field Measurements Figure, undated (provided by e-mail from James Haney to Jenna Mandell-Rice on January 7, 2020)
- V-27. Aerial Photograph (zoom 5), dated July 7, 1959
- V-28. Aerial Photograph (zoom 7), dated July 7, 1959
- V-29. Photograph taken from SR-202, facing west toward subject parcel, Parametrix, 1994
- V-30. Aerial Photograph, King County, dated 1935
- V-31. Aerial Photograph, King County, dated 1936
- V-32. Aerial Photograph, Army Map Service, dated 1942
- V-33. Aerial Photograph, U.S. Geological Survey, dated 1952
- V-34. Aerial Photograph, King County Map Vault, dated 1954
- V-35. Aerial Photograph, Washington Department of Transportation, dated 1959

- V-36. Aerial Photograph, Washington Department of Natural Resources, Carl Berry Film, dated 1959
- V-37. Aerial Photograph, Washington Department of Natural Resources, dated 1965
- V-38. Aerial Photograph, Washington Department of Natural Resources, dated 1970
- V-39. Aerial Photograph, Washington Department of Natural Resources, dated 1978
- V-40. Aerial Photograph, Washington Department of Natural Resources, dated 1981
- V-41. Aerial Photograph, Washington Department of Natural Resources, dated 1985
- V-42. Aerial Photograph, Washington State Department of Transportation, dated 1985
- V-43. Aerial Photograph, Washington Department of Natural Resources, dated 1989
- V-44. Aerial Photograph, King County iMap, dated 1988
- V-45. Aerial Photograph, U.S. Geological Survey, dated 1990
- V-46. Aerial Photograph, Washington Department of Natural Resources, dated 1995
- V-47. Aerial Photograph, Washington Department of Natural Resources, dated 1996
- V-48. Aerial Photograph, King County GIS, dated 2000
- V-49. Aerial Photograph, Washington Department of Natural Resources, dated 2001
- V-50. Aerial Photograph, King County iMap, dated 2002
- V-51. Aerial Photograph, Google, dated 2002
- V-52. Aerial Photograph, GoogleEarth, dated 2002
- V-53. Aerial Photograph, U.S. Geological Survey, dated 2006
- V-54. Aerial Photograph, Google, dated 2007
- V-55. Aerial Photograph, GoogleEarth, dated 2011
- V-56. Aerial Photograph, King County iMap, dated 2013
- V-57. Aerial Photograph, King County, dated 2017
- V-58. Aerial Photograph, GoogleEarth, dated 2018
- V-59. Findings and Decision of the Hearing Examiner for the City of Redmond, In the Matter of the Application of Ron Kluger for Approval of a Preliminary Plat, PPL 90-0006, dated October 7, 1991
- V-60. Parametrix Inc., City of Redmond 160th Ave NE Design Report, Drainage Basins Map, dated 1995
- V-61. Parametrix Inc., City of Redmond 160th Ave NE Design Report, Plan & Profile Sta. 22+00 to Sta. 36+00 Map, dated 1995
- V-62. Parametrix Inc., City of Redmond 160th Ave NE Route Location Study Figures, dated 1995

- V-63. Parametrix, Inc., 160th Avenue NE Extension Preliminary Design Report Project No. 90-CI-86, dated November 1995
- V-64. CH2MHILL, 160th Ave NE Extension Draft Pre-Design Report, dated November 8, 2012
- V-65. CH2MHILL, 160th Ave NE Extension Project—Wetland and Stream Assessment Appendices
- V-66. Short Plat SS-78-41 Application and Decision, dated January 23, 1979
- V-67. Excerpt from Terra Associates Report on Project No. T-2887-3, dated December 11, 1996, revised July 7, 1997
- V-68. Washington State Department of Transportation, SR 202 NE 85th St. to NE 109th St. R/W Plan, dated November 5, 1984²
- V-69. Redmond Public Works Department Map, SE ¼ SEC. 35, T. 28 N., R. 5 E.
- V-70. Field Notes, Map, dated April 9, 2014
- V-71. Map, King County, Washington Section 35, Township 26, N. Range 5 W. M., dated December 31, 1907
- V-72. Map, U.S. Geological Survey, dated 1897
- V-73. Map, U.S. Geological Survey, dated 1950
- V-74. Timber Cruise Map, King County, dated December 31, 1907
- V-75. E-mail from Tom Hardy to Casey Costello re: stream questions, dated December 6, 2016
- V-76. E-mail from Casey Costello to Tom Hardy, re: stream questions, dated December 7, 2016
- V-77. E-mail from Tom Hardy to Roger Dane, re: Veal property site visits, dated April 16, 2014
- V-78. Video of water on Veal parcel due to slump of Redmond-Woodinville Road NE, recorded by Rory Veal, dated January 23, 2016
- V-79. Video of water on Veal parcel due to slump of Redmond-Woodinville Road NE, recorded by Rory Veal, dated September 19, 2017
- V-80. Video of intercepted ground water in storm water system during drought, recorded by Rory Veal, dated August 7, 2017
- V-81. Video of water originating from Basin D and bypassing catch basin, recorded by Rory Veal, dated September 9, 2019
- V-82. Video of water discharging from subject culvert onto Veal parcel, recorded by Rory Veal
- V-83. Demonstrative of channel measurements/size
- V-84. Bruce Dodds, Curriculum Vitae
- V-85. Terry Curtis, Curriculum Vitae

² Throughout these findings, the date of this document is variously stated as either 1985 or 1986 by the parties. The original plan date is November 1984, but the plans are marked revised with one revised date of December 17, 1984 and the construction is believed to have occurred in 1985-1986.

- V-86. Ed McCarthy, Curriculum Vitae
- V-87. Brian Collins, Curriculum Vitae
- V-88. King County Road Archives Redmond-Woodinville Road survey run by King County in 1913, including Profile and Plan and various quit claim deeds (164 pages)
- V-89. Excerpt from Handbook of Drainage and Culvert Practice, *The Location, Grading, and Drainage of Highways: A concise Discussion of General Principles Illustrated by Current and Recommended Practice*, by Wilson G. Harger, C.E., published by McGraw-Hill Book Company Inc. 1921
- V-90. Post-hearing written rebuttal testimony of Brian Collins, dated March 4, 2020
- V-91. Post-hearing written rebuttal testimony of Bruce Dodds, dated March 4, 2020

City of Redmond Exhibits

- C-1. Administrative Interpretation issued by Carol Helland, then Deputy Director of Planning and Community Development, dated October 17, 2019
- C-2. Process Agreement between the City of Redmond and Rory and Donna Veal, dated July 18, 2019
- C-3. Code Interpretation Request Letter from Brent Carson and Duncan Greene of Van Ness Feldman submitted by Rory and Donna Veal on August 19, 2019, together with:
 - Appendix A: Factual Background
 - Appendix B: Legal Analysis
 - Appendix C: CTED Example Code Provisions for Designating and Protecting Critical Areas
 - Appendix D: Glossary of Terms, Washington State Department of Ecology Stormwater Management Manual for Western Washington, dated August 2001 (excerpts)
 - Appendix E: City of Redmond Ordinance No. 1693, passed by the Redmond City Council on July 7, 1992, with attached Sensitive Areas Regulations
- C-4. General Application form for Veal Code Interpretation Request, dated August 19, 2019
- C-5. Declaration of Rory Veal, dated August 19, 2019, together with the following attached exhibits:
 1. Aerial photographs
 2. 1993 and 1997 Stream Classification Maps
 3. Affidavit of Ronald Kluger, with the following attachments:
 4. Calculations for Redwood Manor, prepared for Ron Kluger by Litchfield Engineering, dated December 11, 1995, and Drainage Report for Redwood Manor, prepared for Ron Kluger by Litchfield Engineering, dated March 1994
 5. Redwood Manor Grading and Drainage Plan 7/1/1999 (Annotated)

6. Letter to Rory Veal from Bruce J. Dodds, PE, PLS, Dodds Consulting Engineers, Inc., dated August 16, 2019 re: History of Surface Water Drainage through WSDOT SP202 Culvert @ Station 71+70, including Tabs 1 – 12
 7. Letter from Ed McCarthy, PE, PS, to Rory Veal, dated August 11, 2015 re: Veal Residence – Hydrology Assessment, 9859 Woodinville-Redmond Road
 8. Technical Committee Report to Redmond Planning Commission, dated October 23, 2015 re: Redmond Zoning Code: 2015 Landslide Hazard and Streams Classifications Map Update
 9. Planning Commission Report to Redmond City Council, dated December 2, 2105 re: Redmond Zoning Code: 2015 Landslide Hazard and Streams Classifications Map Update
 10. Letter to Rory Veal from Eric G. LaBrie, AICP, ESM Consulting Engineers., LLC, dated June 24, 2016 re: Veal Property Maintenance
 11. Stream Assessment Report prepared for Rory Veal by Beaver Creek Environmental Services, Inc., dated September 22, 2017
 12. Wetland Evaluation & Delineation Report prepared for Rory Veal by Beaver Creek Environmental Services, Inc., dated November 10, 2017
 13. Letter to Kevin Andrade of Trammel Crow Company from Greg Munger and Anil Butail of Terra Associates, dated June 26, 1996 re: Preliminary Report – Wetland Evaluation, Riverpointe Project, Redmond, Washington
 14. Memo to Rory Veal from Emily Flanagan, dated May 18, 2018 re: City Review of Stream Assessment Report
 15. Maps, Redmond Planning Commission Minutes of October 15, 2005, miscellaneous internet articles and emails
- C-6. Herrera Technical Memorandum, dated October 17, 2019
 - C-7. Herrera Scope of Work Task Order 19-01
 - C-8. City of Redmond Ordinance No. 1955, effective November 27, 1997
 - C-9. 1997 Sensitive Areas Map – Stream Classification. Redmond Community Development Guide Supplement No. 2 – December 1999
 - C-10. 1993 Sensitive Areas Map – Wetlands and City of Redmond Comprehensive Plan Draft Environmental Impact Statement August 1994 – Appendix A
 - C-11. Aspect Consulting Report to City of Redmond re: Geotechnical Evaluation TO #17-02, Redwood Road Slump, dated 2008
 - C-12. Washington State’s Historic State Roads: Historic Context for Island, Snohomish, King, Pierce, and Kitsap Counties, prepared by the Washington State Department of Archaeology and Historic Preservation and the Washington State Department of Transportation, dated 2014

