

**BEFORE THE CITY OF KIRKLAND
HEARING EXAMINER**

In the Matter of the Appeal of)	#COK 23-0620
)	
)	
Phil and Linda Robson)	Robson Appeal
)	
)	
of a June 6, 2023)	
Planning Official Determination of)	FINDINGS, CONCLUSIONS, AND
Wetland and Stream)	DECISION
)	
On real property addressed as)	
<u>9531 NE 140th Street, Kirkland, WA</u>)	

SUMMARY OF DECISION

Considering the record as a whole, the evidence submitted fails to demonstrate that the City’s wetland and stream determination was issued in error. The appeal must therefore be denied.

SUMMARY OF RECORD

Request

Phil and Linda Robson (Appellants) timely appealed a June 6, 2023 determination of wetland and stream presence issued by the Kirkland Planning Official regarding their property addressed as 9531 NE 140th Street in Kirkland.

Pre-Hearing Procedures

A virtual pre-hearing conference was convened on August 3, 2023 for the purposes of: identifying parties and representatives who must participate; determining whether clarification of issues on appeal was needed; identification of pre-hearing procedural issues; and calendaring pre-hearing document exchange.¹ Attorney Brian Zuanich appeared for Appellants, and Senior Assistant City Attorney Stephanie Croll appeared for the City.

At Appellants’ request, a second virtual pre-hearing conference was held on October 13, 2023. Appellants advised their attorney had withdrawn and they would proceed *pro se*. The City was represented by Senior Assistant City Attorney Stephanie Croll. A post-hearing schedule was established by mutual agreement.

Hearing and Post-Hearing Schedule

The Kirkland Hearing Examiner *pro tem* conducted an open record hearing on the appeal on November 6, 2023, receiving approximately seven hours of testimony and argument. At the conclusion of the hearing, the parties agreed to a post-hearing submission schedule that differed

¹ At this initial pre-hearing conference, both parties agreed to waive the 90-day decision issuance deadline established in Kirkland Zoning Code 145.105(2). *Record Document A*.

from that previously established at the second pre-hearing conference on October 13th. The post-hearing schedule announced at hearing held the record open for additional evidence from both the City and the Appellants as well as for written closing argument, with the final Appellant closing argument due December 11, 2023, and the decision set to be issued December 22, 2023. This post-hearing schedule did not hold the record open for additional evidence from Appellants as a result of the City's anticipated disclosure of public records on an Appellant public records request, due to be disclosed November 8, 2023. Rather the Appellants requested that the City not object to new evidence from the November 8th disclosure being offered by Appellants on reconsideration after the decision was issued, a process to which the City agreed.

On December 7, 2023, Appellants submitted a request to extend the post-hearing schedule, contending that the majority of the materials disclosed on November 8, 2023 by the City in its Public Records Act disclosure were redacted. Appellants asked that all remaining procedures be paused until they learned what was redacted and the effect of those redactions on their appeal, and also proposed that the post-hearing schedule be extended for approximately 60 days, or through February 26, 2024. The Examiner requested clarifying information from Appellants, a response to the request from the City, and further clarifications from both parties.² After considering the arguments of both parties and the direction expressed in City Code and the Kirkland Hearing Examiner Rules of Procedure, a ruling on the Appellants' motion was issued granting a 60-day extension to the post-hearing schedule, but starting 60 days from the date of record closure agreed to in the second pre-hearing conference, which resulted in a decision issuance deadline of February 23, 2024.

Issues on Appeal

Appellants filed a timely appeal of the City's determination of wetland and stream. This list of appeal issues was refined and condensed through the course of the proceedings into the following three (paraphrased) issues:

- 1) The City erred in determining there was a wetland on the property before July 1, 1990.
- 2) It was error to conclude the wetland was naturally created. Appellants contend it was unintentionally created when stormwater facilities were retroactively installed as part of a County road project.
- 3) Department of Ecology's review was biased (with respect to Appellants' consultant), and the Appellants are entitled to unbiased review.