- C-13. Sheets 3.01, 3.02, and 3.03 (09-0085 through 09-0087) from Woodinville-Redmond Road Roadway and Drainage Plan for City of Redmond 2007 Sidewalk Improvements, Project 1010905
- C-14. History of Roads and Highways in the State of Washington, Highway Department Library, dated 1956
- C-15. Executive Proposed Hylebos Creek and Lower Puget Sound Basin Plan, King County Department of Public Works, Surface Water Management, dated 1991
- C-16. As-Built Site Development Plans for Redwood Manor, Litchfield Engineering Site Development and Technical Services, dated 1999
- C-17. Governor Marion Hay signs Permanent Highway Act on March 8, 1911, K. Oldham, HistoryLink.org Essay 7239
- C-18. Kirkland Quadrangle, 7.5 Minute Series (Topographic), Scale 1:24000, USGS, dated 1950
- C-19. Redmond Quadrangle, 7.5 Minute Series (Topographic), Scale 1:24000, USGS, dated 1950
- C-20. State Roads as Established by Legislature, 1893 to 1935, Washington State Department of Transportation, undated
- C-21. SR 202 NE 85th Street to NE 109th Street Road Design Plans, Washington State Department of Transportation, dated 1986
- C-22. Field Measurements Figure prepared by Joanna Curran
- C-23. 1938 Aerial photograph (Army Air Corps/University of Washington, 1938-01-29 – 1938-09-29), from the HistoricalAerials.com website
- C-24. 1964 Aerial photograph (USDA, 1964-8-23 – 1964-10-04), from the HistoricalAerials.com website
- C-25. 1968 Aerial photograph, (USDA, 1968-08-31 – 1968-09-03), from the HistoricalAerials.com website
- C-26. City Staff Report, dated February 3, 2020
- C-27. Letter from Tom Hardy, City of Redmond, to Rory and Donna Veal, dated September 2, 2016
- C-28. Enlargement of GIS Storm Drainage System Map of vicinity including subject property, hand annotated with highlighter during testimony by Emily Flanagan
- C-29. Enlargement of 1985 As-Built for Redmond-Woodinville Road in the vicinity of the subject property, hand annotated with highlighter during testimony by Emily Flanagan
- C-30. Post-hearing written rebuttal testimony of Emily Flanagan, dated March 10, 2020
- C-31. Post-hearing written rebuttal testimony of Joanna Crowe Curran, dated March 10, 2020

Other Documents in the Record (Record Documents)

- R-1. Appeal form and letter from Van Ness Feldman LLP on behalf of the Veals, stamped received by the City October 31, 2019, with attachments (106 pages) including:³
 - A. Administrative interpretation by Carol Helland, dated October 17, 2019
 - B. Request for administrative interpretation from the Veals, dated August 19, 2019
- R-2. Order Setting Hearing and Pre-Hearing Schedule, dated January 8, 2020
- R-3. Appellants' Motion for Partial Summary Judgment, dated January 10, 2020
- R-4. Declaration of Jenna Mandell-Rice, dated January 10, 2020
- R-5. City's Opposition to Appellants' Motion for Partial Summary Judgment, dated January 17, 2020
- R-6. Ruling on Appellants' Motion for Partial Summary Judgment, dated January 22, 2020
- R-7. Appellants' Witness and Exhibit List, dated January 27, 2020
- R-8. City's Witness and Exhibit List, dated January 27, 2020
- R-9. City's Amended Witness and Exhibit List, dated March 3, 2020
- R-10. Appellants' Pre-Hearing Brief, dated February 3, 2020
- R-11. City's Pre-Hearing Brief, dated February 3, 2020
- R-12. Appellants' Written Closing Argument, submitted March 18, 2020
- R-13. City's Written Closing Argument, submitted March 18, 2020

On consideration of the argument, testimony, and exhibits submitted, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

Procedural Background

1. The backdrop against which the subject administrative interpretation was requested began with an April 2018 pre-application meeting between Rory Veal and the City of Redmond to discuss a contemplated subdivision of the real property known as Tax Parcel Number 352605-9123 (subject property). The ensuing site review identified various issues along the site's frontage on Redmond-Woodinville Road, including potential steep slopes, wetlands, and streams. The subdivision application was not submitted. Instead, in June 2018, a consultant contacted the City about submitting a clear and grade permit for the subject property with a scope of work that included piping the identified potential stream. The consultant was informed that the Redmond Municipal Code prohibits "speculative" clearing and grading not associated with specific development proposals. In August

³ The appeal itself was inadvertently omitted from the exhibits offered by the parties; however, it was provided to the undersigned at the outset of appeal scheduling and was reviewed, and it is properly included in the record. The Examiner notes that the .pdf of the appeal packet reviewed and included in the record is a total of 106 pages, but every other page is blank.

2018, Rory and Donna Veal submitted a claim for damages to the City for water trespass onto the subject property, asserting a reduction in value of the property as a result of the City's position that the watercourse on site is a Type IV stream regulated pursuant to the City's critical areas ordinance (codified at Redmond Zoning Code (RZC) Chapter 21.64) rather than an unregulated stormwater drainage course. The City denied the damages claim in December 2018, and the parties negotiated a course of agreed action that could allow resolution of the dispute without resorting to litigation. In short, the property owners would apply for a code interpretation intended to result in the City's determination whether the watercourse is in fact a regulated Type IV stream or instead is an unregulated drainage feature, and if regulated whether intermittent or perennial. *Exhibits C-2 and C-26.*

2. On August 19, 2019, the Veals applied for the code interpretation. The application materials included: the application form; a letter from the Veals' attorneys, with attached recital of facts, legal analysis, CTED model critical areas ordinance materials, the glossary and notations from the DOE Stormwater Management Manual for Western Washington, and City of Redmond Ordinance 1693 (from 1992) including legislative history. Also submitted was a declaration of Rory Veal, with 15 attachments including various historical aerial photographs, earlier Redmond stream classification maps, various documents and plans related to the review process for Redwood Manor, reports prepared by various professionals for the Veals in review of the subject property, and various other documents, photos, maps, and articles (more than 620 pages). *Exhibits C-3, C-4, and C-5.*
3. The City contracted a third-party consultant to review all available materials, conduct a site visit, and issue an independent conclusion as to whether the watercourse in question is a stream or an unregulated drainage. *Exhibit C-6.* Based on review of all this information, Carol Helland, Deputy Director of Planning and Community Development, issued the requested code interpretation (file number LAND-2019-00814) on October 17, 2019, concluding that the watercourse was a regulated perennial Type IV stream. *Exhibit C-1.* On October 31, 2019, the Veals timely appealed the code interpretation, becoming the Appellants. *Record Document R-1.*
4. The appeal submitted by the Appellants enumerated the following (abbreviated, paraphrased) errors in the notice of decision:
 - 1) The City failed to consider the Appellants' factual evidence in their interpretation request;
 - 2) The City disregarded the legal analysis in the Appellants' request for interpretation;
 - 3) The City's analysis of the proposal's compliance with Comprehensive Plan goals and policies was "cherry picked" against the Appellants' interests; and
 - 4) The City engaged in unlawful procedure by: a) Improperly excluding certain issues raised in the interpretation request, specifically finding the interpretation was not governed by RZC 21.76.070.D.2 but rather by the

terms of a private agreement between Appellants and the City; and b) failing to use generally recognized principles of ordinance/statutory construction, as required by RZC 21.76.070.D.5.

The relief requested was that the Director's code interpretation be reversed and remanded to the City with instruction to issue a new administrative interpretation consistent with the Appellants' request. *Record Document R-1*.

5. Due to availability constraints on the parts of the examiner and the parties, and because of the year-end holiday season, the parties agreed to a February 10, 2020 hearing date. *Record Document R-2, Order Setting Hearing and Pre-Hearing Schedule, dated January 8, 2020*. Testimony was completed on a second hearing date of February 24, 2020. A post-hearing submission schedule, agreed to by all parties on the record, allowed for Appellant witness written rebuttal of the City's evidence (*Exhibits V-90 and V-91*) and a response by City witnesses (*Exhibits C-30 and C-31*), as well as written closing arguments (*Record Documents R-10 and R-11*), all due by March 18, 2020. All items were timely submitted and admitted in the record.

Subject Property Description

6. Located in the Education Hill Neighborhood, the 2.47-acre subject property is vacant, containing wild grasses and some trees. It is located on the west side of Redmond-Woodinville Road (also known as and referred to in the materials as both State Route (SR) 202, Red-Wood Road NE, and Woodinville-Redmond Road), immediately south the Puget Sound Energy powerline. The subject property has a zoning designation of R-4, which allows a maximum of four dwelling units per acre. Pursuant to the City of Redmond Comprehensive Plan, it has a land use designation of Single-Family Urban. Parcels to the north have R-1 and R-18 zoning and are developed with Puget Sound Energy powerlines. Parcels to the east and south are developed with single-family residential uses and have R-4 and R-1 and R-4 zoning, respectively.⁴ East of the subject property, across Redmond-Woodinville Road NE, is a single-family residential development known as Redwood Manor. To the west, properties are zoned R-1 and R-12 and are developed with multifamily residential uses. *Exhibit C-26*.
7. The subject property is located in the Sammamish River Drainage of WRIA #8, Cedar Sammamish Watershed. Topographically, the subject property generally slopes relatively gently from east to west, towards the Sammamish River, which is located west of the parcel. The watercourse at issue in these proceedings enters the subject property from a 12-inch culvert near the southeast corner of the site, which culvert carries flows under Redmond-Woodinville Road NE. The watercourse has a defined channel that is approximately 2.6 feet wide, 0.4-foot tall vertical banks, and 0.4 feet of "wetted depth." The current City stream map identifies the watercourse as a ditch from the outlet of the culvert on the west side of Redmond-Woodinville Road for a distance of approximately 250, to elevation ~108 feet, from which point the watercourse, which continues west to

⁴ The Appellants reside on the parcel adjacent to the south, addressed as 9859 Redmond-Woodinville Road NE (Parcel number 0225059135). At various places in the materials, the subject property is referred to as the North Veal Property and their residential parcel is referred to as the South Veal Property. *E.g., Exhibit C-2*.

the river for approximately 260 feet, is classified as a Class IV stream. The stream discharges at elevation ~76 feet into a wetland. *Exhibits C-5.11, C-6, and V-3.*

Decision Appealed From

8. Because the request for administrative interpretation was a request to formally classify the watercourse for the purposes of the Redmond Zoning Code, Planning and Community Development Staff began with consideration of the bases for stream classification enumerated in RZC 21.64.020.A.2(e). These are (paraphrased/abbreviated): City maps including critical area, zoning, neighborhood, and stream classification maps; Washington Department of Fish and Wildlife priority habitat and species maps; Washington State Conservation Commission salmonid distribution maps; relevant federal and state mapping and information; stream classification criteria established in RZC Chapter 21.64; and technical reports submitted by qualified consultants. *RZC 21.64.020.A.2(e)*. Against these criteria, Staff considered the materials submitted with the request for administrative interpretation, including aerial photographs, affidavits of various individuals, technical reports produced in support of proposed development on other properties in the vicinity, hydrology and stream assessment reports prepared for the subject property in 2015 and 2017, and legal analysis. The ultimate goal was to determine whether the information submitted successfully demonstrated through “documentation, photographs, statements, and/or evidence” that the watercourse in question is an intentionally created stream consistent with RZC 21.64.020.A.2(d)(v) created after the Appellants purchased the subject property by diversion of stormwater. *Exhibit C-1; Carol Helland Testimony.*
9. Specifically considering the question of the stream’s inclusion on City maps, the administrative interpretation noted that City mapping has shown a critical area on the subject property in the vicinity of the stream since at least 1994. Maps adopted by the City Council in 1993 indicated the presence of a wetland there, which maps were included in the Draft Environmental Impact Statement for the City’s Comprehensive Plan update in 1994 and were provided in the instant record (Exhibit C-10). A map indicating the presence of a stream segment in that location was adopted with the City’s Sensitive Areas Regulations in Ordinance No. 1955 (Exhibit C-8). In September 1997, a colored geographic information system (GIS) version of the sensitive areas map from Ordinance No. 1955 was made available for public distribution (Exhibit C-9). The administrative interpretation noted that City stream and wetland maps are continuously updated to reflect critical areas and associated buffers as they are identified at a site-specific level during the development review process. *Exhibits C-1, C-8, C-9, and C-10.*
10. The review of the application materials included consideration of the aerial photos submitted by the Appellants dating back to 1936. As interpreted by the Director, the aerial photos show that the subject property was historically managed for agricultural purposes, which at some point included the site’s operation as a dairy farm and later as pasture for horses and grazing animals. Mowing and grazing associated with farm use would have prevented riparian vegetation from establishing which would have helped to visually define the stream in older photographs. The Director noted that buildings historically located on the subject property and the parcel to the south appear to be set

back from the location of the mapped stream. Especially in the case of the earlier photos, the quality of the images is grainy and at a scale that would make it difficult to detect a narrow stream that could have been present but obscured by vegetation. The Director determined that the aerial photographs submitted failed to demonstrate the historic absence of a stream. *Exhibits C-1 and C-5.1.*

11. Regarding Mr. Veal's declaration that in 1984 when they bought their residential parcel (adjacent to the south) there was no stream and that the subject property could be observed to be open pasture with no indication of ditch, stream, wetland, or other water body, the Director concluded that a small, narrowly incised stream would not have been verifiable by distant observation. The City's mapping including a Class IV stream onsite in 1993 and 1997, prior to the development of Redwood Manor, show that some waterbody was known to be present. Based on more recent site visits during which it was difficult to detect the stream without the use of a hedge trimmer, a small stream could have been present in 1984 and hidden by pasture grass. The Director did not find Mr. Veal's statement to be, by itself, evidence of the absence of a stream. *Exhibits C-1 and C-5.*
12. With their application for administrative code interpretation, the Appellants submitted a technical report prepared in March 1994 while Redwood Manor was under review. Various referred to in the record as the Litchfield report or the 1994 Drainage Report, this document prepared by Litchfield Engineering was a drainage report for the proposed subdivision that reviewed existing drainage conditions up and downstream of the Redwood Manor property, across the road and upslope from the subject property. In reviewing this report, the Director found it confirmed that a stream was known to exist on the subject property before Redwood Manor was constructed. The 1994 Drainage Report described the drainage downstream from the culvert in the southwest corner of the Redwood Manor property - the culvert in question in this case - as follows:

At the discharge point, the drainage flows down a natural drainage swale in a westerly direction towards the Sammamish River. The swale descends at a slope ranging from 15 to 35% and is approximately 3 feet deep, 3 feet wide with sideslopes near vertical. The sidewalls of the swale are bare native sands and gravel and appear stable as no significant signs of erosion were noted.

Exhibit C-5.4 (page 0054) (also Exhibit V-11). The Director noted that the drainage swale described as flowing from the culvert in question in this 1994 report is consistent with the 1993 sensitive areas map and the wetland map included in the 1994 Draft EIS for the Comprehensive Plan update. Finally she noted that in 1997 the Redmond City Council adopted a sensitive areas stream map which also shows the stream segment on the subject property consistent with the Litchfield Report, and the September 1997 color sensitive area maps clearly identified a Class IV stream segment on the subject property before it was purchased by the Appellants in 1998. *Exhibits C-1, C-5.4, C-8, C-9, and C-10.*
13. With the application for administrative interpretation, the Appellants submitted three technical reports specifically reviewing the subject property: the McCarthy Report, a

hydrology assessment of the subject property prepared August 11, 2015 by Ed McCarthy for the Veals (*Exhibit C-5.7*); the Beaver Creek Stream Assessment report, prepared in September 2017 by Beaver Creek Environmental Services, Inc., for the Veals (*Exhibit C-5.11*); and the Dodds Consulting Report prepared in August 2019 by Dodds Consulting Engineers (*Exhibit C-5.6*). Reviewing all three, the Director determined that only the Beaver Creek Stream Assessment was prepared with the stated purpose of classifying the stream by consultants qualified consistent with RZC Chapter 121.64 to identify and evaluate the sensitive area in question. *Exhibit C-1*.

14. The Beaver Creek Stream Assessment relied on the water typing system of WAC 222-16-030, which system defines “natural waters” as “only excluding water conveyance systems which are artificially constructed and actively maintained for irrigation.” WAC 222-16-030(5)(d). The Director reasoned that because the feature was not evidently managed over time for irrigation, it is not excluded from “natural waters” under the WAC definition. She specifically challenged the report’s conclusion that while “one area of the site exhibited characteristics applicable as a stream”, that “this feature appears created out of upland as a surface water runoff device, and therefor is unregulated by City of Redmond,” (*Exhibit C-5.11 page 3*) as lacking application of the stream classification criteria established in City code.⁵ Ultimately, she concluded that the Beaver Creek Stream Assessment report did not provide the analysis necessary to demonstrate that the stream is not a “natural water” and that it omitted explanation as to why the full length of the watercourse would not be properly classified as the more restrictive Class IV Stream as prescribed by RZC 21.64.020.A(d).⁶ *Exhibit C-1; Carol Helland Testimony*.
15. Pursuant to authority in RZC 21.64.010.G(3), the City commissioned a technical report by an independent qualified consultant to classify the watercourse. In preparing the resulting report (*Exhibit C-6*), referred to as the Herrera Memo in the materials, Herrera assigned a fisheries biologist and a fluvial geomorphologist to conduct a site visit, in which they were joined by City and Appellant representatives.⁷ Herrera’s analysis included review of the Veal’s application materials, an in-depth assessment of the underlying topography, and the geologic and geomorphic history of the watercourse and surrounding land to evaluate whether the stream existed prior to development of the surrounding land. The Herrera Memo ultimately concluded:

⁵ The Examiner takes note that the only reference to Redmond code (page 1, definition of stream cited at Title 20A.20.190) in this 2017 report appears to be to the Redmond Community Development Guide, which code was replaced by the adoption of the Redmond Zoning Code in April 2011.