Testimony

At the open record public hearing, the following individuals presented testimony under oath in the order listed:

For the City

Dawn Nelson, City of Kirkland, Planning Manager

² These post-hearing communications, conducted entirely via email, are added to the record to capture all of the parties' arguments and to ensure the complete procedural history is included in the record.

Kelli Jones, City of Kirkland, Surface Water Manager

Adam Weinstein, City of Kirkland, Director of Planning and Building Department

*For the Appellants*³

Lawrence D. Fisher, WA Department of Fish and Wildlife, Fish and Wildlife Biologist

Anthony J. Bredberg, B & A, Inc., Forensic Agronomist

David Kelley, Kelley and Associates Environmental Sciences, Inc., Plant and Soil Scientist

Linda Robson, Appellant

Erik Ainsworth, Reliant Design Group, Professional Engineer

Attorney Representation

Stephanie E. Croll, Senior Assistant City Attorney, represented City of Kirkland.

The Appellants were not represented by legal counsel at the hearing.

Exhibits

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

For the Appellants (Appellants' exhibits cited in Findings with prefix "A")

- A-1. B & A, Inc. Cover Letter, Wetland Issues, 9531 NE 140th St., Kirkland, WA 98034, October 19, 2022 – Bates stamp page A00001, with attachment⁴
- a. Letter from B & A, Inc. to G. Crabbe Consulting, dated February 8, 2013, re: Pond Confirmation at 9757 124th Ave. NE, Gerde Property- King County parcel number 1238500890) – page A00003
- A-2a. B & A, Inc. Report on Wetland Issues, 9531 NE 140th St., Kirkland, WA 98034, October 19, 2022 –page A000015, with attachments:
- List of Exhibits to the Report –page A000029:
 - Tax Map Location – page A000032
 - Short Plat #180038 memo in yellow, 1979 – page A000034
 - Short Plat Approval, January 20, 1980 – page A000036
- A-2b. Continuation of List of Exhibits to the Report on Wetland Issues (see page 29, Exhibit 2a):
- Sheet 1 Timberwood Drainage Repair Plans, June 1980 – page A000039

³ Despite the doctor's having attended the virtual hearing the entire day, the Appellants elected not to offer the testimony of Dr. Mon Yee. *Hearing Recording, time stamp 4:57:16.*

⁴ Although identified with exhibit numbers, Appellants' documents were submitted as several large .pdf files with continuous bates stamped pages. The first page of each exhibit or attachment (or the associated cover sheet) is identified by its Bates stamp page number at the end of the exhibit list entry.

- Drain line note King Co. site plan, June 1980 – page A000041
- Clifford Johnson letters etc., 1982 – page A000044
- April Site Photos, 1983 – page A000050
- County Accepts, July 13, 1982 – page A000054
- Easement docs, September 2, 1982 – page A000056
- Short plat approval no wet, November 14, 1983 – (cover) page A000064

A-2c. Continuation of List of Exhibits to the Report on Wetland Issues (see page 29, Exhibit 2a):

- Short plat approval no wet, November 14, 1983 – (actual exhibits) page A000065
- Sewer Easement down drainageway, June 13, 1995 – page A000067
- Count sketch map w note of spring, May 23, 2005 – page A000070
- County work order, June 17, 2005 – page A000072
- County work order, January 11, 2006 – page A000074
- BLA w ditch note, February 25, 2006 – page A000076
- BLA map, May 20, 2006 – page A000081
- County work order, January 11, 2008 – page A000083
- County work order, October 31, 2008 – page A000085
- Robson work order request, May 28, 2009 – page A000087
- County yellow order w note, July 20, 2009 – page A000090
- County work sign off, November 11, 2010 – page A000092
- Wetland Resource Map with Current Photo, 2013 – page A000094
- Wetland Resources Map n letter, June 27, 2013 – page A000096
- Wetland Resources Delineation, July 17, 2013 – page A000101
- Soundview Critical Area Map, September 18, 2018 – page A000106
- Watershed Delineation Report, August 18, 2020 – page A000109
- Ecology Wetland Rating Form Figures, 2014 – (cover) page A000138