⁶ The exact language is: “When 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).

⁷ The site evaluation was conducted pursuant to restrictions on access established in the Process Agreement, which did not allow for full assessment of the Fish and Wildlife Habitat Conservation Areas located on the subject property. The Herrera Memo does not include a wildlife report, full riparian corridor characterization, possible mitigation sequencing, and assessment of the mapped on-site wetland were not within the scope of work established in the Process Agreement. *Exhibits C-1 and C-6*.

[The] watercourse on the Subject Property is a naturally formed watercourse. The geology and soils in the area have led to the formation of two shallow aquifers on hillslopes above the Subject Property that supply the springs that formed the channel. Over time this spring-fed water defined a channel that flowed down the hill, across the Subject Property, and to a confluence with the Sammamish River. The stream channel was defined prior to construction of SR 202, between 1902 and 1913 (see Appendix B). At that time, the 12-inch culvert was placed under SR 202 to convey the watercourse downstream. The upper reaches of the stream are now covered by development, and the flow that would have fed surface springs and seeps was redirected into a stormwater system in 1996. The presence of water draining the perched aquifer and flowing through the stream on the Subject Property during drier, summer months evidences the perennial nature of the stream. Measurements of the channel geometry over the last 22 years indicate the watercourse has maintained a stable width and depth where it enters the Subject Property.

Exhibit C-6, page 15. The administrative interpretation notes that Herrera’s conclusions are consistent with stream identification and typing at the site-specific level for various public and private development projects proposed in the Sammamish River Valley. (*Exhibit C-1, page 11*)

16. Considering all the information available, the Director determined that the information submitted by the Appellants failed to credibly demonstrate that the watercourse was an intentionally created stream or that it is excluded from “natural waters” in the WAC stream typing system. She determined that the evidence demonstrated that the watercourse is a stream pursuant to RZC 21.64.020.A(2)(d), and that “although the flow and location may have changed over time due to artificial influences, it occurred naturally from the passage of water. This determination is supported by evidence of historical drainage patterns, constructed conveyances, soils information and physical conditions documented in the Herrera Memo together with an evaluation of the factors contained in RZC 21.64.020.A.2.e. The Beaver Creek Stream Assessment does not provide the level of detail or analysis required of a written stream assessment. It does not demonstrate that the 1997 stream mapping on the Subject Property is inaccurate or that the stream is manmade.” The administrative interpretation concludes that the stream on the subject property is designated as a Class IV perennial stream. *Exhibit C-1; Carol Helland Testimony.*

Appellants’ Evidence and Assertions

17. In their appeal, the Appellants contended that the watercourse that currently exists on the subject property is a “storm or surface water runoff device” or an “entirely artificial watercourse” rather than a “natural stream” and argued that the application materials submitted by the Veals demonstrate that the stream located on the subject property was manmade and constitutes an intentionally created stream consistent with the definition of stream contained in RZC 21.78 and the criteria of RZC 21.64.020.A.2(d)(v). *Record Documents R-10 and R-12.*

18. Appellant Rory Veal testified in support of the appeal. He explained his knowledge of the subject property began with his purchase of his residential parcel adjacent to the south in 1984. He recounted that at that time the subject property was a large open pasture housing three horses, with a margin of blackberries on the west edge and along the Redmond-Woodinville Road NE embankment. He testified that over the course of the next 10 years, the Veals walked the entire subject property, feeding apples to the horses. In 1994, they hosted a large barbeque and set up a hole in one course on the subject property. He stated that there was no three-foot by three-foot channel at the time. The culvert was in place, and in dry weather, it was dry. After rains, some water would come out of culvert and spread out through the field, which was generally grazed to the ground. In September 1998, the Veals bought the subject property as an investment, intending to subdivide in the future. The subject parcel, which had been segregated from a larger holding in 1997 by the previous owner, was still an open field, although the horses were gone. At that time, the culvert end had water coming out of it, which ran through the grass; according to Mr. Veal there was no channel whatsoever. The Veals lived next door the subject property from 1984 through 2003, when they moved out of state, and then returned in 2014. During that time, Redwood Manor had been developed with 12 single-family residences. The entire subject property was then overgrown with blackberries surrounding a large stand of alder trees. A channel had formed from the culvert outlet with water flowing to the wetland reach, where the channel disappeared. The wetland was a shallow swale filled with reed canary grass with sheet flow towards the ravine, where an obvious channel recommenced. There had been no vegetation management in the intervening time. Mr. Veal testified that they observed a “huge increase” in the volume of water flowing out of the culvert. In his observation, prior to development of Redwood Manor, the only flows coming out of the culvert appeared to be road runoff from the roadside ditch, but clearly new sources of water were now flowing out of the culvert. Mr. Veal testified that the Redwood Manor stormwater detention system had intercepted flows from drains collecting runoff from upslope of Redwood Manor, such that even after 60 days with no rain, the culvert would still discharge high volumes of water. After a slump formed in Redmond-Woodinville Road NE, Mr. Veal investigated the source of increased runoff and found that a catch basin had been improperly installed away from the curb, allowing runoff to bypass the catch basin and enter the culvert, dumping onto the subject property. *Rory Veal Testimony; Exhibits V-6 and V-81.*
19. Mr. Veal disputed that the City sensitive area maps from 1993 (*Exhibit V-22*) depict a stream segment on his property, but he acknowledged that City mapping showed a stream segment on the subject property in 1997, which was before his purchase of the property. At the time, he understood the City’s sensitive area mapping was advisory and not conclusive as to streams, and he did not feel there was potential for a stream to be designated on the entire site until they returned from Idaho in 2014 to apparent regulatory changes. When the City informed him they wanted to redesignate portions of his property as containing mapped streams, he cooperated in the remapping until he realized the City intended to identify a stream all the way across the subject property. In a July 2016 meeting, he presented what he felt was solid evidence that there was no channel, including the McCarthy report from 2015, which said the watercourse is a drainage

feature caused by increases in flow from Redwood Manor. Mr. Veal testified City representatives were not convinced by that report. *Rory Veal Testimony; Exhibit V-13.*

20. Asked to reconcile the 1994 Litchfield report with his recollection of there being no channel in 1997, Mr. Veal testified that he believes the Litchfield report was mistaken. *Rory Veal Testimony.*
21. In support of their position, the Appellants offered testimony from Brian Collins, a geomorphology consultant with a doctoral degree in geological sciences. Dr. Collins prepared a technical memorandum in support of the appeal, dated January 28, 2020. *Exhibit V-7.* In preparing his technical memo and for his hearing testimony, Dr. Collins reviewed all available documents and maps, analyzed aerial imagery from 1936 on, and conducted a site visit. During his site visit, Dr. Collins observed a channel that originates from the culvert at SR202 and discharges into a scoured pool with a three-foot maximum depth which transitions into a channel within 12 feet, then traverses the subject property down to the Sammamish River about 600 feet downslope. On site, the channel crosses through trees (alders) and open areas and then enters a low ravine 15 feet deep and 100 feet across. In the upper alder reach, Dr. Collins observed the channel is actively incising where the bed is not protected by alder roots, and where there are roots, it has a less defined channel. In his opinion, the channel is actively eroding downward; where the alders are less dense, the channel is actively widening, while in the wetland reach, the channel is not incising apparently due to topography and vegetation. According to his review of Google Earth images, the alders were just starting to become established in 2002 and the canopy reached the point of being nearly closed in 2005. The alders are limiting the incision of the channel, which Dr. Collins testified says something about the timing of channel creation: that it is currently enlarging indicates that flow has increased just recently. His review of the historical aerial photographs in the record led him to conclude that the channel had not formed until the early part of this century, asserting no channel is visible until the 2002 image. *Brian Collins Testimony; Exhibit V-7.*
22. Regarding the description of a watercourse on the subject property in the 1994 Litchfield report, Dr. Collins testified that he can't reconcile the channel described by Litchfield with what he observed on site, going so far as to suggest that the report could potentially be addressing a different watercourse. His issue with the Litchfield report was that it is known that if discharge increases, a channel gets bigger. It is known that discharge has increased, so the channel must be larger now than it was in 1994; yet the current channel is not larger than that described by Litchfield. He also noted that a swale is not a channel, and that in calling it a swale, the Litchfield report confuses things. Regarding the Herrera Memo, Dr. Collins contended that it discusses springs upslope for which he found no evidence in previous reports. Also, he contended that the Herrera Memo appears to argue that because there is a swale there must be a channel, and he disagrees, contending many swales do not form channels. Mr. Collins pointed out that the historical information available about the upstream property includes the Hearing Examiner decision for the Redwood Manor Preliminary Plat (PPL90-0006), in which the findings include a statement that "the City indicated that no wetlands or springs were on the [Redwood Manor] site, but if they were found during field engineering for the drainage system, they

would have to be identified and classified, and measures would have to be taken to protect them.” *Exhibit V-8, Tab 7, Finding 22, page 5 of 20*. Because no springs were ever identified, classified, and protected on the Redwood Manor site, Dr. Collins argued that the Dr. Curran’s conclusion that upslope springs contribute to natural flows in the watercourse is less credible. *Brian Collins Testimony*.