A-2d. Continuation of List of Exhibits to the Report on Wetland Issues (see page 29, Exhibit 2a) – page A000138:

- Orca Survey, August 31, 2020 – page A000146
- Robson letter September 27, 2022 – page A000148
- Wetland Resource to Watershed Survey Map – page A000150

- Water Line Map – page A000152
 - Active Stormwater Problem Map – page A000154
 - Stormwater Vault Map – page A000157
 - Resume Anthony J. Bredberg, cover page – (cover) page A000159
- A-2e. Resume Anthony Jay Bredberg – (actual exhibit) page A000160
- B & A, Inc. Addendum Report on Wetland Issues, 9531 NE 140th St, Kirkland, WA, October 23, 2023 (5 pages) with attachments – page A000163
 - King County Public Works letter re: Timberwood Plat, July 29, 1982 – page A000168
 - Robson Special Use Permit, May 28, 2009 – page A000172
 - DOT Timberwood Drainage Repair work orders 2005 - 2010 – page A000174
- A-3. City of Kirkland (COK) Communications - page A000184
- a. Provisions and Conditions for Robson Short Plat by City of Kirkland, August 27, 2019 – page A000185⁵
 - b. Rose Jackson email referencing additional drain work (two videos), November 18, 2020 – page A000224
 - c. Email correspondence City of Kirkland Interdepartmental discussion of potential “Aging and Failing” Timberwood drainage project– page A000225
 - d. Email correspondence City of Kirkland Interdepartmental discussion of Timberwood Drainage Project, April 1, 2021 – page A000228
 - e. Email from Linda Robson to Anthony J. Bredberg re: Desiree Goble telephone conversation overview – DOE to be called in, June 7, 2021 – page A000230
 - f. DOE-Goble email correspondence re: site visit, February 8, 2023 – page A000231
 - g. Wetland Site Visit Letter to Robsons from Desiree Goble, February 13, 2023 – page A000235
 - h. COK Robson Wetland and Stream Determination Letter, June 6, 2023, with attached Department of Ecology communications – A000236
- A-4. Department of Ecology (DOE) Communications (cover page) – A000254
- a. DOE letter to Anthony J. Bredberg, March 25, 2014 – page A000255
 - b. Molstad email to City of Kirkland, February 8, 2023 (with attached February 6, 2023 email)– page A000257 (duplicate of A-3.f)
 - c. Email exchange between Joe Burcar of DOE and Linda Robson, last date May 8, 2023 – page A000261

⁵ Exhibit A-3.a includes another duplicate of The Watershed Company August 18, 2020 wetland delineation report at pages A000188-223)

- d. DOE letter to Kirkland (two copies), May 15, 2023, with attached DOE publication (duplicate exhibit) – page A000265
 - e. [none provided]
- A-5. Expert Witnesses (cover sheet) – page A000288
- a. Lawrence Fisher, Fish and Wildlife Biologist
 - 1. Lawrence Fisher Resume – page A000289
 - 2. Larry Fisher letter re: Water Course Assessment, Proposed Subdivision Project, Parcel No.1926059201, City of Kirkland, Washington, dated October 5, 2023 – page A000291
 - b. [none provided]⁶
 - 1. [none provided]
 - 2. [none provided]
 - c. David Kelley, Registered Professional Soils Scientist
 - 1. David Kelley Resume – page A000300
 - 2. David Kelley Letter re: Wetland Issues in Ravine, dated October 22, 2023 – page A000305
 - d. Professor Mon Yee, PhD
 - 1. Mon Yee Resume – page A000306
 - 2. Bio of Mon Yee – page A000310
 - 3. Mon Yee Letter re: Jurisdictional Wetland Issues, dated October 22, 2023 – page A000312
 - e. Anthony J. Bredberg, Researcher, Soils Scientist, Wetlands Scientist, Botanist, Agronomist, Geomorphologist, Inventor

Letter from Department of Ecology to Anthony J. Bredberg, dated March 25, 2014 – not listed in exhibit list but provided, starting at page A000314

City of Kirkland Wetland and Stream Determination (duplicate), dated June 6, 2023 – not listed in exhibit list but provided, starting at page A000316

DOE letter to Kirkland, May 15, 2023, with attached DOE publication (duplicate exhibit) – not listed in exhibit list but provided, starting at page A000319

 - 1. Anthony J. Bredberg Resume – page A000332
 - 2. B & A, Inc. Forensic Agronomist Foundation – page A000335
 - 3. B & A, Inc. Press Release with attached discussion of an historic Mexican megatsunami, a 2013 United States patent application, and other documents – page A000336

⁶ See Exhibit A-10.

- A-6. Photos (cover sheet – page A000354)
 - a. 1982.04 S0400-C78-F3100-Timberwood-Apr1982-Sheet 1 – page A000355
 - b. 1982.04 S0400-C78-F3100-Timberwood-Apr1982-Sheet 2 – page A000356
- A-7. Site Plans (cover sheet) – page A000357
 - a. Concept Layout (five lot subdivision of the subject property), undated – page A000358
- A-8. Public Records Requests (PRR) (cover sheet) – page A000359
 - a. PRR P039846-011823, October 16, 2023, Uploaded Files, February 22, 2023 – November 8, 2023, Tallies1 – page A000360
 - b. Dates and correspondence with City for PRR P039846-January 18, 2023 - October 3, 2023 – page A000361
 - c. Timberwood Drainage Repair SW Maintenance File, April 20, 1981 – page A000391
 - d. KC Public Works letter to property owners about potential hazard in Tract B Redacted, September 29, 1982 – page A000398
 - e. Timberwood Drainage Project Redacted, 1982-1984 – page A000406
 - f. 2022.03 swmapbook_M5_-_SE (1) – page A000407
 - g. [none submitted]⁷
 - h. [none submitted]
 - i. [none submitted]
 - j. [none submitted]
- A-9. Reference Manuals (cover sheet) – page A000408
 - a. Army Corps of Engineers Manual, 1987 – page A000409
 - b. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (Version 2.0) Army Corps of Engineers Supplemental Manual, 2010 – page A000552
- A-10. Appellants’ Late Produced information (cover sheet) – page A000705
 - a. Erik B. Ainsworth letter re: Wetland Issues in Ravine, October 27, 2023 – page A000706
 - b. Email exchange between Desiree Goble and Linda Robson, last date January 20, 2023 – page A000710
 - c. Agreement for preparation of Wetland and/or Stream Study – page A000714
 - d. Email exchange between Joe Burcar of DOE and Linda Robson, last date April 24,

⁷ The documents listed in Appellants’ exhibit list as Exhibit A-8.g, A-8.h, A-8.i, and A-8.j may be in the Appellants’ document, but the undersigned was unable to locate them due to the manner in which documents were organized and identified.

2023 – page A000716

- e. The Watershed Company cost proposal for environmental consulting, August 8, 2019 (duplicate) – page A000722⁸
 - f. Anthony J. Bredberg email to Linda Robson re: qualified professionals, October 28, 2023 – page 727
 - g. Legible version of Materials Testing & Consulting, Inc. Sieve Report for subject property, testing dated February 28, 2023 – not Bates stamped
- A-11. Appellants’ Final Comments and Evidence in Response to City’s Rebuttal of Exhibit A-10, undated (not Bates stamped)
- A-12. Appellants’ Closing Argument, November 27, 2023 (not Bates stamped)
- A-13. Appellants’ (Amended) Final Reply to City’s Response to Appellant Closing Arguments, undated (not Bates stamped)

For the City (City exhibits cited in Findings with prefix “C”)