23. On cross examination, Dr. Collins was asked to describe a darkened line in the 1936 and 1938 aerial photos, which counsel for the City suggested could be evidence of water in the path of the current day water course. Dr. Collins described the line as “a little bit sinuous” and said that, to him, that feature indicated saturated soil rather than surface water. He also acknowledged that the aerial photos clearly depict vegetation management on the subject property (1936, 1938, and 1952) and testified that alders or other vegetation in the more saturated soils could have been mowed or otherwise suppressed (grazing animals) prior to 2002. *Brian Collins Testimony*.
24. The Appellants offered testimony by Terry Curtis, a Certified Photogrammetrist. Mr. Curtis reviewed the historic aerial photographs in the record to provide an opinion as to whether they show a channel. Mr. Curtis prepared a report for the appeal (dated January 24, 2020) based on his review of available aerial photographs, topographical maps, US Geological Survey historical photos, GIS iMapping, and Google Earth images of the subject property, which he examined for the presence or absence of a natural stream, manmade ditch, or eroded channel crossing the subject property emanating from the culvert under Redmond-Woodinville Road NE. *Exhibit V-9*. In his testimony, Mr. Curtis explained that when attempting to identify a stream channel in an aerial photo, one is looking for a topographic element and/or differences in vegetation. He stated that in an agricultural area, taller grass, or greener vegetation can indicate presence of moisture in the soil. In reviewing the photos for his report, he used specialized equipment, the use of which is within his experience, to review the photographs stereographically, which allows the viewer to measure varying heights with a higher degree of accuracy than standard viewing of the images. Mr. Curtis reported that he saw no channel on either side of SR 202 in any of the photographs until about 2001. He did not dispute there is a channel present today and stated that there has always been moisture there, but prior to the early 2000s, the photographic record shows at most faint signs of a periodic moist area in different seasons, different moisture conditions, and differing vegetation. Mr. Curtis opined that the detectability of a channel in the aerial photos correlates pretty closely with development of Redwood Manor. In his opinion, if a stream had been present, it would show year to year. Asked to specifically address the dark band (described by Mr. Collins as sinuous) in 1938 aerial photo (*Exhibit C-23*), two 1968 aerials (*Exhibits C-24 and C-25*), a 1988 aerial (*Exhibit V-44*), and a 1995 aerial (*Exhibit V-46*), among others, Mr. Curtis stated that the darkness indicates a possibly wet swale and acknowledged that the swale is consistently evident throughout the available photographs, but contended that no channel is evident until the 2000s. He also testified that groundwater and subsurface flows can create such moist areas. Mr. Curtis did not explain why the three-foot deep by three-foot wide channel described in the Litchfield report could not be detected in the 1990 or 1995 aerials. *Terry Curtis Testimony*.

25. Finally, the Appellants offered the testimony of Bruce Dodds, an engineer with professional experience in designing highways who prepared a report submitted with the administrative interpretation application (*Exhibit V-8*) which was intended to provide expert opinions on the sources of flows exiting the culvert onto the subject property. Mr. Dodds testified that all drainage coming into the culvert today is from manmade sources as opposed to natural sources. In reviewing historic records for Redmond-Woodinville Road NE, Mr. Dodds found files in the King County archives (available online) that show the profile and plan of that road as originally designed (included in the material admitted at *Exhibit V-88*), which indicates that the culvert was initially installed at the time of road construction in 1913 as a one- by two-foot log culvert. He indicated that the stations reflected on the 1913 profile and plan are “pretty darn close” to the locations of culverts existing in place today, including the subject culvert. The 1913 profile and plan indicates the presence of streams elsewhere in the vicinity but does not indicate a stream at the location of the instant culvert, nor on the property upslope from the culvert. Mr. Dodds testified that one purpose for installing a culvert could be for draining a roadside ditch, and he surmised that the log culvert was installed here as a relief culvert. After road and ditch construction, the culvert would also have drained runoff from the east side of the road. He asserted that the spacing between existing culverts supports his theory that the subject culvert was installed to drain a roadside ditch installed on the east side of the road to catch all runoff from the roadway, which he theorized had been superelevated such that all runoff flowed to the east side of the road. Mr. Dodds opined that this concentration of road runoff was the only source of flows in the culvert when it was originally installed, rather than any existing surface water (stream) conveyance. Washington State Department of Transportation (WSDOT) widened the road in 1986, and in his review of the 1985 As-Built plans for that project (*Exhibit V-68*), Mr. Dodds found no evidence of a stream at the location in question. Ultimately, he submitted that the sources of water coming out of the culvert onto the subject property are limited to stormwater runoff from Redwood Manor impervious surfaces, the interceptor ditch collecting drainage and groundwater from the upslope parcel, and runoff from the road. *Bruce Dodds Testimony; Exhibits V-8, V-68, and V-88.*
26. Regarding the lack of a stream identified in the 1913 plans for the road and the location of the subject culvert, Mr. Dodds acknowledged that he did not know what the state or local regulatory definitions of stream were at that time and whether they would identify the same waterbodies as streams as the current Redmond critical areas ordinance. He acknowledged that his written report indicates that groundwater from the Redwood Manor property was directed to the culvert and thus entered the subject property. *Bruce Dodds Testimony; Exhibit V-8 (page 5).*
27. In his post-hearing rebuttal, Mr. Dodds chiefly challenged the testimony of Emily Flanagan and reiterated that a roadside ditch on the east side of SR 202 that received stormwater from the east half of the road surface and all surface flows from the property upslope, including those from Redwood Manor, have always been and continue to be directed to the culvert and thus onto the subject property. He contended that catch basin 20878 was constructed incorrectly, which has caused significant quantities of stormwater that was supposed to discharge to a ravine directly north of Redwood Manor to be

diverted to the subject culvert, since at least 1998, which he asserted has increased the erosive power of the flows out of the culvert. *Exhibit V-91*.

City's Evidence and Assertions

28. The City argued that Appellants failed to meet their burden of demonstrating that the administrative decision was not based on a preponderance of the evidence or was clearly erroneous. The City contended that because the Appellants seek to have the watercourse designated as an intentionally created stream, they bear the additional burden of demonstration through “documentation, photographs, statement, and other evidence” its “purposeful creation” pursuant to RZC 21.64.020.A.2(d)(v). The City submitted that the Appellants provided no evidence, either with the administration interpretation application or at hearing, proving that the watercourse was either an intentionally created stream, nor that it was an entirely artificial watercourse per the City’s definition of stream in RZC Chapter 21.78, nor that it was artificially constructed and actively maintained for irrigation, per WAC 222-16-031. The City argued the Director’s interpretation that the stream is a natural, regulated watercourse should be affirmed. *Record Documents R-11 and R-13*.
29. The City offered testimony and records from its Stream and Habitat Planner, Tom Hardy. Mr. Hardy conducted two site visits to the subject property in April 2014 related to a previous application by a developer who requested the City’s input on the site’s potential for development. An April 16, 2014 email Mr. Hardy sent to convey what he found on-site was included in the record and provided the following (paraphrased) information. The first site visit on April 9, 2014 followed rainfall of nearly half an inch on the previous day. Mr. Hardy described the stream as starting from the culvert at the road and traveling west to a ravine at the west edge of the property. He observed that the “majority of flow entering the culvert on east side of Red-Wood Road was coming from hillside stormwater pipe” and “little to no flow was coming from stormwater vault from Redwood Manor,” and the “stream channel was defined but not deeply incised indicating hydrology or stream power not enough to scour underlying soils, and probably subsurface soil layer (till?) helping to keep stream and adjacent wetland on surface. ...[S]tream flow has been present in the ravine for a long time; ~75+ year old Douglas firs and Big Leaf maples on ravine slope that was cut by stream flow in the past. Clear evidence that stream has been flowing here for a long time (i.e., ravine is not a recent creation).” *Exhibit V-77*.
30. In 2016, still working to type the watercourse in question, Mr. Hardy sent an email to a Washington State Department of Fish and Wildlife habitat biologist, seeking input from the state agency as to how they would rate the stream. In a December 6, 2016 email, Mr. Hardy described the watercourse as follows:

... The stream channel is relatively steep; 8%. The only current open channel is downstream of Red-Wood Road where it comes out of a culvert (installed in the 1920s or 1950s). Upstream of the road culvert is an approximately five acre basin; half is single family homes built in 1997 and half in forested condition. Most of the flow comes from the developed area, although some flow was there prior to the development. The channel continues from the road where the channel

isn't deeply defined (~400-ft), and then flows into a deeply defined ravine section (~900-ft) with mature trees. The channel is between 1-2 feet wide and flows year round (partly because of ground water intercepted in the development).

Mr. Hardy concluded his email by asking: "Is it a stream?" *Exhibit V-76*. The state wildlife biologist answered:

...I understand that the majority of the water in this system is stormwater. However, since some portion of the watercourse is derived from natural sources (i.e., rainwater, groundwater, subsurface recharge) this makes it a regulated watercourse. For WDFW's purposes [the question] is not whether it is a stream but whether or not it would be presumed fish bearing or non-fish bearing.

Exhibit V-76.