City Staff Report, City’s exhibit packet .pdf page 3⁹

- C-1. Wetland and Stream Determination Letter for Robson Property, dated June 6 2023, packet .pdf page 11
 - a. Department of Ecology letter re: Robson property, dated May 15, 2023, .pdf page 14
 - b. Department of Ecology publication, *Focus on Irrigation-Influenced Wetlands*, July 2010, .pdf page 24
- C-2. Appeal of Wetland and Stream Determination, dated June 20, 2023, .pdf page 27
- C-3. Wetland Resources Inc. Determination, dated July 17 2013, .pdf page 31
- C-4. Soundview Consultants wetland maps (two figures), dated September 25, 2018, .pdf page 34
- C-5. The Watershed Company cost estimate, dated May 21, 2020, .pdf page 36
- C-6. The Watershed Company Delineation Report, dated August 18, 2020, .pdf page 38
- C-7. B & A Inc. Report (Parts 1-4), dated October 19, 2022, .pdf page 74
- C-8. E-mail to Washington Department of Ecology requesting technical assistance, dated January 24, 2023, .pdf page 221
- C-9. Morning Heights Street and Storm Drain Plan and Profile Drawing, dated May 6, 1968, .pdf page 223

⁸ The document offered by Appellants at their pages A000724-000726 was withdrawn by Appellants at hearing and not admitted. *Hearing Recording*.

⁹ The City’s Staff Report was not included on the City’s Exhibit list and was not given an exhibit number. This document will refer to it as the City’s Staff Report. Further, City Exhibits 1 through 17 were submitted in a single .pdf document, which has bookmarks, but this exhibit list will provide the first page of each document as “.pdf page [X].”

- C-10. Timberwood Road and Storm Drain Plan, approved June 10, 1974, .pdf page 224
- C-11. Timberwood Subdivision, recorded November 14, 1974, .pdf page 226
- C-12. SP977014 Storm Drainage Design, approved May 29, 1977, .pdf page 228
- C-13. Letter from Hooper to Peeler, dated July 29, 1982, .pdf page 230
- C-14. Timberwood Drainage Repair As Built Plans, dated July 29, 1984, .pdf page 231
- C-15. Poplar Lane No. 2 Storm Drain Plan, approved February 20, 1968, .pdf page 233
- C-16. Robson Property Vicinity Map, .pdf page 234
- C-17. Summary of Drainage System near 9531 NE 140th Street by Kelli Jones, dated October 23, 2023, .pdf page 235
- C-18. Email exchange between the Robsons, Anthony J. Bredberg, Kevin Nortness, and Stephanie Croll (among others) first date December 13, 2022 and last date December 22, 2022¹⁰
- C-19. *Bredberg v. Middaugh*, Case No. C20-190 MJP, (W.D. Wash. Jul. 10, 2020)
- C-20. *Bredberg v. Soil Science Society of America*, Case No. 11-6072-HO (US District Court, District of Oregon, Aug. 5, 2011)
- C-21. Memorandum from Kelli Jones, PE, to Stephanie Croll re: Access Road for Timberwood Drainage Repair, November 13, 2023
- C-22. City's Post-Hearing legal brief (entitled City's LUPA Response), dated December 4, 2023

The record also includes: (cited in Findings as "Record Document")

- A. Order Setting Hearing and Pre-Hearing Schedule, August 3, 2023
- B. Notice of Appearance of Attorney Stephanie E. Croll for the City, August 4, 2023
- C. Notice of Appearance of Attorney Brian C. Zuanich for Appellant, August 7, 2023
- D. Appellants Request for Pre-Hearing Conference, dated October 5, 2023
- E. Appellants Motion to Compel Discovery, dated October 9, 2023
- F. Second Pre-Hearing Order, October 16, 2023
- G. City Motion to Strike, November 3, 2023
- H. Appellant Response to City's Motion to Strike, dated November 2, 2023
- I. Post-Hearing Order Ruling on Appellants' Motion to Extend Post-Hearing Schedule, December 15, 2023, with the following attachments:
 - 1) Email from Sharon Rice to Bryan Cole, dated November 9, 2023, containing final post-hearing schedule

¹⁰ City Exhibits 18 through 21 were submitted in response to Appellants' late disclosed Exhibit 10, consistent with the post-hearing schedule.