31. At hearing, Mr. Hardy testified regarding his observations and analysis, noting that the fact there were flows after six days of no rain (on the second April 2014 site visit) was a clear indication to him that the stream has some source other than rain/stormwater runoff as a base flow, such as ground water. When he next visited the site in 2016 investigating potential code enforcement action related to clearing activities in the stream corridor, he observed some clearing of vegetation and ditching that had been conducted by a small excavator, with observable impacts to wetland hydrology. At this time, the stream channel had incised as compared to its 2014 condition, such that it was deeper and possibly narrower as a result of the incising. In his opinion, the incision of the stream channel had resulted from human intervention with stream flows. Mr. Hardy sent the Veals a letter warning them that clearing in the stream buffer was a violation of Code. At hearing he testified that clearing activity appeared to stop after the letter was sent, but that no restoration of the impacted stream buffer was performed. *Tom Hardy Testimony; Exhibit C-27*.
32. In looking at the historical photos in the record, Mr. Hardy testified that he could discern what appears to be the watercourse in question traversing the subject property on the 1938, 1964, and 1968 aerial photos of the site. *Tom Hardy Testimony; Exhibits C-23, C-24, and C-25*.
33. The City presented the testimony of Cathy Beam, Principal Planner, who has worked with the City on environmental policy and regulations since prior to the adoption of the first Redmond sensitive areas ordinance in 1992. Ms. Beam testified as to her participation and recollection of the process through which the City's stream typing system was adopted, which included a citizen advisory board to better ensure that the adopted regulations reflected the values of Redmond residents. Specifically addressing intentionally created streams, she testified that such streams were expressly excluded from the critical areas regulation unless they bear salmonids or were created as mitigation for impacts. In her experience, the City defines an intentionally created stream as one that is manmade with documented, purposeful creation, such as a drainage swale that is constructed on a specific date. Speaking to the City's sensitive area mapping, she testified that City critical areas mapping is developed with best available information and

that the maps are updated as information is collected by the City in the course of regulating private and public development. Typically, critical areas on private property are not studied and classified unless and until there is a development proposal on or near a parcel containing regulated critical areas, at which time developers commission studies prepared by qualified professionals. When the City accepts a study in the course of project review, that study is added to the information collected for the next periodic map update. She noted that although the City attempts to keep up these maps with best available information as a service to Redmond citizens, the maps themselves contain disclaimers informing users that site specific technical reports will overrule mapping; the maps are advisory. *Cathy Beam Testimony.*

34. The City offered the testimony of Emily Flanagan, Senior Surface Water Engineer. Based on her knowledge of the site and vicinity, and on her review of the 1913 profile and plan for Redmond-Woodinville Road, Ms. Flanagan disagreed with Mr. Dodds that the stormwater runoff from the road drained to the east side of the road and flowed in a ditch to the culvert in question, and then onto the subject property. She read the 1985 As-Built for the road as indicating that for a length of approximately 300 feet, Redmond-Woodinville Road is superelevated to direct all runoff onto the west side of the road, from where it would sheet flow across the subject property, not the east side of the road where it could enter the culvert. She submitted that the notation “drain to ditch,” which Mr. Dodds interpreted to mean drain to a ditch that flowed to the culvert in question, instead means drain to the ditch under the PSE powerlines to the north. She testified that 1985 As-Built the plans show no ditch between stations 74 and 75 on the upslope portion of the road; the dashed line is the right-of-way boundary, while the long dash line shows the edge of pavement. She also disagreed with Mr. Dodds that the culvert in question was initially installed as a relief culvert. Ms. Flanagan testified that the current standard for relief culvert spacing on a road with an approximately 2% gradient, as the subject roadway has, would be one relief culvert every 500 feet. This is consistent with the culvert spacing regime in the excerpt from the 1921 Handbook of Culvert and Drainage Practice submitted by the Appellants, which stated: “current practice favors ditch relief culverts on 8 per cent. grades at intervals not exceeding 300 ft. and on 5 per cent. grades not exceeding 500 ft.” *Exhibit V-89, book page 217.* The actual spacing between the subject culvert and the next nearest culvert to the north is less than 300 feet. Ms. Flanagan testified that because culverts add significant expense, builders of roads do not install more than are required. The spacing of less than 300 feet suggests that the culvert in question was needed for the purpose of conveying upslope flows downslope under the road, rather than as a relief culvert. Regarding why the 1913 profile and plan for the road does not identify a stream at the subject culvert’s location, she surmised that when the road was originally built only larger watercourses, such as those currently classified as Class II or larger, were likely to be considered streams. She speculated that the current regulatory scheme regulates a much wider variety of watercourses than were regulated in 1913. *Emily Flanagan Testimony; Exhibit C-28 and C-29.*⁸

⁸ As reflected in the hearing audio, on Exhibit C-28, Ms. Flanagan circled the approximate area that drains to the subject culvert in purple highlighter. On Exhibit C-29, she identified the subject culvert and the next nearest culvert to the north with yellow highlighter. She highlighted the portion of SR202 that drains to the subject property in pink.

35. In 2018, because she is the senior surface water engineer at the City, Ms. Flanagan was asked to write a memo for the Veals explaining how the City arrived at the determination that the watercourse is a Class IV stream for its entire length on-site. She discussed her 2018 memo in her testimony at hearing. One significant factor driving that conclusion was the presence of the Class IV stream on the western portion of the property, that travels in a well-defined ravine containing trees at least 50 years old, meaning there was sufficient flow to carve the ravine long before Redwood Manor was built. Another factor in Ms. Flanagan's 2018 conclusion was that the Litchfield 1994 drainage report, produced in review of then-proposed Redwood Manor, identified the property upstream from the proposed subdivision (forested in the predeveloped condition) as producing enough natural runoff prior to development to warrant a bypass to be constructed to pass existing subsurface flows around the project. Of the downstream conditions, the Litchfield report noted that, from the outlet of the subject culvert, flows travel across the subject property in a natural drainage swale towards the Sammamish River. Ms. Flanagan agreed with the assertion by Ed McCarthy in the 2020 McCarthy report prepared on behalf of the Appellants (*Exhibit V-14*) that development of Redwood Manor probably increased the flow volumes being conveyed in the subject culvert; however, she noted that the McCarthy report itself models flows in the predeveloped condition and predicts a small amount of runoff from upstream of the culvert. Considering the topography and shape of the drainage basin, Ms. Flanagan testified that the subject watercourse appears to be a natural flow path for groundwater and interflow seeping out of the upstream basin and, based on the maturity of the ravine, the flow path clearly predates Redwood Manor's development. Ms. Flanagan indicated that if any portion of the flow volumes of a watercourse are from a natural source, the City considers that watercourse a stream, and in her testimony, she indicated that WDFW would reach the same conclusion. Finally, at no point on the subject property is any portion of the watercourse engineered or constructed. For these reasons, the City does not consider the watercourse an intentionally created stream, but rather a regulated stream that meets the criteria for a Class IV typing. Ms. Flanagan disagreed with the conclusion of the Beaver Creek stream assessment that it is an artificial watercourse because it comes out of the end of a culvert. She noted there are numerous places in the City where streams begin in pipes and become natural waters as they go downstream. *Exhibit V-3; Emily Flanagan Testimony.*
36. The City offered testimony from the two consultants who conducted the site visit and analysis in the Herrera Memo, Joanna Curran and Brianna Blaud. Ms. Blaud participated in the site visit conducted by Herrera; it was her role to take field measurements, including bankful width, depth, and spot slope measurements, as well as to note riparian conditions and vegetation. She testified that the banks of the watercourse were steep in the channel, but that in areas they were obscured by vegetation, primarily reed canary grass, which makes banks hard to find. She did not observe any manmade channel segments on-site. The Herrera stream classification was determined by the presence of water and by ruling out other classifications. The watercourse is not a Class I stream, because it's too minor. It's not a Class II because there are no salmonids, and not a Class III stream because there is no fish access. With its established channel and groundwater contribution, it is a Class IV stream. It was flowing at 2.6 gallons per minute without recent rain, which makes it a perennial stream. *Briana Blaud Testimony.*

37. In her testimony and post-hearing rebuttal declaration, Dr. Joanna Curran clarified the information she relied upon in reaching the conclusion that the watercourse at issue is a natural stream. Addressing her assertion that the watercourse constitutes a natural drainage, she identified the sources of evidence supporting her opinion: topographic shape of the land and direction of slopes tending to direct water flows in a southwest direction; typically significant seasonal rainfall; the observation that water flowing over geologic time in one direction reduces the elevation locally to form a drainage pattern; and the topographical information in the Litchfield report that indicates a grassy swale from the upper to the lower slope. (*Exhibit V-11, see "11/93 Revised Layout"*) She noted that both the Geotech Consultants report from April 1991 (*Exhibit V-25*) and the Aspect Consulting geotechnical report from February 2018 (*Exhibit C-11*) contain evidence of perched groundwater at elevations that match the location identified in the 1991 hearing examiner proceedings (*Exhibit V-59, PPL-90-0006*) of where standing water on what was to become Lots 2 and 3 of Redwood Manor required installation of subsurface drains to prevent basement flooding for the proposed residences, the basements of which would be below the ground water table. The two geotechnical reports each represent a single snapshot in time more than 25 years apart, and considered with the hearing testimony about an ongoing problem of standing water in that location, Dr. Curran stated that they show a pattern of groundwater expressing to the surface upslope from Redmond-Woodinville Road over geologic time, which Dr. Curran characterized as a perennial source. Noting that the 2020 McCarthy Report (*Exhibit V-14*) called out a continuous flow from the drains from Redwood Manor to the culvert, some portion of which is known to be groundwater, Dr. Curran saw this as further evidence of a pre-development perched ground water table that is now intercepted by subsurface drains instead of flowing under or at the ground surface. Speaking to Mr. Dodds' contention that if the watercourse had been a perennial stream, it would have gotten deeper and wider over time, Dr. Curran acknowledged that there is a greater volume of water flowing through the culvert onto the Veal property than would have flowed predevelopment; however, she contended that that channel response to changes in flow would not necessarily have followed the linear progression of the 1984 channel evolution model Mr. Dodds relied upon in reaching his conclusion. The pre-Redwood Manor downstream analysis identified a grassy swale on the subject property, and that swale remained until dredging was conducted by the Appellants in 2016. Taken together, she found evidence of a perched aquifer to be compelling. Having viewed the current channel under current vegetation, she stood by the conclusions of the Herrera Memo that the entire length of the watercourse on the subject property is a natural flow path for the water expressed by the perched aquifer, concurring with Ms. Blaud's conclusion that the watercourse is correctly typed as a natural Class IV stream and not as an artificial or intentionally created stream. *Joanna Curran Testimony; Exhibits C-6, C-31, V-11, V-14, V-25, and V-59.*
38. Carol Helland, the author of the administrative interpretation appeared at hearing to discuss the decision under appeal. She testified that from the City's vantage, the code does not contain ambiguity sufficient to require, and thus to confer her authority, to issue a code interpretation, but that the Process Agreement (*Exhibit C-2*) entered into by the parties specified that she would do so. Ms. Helland stated that the City does not dispute

that the volume of stormwater traversing the subject property has increased over time; however, the function of fish and wildlife habitat conservation areas, including Class IV streams, is by definition to convey stormwater.⁹ Similarly, Ms. Helland acknowledged that historically this stormwater sheet flowed across the subject property, and that as a result of development over decades its flow path has narrowed and concentrated, but she contended that does not make it artificial. The RZC’s definition of stream specifically excludes artificial irrigation ditches, stormwater/surface runoff devices, and other entirely artificial devices unless used by salmonids. She noted that Washington State Department of Natural Resources regulations consider stormwater runoff as included in “waters of the state.” The RZC does not define device, but in her experience, in Redmond “device” does not refer to something happened accidentally, but rather only to things that were purposefully created for a specific function; to her mind, every reference to “device” in the City’s regulations is a reference to an engineered solution. “Entirely artificial” water courses or devices would include such things as mitigation projects, coy ponds, fountains, landscape features, and engineered solutions to drainage issues. *Carol Helland Testimony.*

39. Addressing the Appellants’ assertion that the administrative interpretation ignored some of the materials submitted with the application, she testified that she found some of them not to have been prepared for the purpose for which they were being put forward, or to have been prepared for the purpose of addressing regulations no longer in effect, or not to have been prepared with the same rigor as is required under current code. As examples, she noted that the Redwood Manor project vested before the current CAO was in effect and that the Appellants still have still never submitted a formal stream reconnaissance study. Ms. Helland asserted that the fact that water was directed to a culvert and the culvert discharges onto the subject property does not render the watercourse an entirely artificial device; that water was already there and already flowing across the subject property. For example, intentionally created streams and artificial devices would include engineered bioswales; in such facilities stormwater is not a natural flow. On the subject property, there was no irrigation ditch built or maintained for agricultural purposes over time and no intentionally created stormwater conveyance. Specifically addressing the Appellants’ historical aerial photographs, Ms. Helland noted that Appellants’ witnesses acknowledged that the band or dark area in the photos, located where the channel is currently located, could show the presence of a swale or the presence of moisture, and that the RZC definition of stream includes swales. *Carol Helland Testimony.*

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⁹ RZC 21.64.010.B(3)(a).

CONCLUSIONS

Jurisdiction:

Pursuant to RZC Table 21.76.050.B, RZC 21.76.050.F, and RZC 21.76.060 D.4, administrative interpretations by the Director of Planning and Community Development are Type I land use decisions appealable to the City's Hearing Examiner.

Criteria for Review of the Appeal:

Pursuant to RZC 21.76.060.D.4, appeals of Type I administrative interpretations are heard by the City's Hearing Examiner. Pursuant to RZC 21.76.060.I, the Hearing Examiner reviews such appeals in open record appeal proceedings in an appellate capacity and within 10 business days after the close of the record, shall issue a written decision to grant, grant with modifications if the Examiner determines that the appellant has carried the burden of proving that the Type I decision is not supported by a preponderance of the evidence or was clearly erroneous. In conducting such proceedings, the Hearing Examiner shall accord substantial weight to the decision of the department director.

Other Applicable Provisions

RZC 21.76.070.D, Administrative Interpretation

1. Purpose. The purpose of this section is to provide for the interpretation of the Zoning Code. 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.
2. Scope. The RZC shall be interpreted whenever any of its provisions, or the application of such provisions to any specific set of circumstances, is ambiguous; i.e., where the Code is subject to two or more reasonable interpretations.
3. Procedures. The Code Administrator shall be responsible for interpreting the provisions of this code, except where expressly provided otherwise. Any interested person may apply for an interpretation of this code. Applications for administrative interpretation are processed as Type I reviews.
4. Decision Criteria.
 - a. The provisions of the RZC shall be considered to be the minimum requirements adopted for the promotion and protection of the public health, safety, and general welfare, and all administrative interpretations shall be made in this context.
 - b. The RZC is not intended to interfere with, abrogate, or annul any easements, covenants, or other agreements between parties, except where the agreements may conflict with the enforcement of the RZC.
 - c. In the case of conflicts between parts of the RZC or between the RZC and other rules, regulations, resolutions, ordinances, or statutes lawfully adopted by other authority having jurisdiction within the City, the most restrictive shall govern. In the case of conflicts between the text, maps, and charts of the RZC, the text shall govern unless otherwise stated.
 - d. Interpretation of the Official Zoning Map shall be as set forth in RZC 21.04.020.B.

- e. Interpretation of the Redmond Comprehensive Plan is to be made recognizing that the boundaries of the plan categories are not exact but illustrate general relationships and locations.
5. Administrative interpretation shall utilize generally recognized principles of statutory and ordinance interpretation adopted by the courts of this state.

RZC Chapter 12.78, Definitions.

Intentionally Created Streams. Streams created through purposeful human action, such as irrigation and drainage ditches, grass-lined swales, and canals.

Stream. 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 21.64.020.A, Classification and Rating of Fish and Wildlife Habitat Conservation Areas.

1. The Growth Management Act identifies fish and wildlife habitat conservation areas. These areas include:
- e. Waters of the State. Waters of the state include lakes, rivers, ponds, streams, inland waters, underground waters, and other surface waters and watercourses within the jurisdiction of the State of Washington, as classified in WAC 222-16-031.

RZC 21.64.020.A.2(d) Riparian Stream Corridors

Riparian stream corridors include Class I through IV streams and adjacent riparian habitat areas (stream buffers). Streams shall be designated Class I, Class II, Class III, and Class IV according to the criteria in this subsection. When 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.

- i. “Class I” streams are those streams identified as “Shorelines of the State” under the City of Redmond Shoreline Master Program.
- ii. “Class II” streams are those natural streams that are not Class I and are either perennial or intermittent and have salmonid fish use or the potential for salmonid fish use.
- iii. “Class III” streams are those natural streams that are not Class I or Class II and are either perennial or intermittent and have one of the following characteristics:
 - A. Non-salmonid fish use or the potential for non-salmonid fish use; or
 - B. Headwater streams with a surface water connection to salmon-bearing or potentially salmon-bearing streams (Class I or II).

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

RZC 21.64.020.A.2(e)

The critical areas ordinance directs City staff to classify streams based on the following types of information, as available:

- i. 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. These maps shall be used as a general guide only for the assistance of property owners and other interested parties; boundaries are generalized. The actual type, extent, and boundaries of fish and wildlife habitat conservation areas and streams shall be determined in the field by a qualified consultant according to the procedures, definitions, and criteria established by this chapter. In the event of any conflict between the critical area location and designation shown on the City’s map and the criteria or standards of this section, the criteria and standards shall prevail;
- ii. Department of Fish and Wildlife priority habitat and species maps;
- iii. Anadromous and resident salmonid distribution maps contained in the habitat-limiting factors reports published by the Washington State Conservation Commission;
- iv. Federal and state information and maps related to species of concern;
- v. Application of the criteria contained in these regulations; and
- vi. Consideration of the technical reports submitted by qualified consultants in connection with the applications subject to these regulations.

Conclusions Based on Findings:

1. An administrative agency’s decisions will not be overturned unless evidence in the record shows the agency has “engaged in an unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; ... [or] [t]he agency has erroneously interpreted or applied the law.”¹⁰ An action is clearly erroneous when it leaves the reviewing [authority] with “the definite and firm conviction that a mistake has been

¹⁰*Bellevue Farm Owners Ass’n v. State of Washington Shorelines Hearings Board*, 100 Wn.App. 341, 363 (2000), citing *Batchelder v. City of Seattle*, 77 Wn.App. 154, 158 (1995).

committed.”¹¹ An Appellant bears the burden of proving by the above preponderance of evidence that error was committed.¹² In appeals of City of Redmond Type I decisions, the Hearing Examiner is required to give substantial deference to the decision of the Director.¹³

2. The administrative interpretation’s conclusion that the watercourse in question is a natural stream is supported by a preponderance of the evidence.
 - a. First, Dr. Curran’s testimony and written conclusions addressing the size and topography of the upslope area contributing to flows in the watercourse is credible and consistent with the majority of the evidence. In particular, the Litchfield report identifies the drainage path of the Redwood Manor property and uphill forested lands as trending from the northeast to the southwest in line with a grassy swale on the Redwood Manor property, as well as in line with the subject culvert, and an approximately three-foot wide channel on the subject property. Dr. Curran’s conclusion that there were groundwater, interflow, and/or other natural sources of water that would collect at the culvert elevation and pass through onto the subject property prior to Redwood Manor’s construction is consistent with the Litchfield report, as well as with the 1991 Geotech Consultants report, the 2018 Aspect Consulting report, and the 2020 McCarthy report, all of which refer to (a) perched aquifer(s) on or above Redwood Manor contributing flow volumes. These reports are, in turn, consistent with testimony reflected in 1991 Hearing Examiner findings for the Redwood Manor subdivision speaking to standing water on that property anticipated to conflict with the proposed homes unless drained off site. The presence of the well-established ravine on the western portion of the subject property, with mature trees ranging in estimated age between 50 and 75 years on the slopes of the ravine shows that flow volumes across the subject property in quantities sufficient to carve the ravine have existed since prior to Redwood Manor’s construction and the resulting concentration of stormwater runoff. That quantity of water had to traverse the subject property to arrive at the eastern end of the ravine. Despite Appellants’ argument to the contrary, the aerial photos in evidence show a persistent wetted path thru the eastern portion of the subject property, east of the ravine. Even Appellants’ witnesses conceded that the “little bit sinuous” darkened path represented water passage, whether above or below the surface, in approximately the same location as today’s watercourse dating back to at least 1938. Dr. Curran’s personal observation that the present, defined channel stream can be difficult to see even standing next to it, without clearing vegetation, further supports the conclusion that the wetted flow path repeatedly depicted in historic aerial photos, ending in a deeply carved ravine, could contain a channel simply not be visible in aerial photography despite its presence in fact. The RZC definition of stream requiring a defined channel or bed

¹¹ *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 894 (2004), citing *Schofield v. Spokane County*, 96 Wn.App 581, 586 (1999).

¹² RZC 21.76.060.I.4.

¹³ RZC 21.76.060.I.4.

expressly includes defined-channel swales as regulated streams. While runoff from Redwood Manor and from Redmond-Woodinville Road also enter the site and inarguably contribute to the volumes of flow in the watercourse onsite, the conclusion that some portion of the flow volumes are naturally occurring is well supported in the record as a whole. On its own, the Litchfield report substantially supports the conclusion that prior to Redwood Manor's construction, there was enough flow entering the subject property to create an approximately three-foot wide by three-foot deep channel at the outlet of the culvert. *Findings 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 29, 30, 31, 32, 34, 35, 36, and 37.*

- b. Second, the evidence shows that since at least WSDOT's 1985-86 widening project, the portion of Redmond-Woodinville Road along the site's frontage is superelevated to drain west directly onto the subject property and not east. Thus, since at least 12 to 13 years prior to Redwood Manor's construction, runoff from the highway was not a source of the flow volumes in the culvert in question. It is not demonstrated in the documents available that there was a ditch on the east side of the highway at any time that drained into the culvert, or that the culvert in question was originally installed as a relief culvert to prevent road runoff from undercutting the highway, as was opined by Mr. Dodds. Reviewing the 1913 profile and plan, the 1984 WSDOT As-Builts, the drainage system maps submitted by the City at C-28 and C-29, and the historic road standards submitted by the Appellants, Ms. Flanagan's theory of placement of the culvert is more consistent with facts documented in the record than Mr. Dodds's. On a road with a gradient under 2.5%, the subject culvert being placed less than 300 feet from the next nearest culvert would not appear to be a relief culvert, which suggests there were other flows that needed to be conveyed under the road. That there could have been other flows needing to be conveyed under the road at its construction would be consistent with same reports as those relied upon by Dr. Curran (and cited in the previous conclusion) when she determined the watercourse is a natural flow path. *Findings 12, 13, 25, 26, and 27.*
- c. The City's stream definitions, in RZC Chapter 21.78 (intentionally created stream and stream, cited in full above), do not conflict with one another, nor do they conflict with the method established in RZC 21.64.020.A.2(d)(v) for determining whether a stream was intentionally created (cited in full above). The evidence presented by the Appellants failed to establish that the watercourse on the subject property was created through purposeful action. According to the Litchfield report and the 1991 Redwood Manor hearing examiner findings, humans did intentionally install drains to pass water that would pool on the surface in the predeveloped condition to and through the culvert under the road. Nothing presented persuades the undersigned that this intentional groundwater draining activity meets the definition of intentionally created streams, e.g., irrigation ditches, canals, drainage ditches, and purposefully created grass lined swales. Those standing waters were there many decades after both the original construction of the highway in 1913 and its 1985/86 widening, and they were there prior to construction of Redwood Manor itself, in volumes great enough to carve the ravine. Those naturally occurring waters were added to whatever flows were already passing through the culvert, while road runoff from Redmond-

Woodinville Road along the site frontage was not. Regardless of water source, the evidence presented failed to establish that whatever channel or grassy swale existed on the subject property was purposefully created. The Director's administrative interpretation that the watercourse is a regulated stream and not an excluded intentionally created stream or artificial watercourse is supported by a preponderance of the evidence. *Findings 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 29, 30, 31, 32, 33, 38, and 39.*

3. Appellants contended that in order to justify the administrative interpretation that it is a Class IV stream, the City needed to come forth with evidence showing that the stream existed under pre-development conditions, which Counsel for Appellants argued means that the City had to come forward with evidence showing the bed and bank were formed by water flowing naturally on the site. This fundamentally mistakes the Appellants' legal position, as both Applicants for the administrative interpretation and as Appellants. The burden of proof is theirs in both cases. They are obligated to affirmatively show that the City's interpretation is not supported by a preponderance of evidence or is clearly erroneous. Respectfully, they have made neither showing. Addressing the Appellants' arguments as stated in the appeal, the undersigned finds no evidence that City Staff failed to consider either the facts or the legal argument submitted in support of the request for administrative interpretation. The request letter and three attachments, and Mr. Veal's declaration and 15 attachments, were clearly considered and in part relied upon by City Staff and City consultants in reaching their conclusions. Speaking to Appellants' allegation that the City failed to use generally recognized principles of statutory construction in interpreting the codes in question, with due respect, the undersigned disagrees. The language of the applicable City code provisions is straight forward and without internal conflict. To the extent that an ambiguity can be read into the various provisions, however, deference is owed to the Director's interpretation.¹⁴ The Appellants' failed to provide evidence or pursue argument as to the claims in the written appeal addressing "cherry picked" Comprehensive Plan support for the administrative interpretation and the alleged unlawful procedure, and these claims are dismissed. Evidence and arguments not addressed were found not to be persuasive. As a whole, the record submitted fails to create a firm conviction in the undersigned that the City erred. The Appellants have not met their burden of proving that the Director's administrative interpretation was unsupported by a preponderance of the evidence or was clearly erroneous. The appeal must therefore be denied.

¹⁴ Courts of Washington State have held that construction of a statute is a question of law that is reviewed de novo. *McTavish v. City of Bellevue*, 89 Wn. App. 561, 564 (1998). Because municipal ordinances are the equivalent of statutes, they are evaluated under the same rules of construction. *McTavish*, 89 Wn. App. at 565. When a statute is unambiguous, construction is not necessary and the plain meaning controls. *Ibid.* Where a statute is ambiguous, the agency's interpretation is accorded great deference in determining legislative intent. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 628 (1994).

DECISION

Based on the preceding findings and conclusions, the Appellants have failed to meet their burden of proof to show the Director’s administrative code interpretation is not supported by a preponderance of the evidence or is clearly erroneous, and the appeal must therefore be **DENIED**.

Decided April 6, 2020.

By:



Sharon A. Rice
City of Redmond Hearing Examiner

1 **BEFORE THE HEARING EXAMINER**
2 **FOR THE CITY OF REDMOND**

3
4 In the Matter of the Appeal of

5 **Rory and Donna Veal**

6 Of the October 17, 2019 Administrative
7 Decision file number LAND-2019-00814
8 regarding their Real Property known as Tax
9 Parcel Number 352605-9123

NO. APL LAND-2019-01139

FINDINGS, CONCLUSIONS, AND
DECISION

CERTIFICATE OF SERVICE

10 CERTIFICATE OF SERVICE

11
12 I HEREBY CERTIFY that on this 6th day of APRIL 2020, a true and correct copy of the FINDINGS,
13 CONCLUSIONS, AND DECISION in the Matter of the Appeal of Rory and Donna Veal, was sent via
14 email to the Parties to the Appeal.
15

16
17 April 6, 2020
18

19 _____
20 Date

21 *Cheryl Xanthos*
22
23

24 _____
25
26 Cheryl Xanthos, MMC
27 City Clerk
28 City of Redmond, Washington
29
30