- 2) Email from Linda and Phil Robson to Bryan Cole, dated December 7, 2023 9:23 am, requesting pause/extension of post-hearing schedule
- 3) Email from Stephanie Croll to Sharon Rice, dated December 7, 2023 10:08 am, objecting to extension of post-hearing schedule
- 4) Email from Linda and Phil Robson to Bryan Cole, dated December 7, 2023 11:00 am, arguing in favor of their extension request
- 5) Email from the Examiner to the parties via Bryan Cole, dated December 7, 2023 2:45 pm, requesting more information to decide the motion
- 6) Email from Linda and Phil Robson to Bryan Cole forward to the Examiner, dated December 8, 2023 9:58 am, providing a response to request for more information and requesting extension of post-hearing schedule through February 26, 2024
- 7) Email from Stephanie Croll to Bryan Cole and Sharon Rice, dated December 8, 2023 10:08 am, stating additional information about their objection to extension of post-hearing schedule
- 8) Email from Linda and Phil Robson forwarded by Bryan Cole to the Examiner, dated December 11, 2023 3:55 pm, confirming their ongoing extension request despite having submitted final closing argument per the schedule
- 9) Email from the Examiner to the parties via Bryan Cole, dated December 11, 2023 4:34 pm, second request for additional information to decide the motion
- 10) Email from Stephanie Croll forwarded via Bryan Cole, dated December 12, 2023 11:14 am, responding to Examiner's second request for information in response to Appellants' motion for/City's objection to extension of post-hearing schedule
- 11) Email from Linda and Phil Robson forwarded by Bryan Cole to the Examiner, dated December 12, 2023 3:35 pm, responding to Examiner's second request for information in response to Appellants' motion for/City's objection to extension of post-hearing schedule
- 12) Email from Stephanie Croll forwarded via Bryan Cole, dated December 15, 2023 11:19 am, with the City's Response to the Post-Hearing Order
- 13) Email to the parties from the Examiner via Bryan Cole, dated December 15, 2023 11:31 am, addressing the City's response to the Post-Hearing Order

Based on the record developed at the open record hearing, the Hearing Examiner enters the following findings and conclusions.

FINDINGS

Decision and Appeal

1. In reviewing a development proposal, on June 6, 2023, the City of Kirkland Planning Official issued a "Wetland and Stream Determination for the property at 9531 NE 140th Street" (the subject property), informing the owners Phil and Linda Robson that their property included two regulated critical area features.

Wetland A is a Category III wetland with five (5) habitat points, and it requires a buffer width of 105 feet from the edge of the delineated wetland boundary. Wetland A extends southeast onto the neighbor's property. Wetland A is identified by flags WLF A-1 through WLF A-21 on the Preliminary Topographic Survey for Linda Robson prepared by ORCA Land Surveying and dated August 31, 2020. The required minimum 105-foot buffer from the edge of Wetland A is also shown on this survey.

Stream A is a Type Np stream with standard buffer width of 50 feet and is located within Wetland A on the east side of the site, flowing to the east and running offsite onto the neighbor's property on the southeast side of the property. Stream A is identified by flags WMA 1-R to WMA6-R and WMA 1-L to WMA6-L on the Preliminary Topographic Survey for Linda Robson prepared by ORCA Land Surveying and dated August 31, 2020. The required minimum 50-foot buffer from the edge of Stream A is not shown on this survey, but would be encompassed by Wetland A and by the buffer for Wetland A.

In addition, each critical area buffer has a required 10-foot structure setback from the upland edge of the entire buffer.

Exhibit C-1. This decision expressly rejected the property owners' contention that the wetland – which as of the filing of the appeal, all parties agreed existed on the subject property – has been created unintentionally as a result of the construction of a road, street, or highway, concluding instead that it came into existence as a result of historical surface water flows and groundwater flows that predated the construction of roads required to serve the surrounding developments and the Robsons' property. *Exhibits C-1 and City Staff Report.*

2. On June 20, 2023, a timely appeal was submitted by Phil and Linda Robson (Appellants) contesting the wetland and stream determination issued by the Planning Official, alleging the following (abbreviated, paraphrased) errors in the wetland and stream determination:
 - 1) The City erred in determining there was a wetland on the property before July 1, 1990.
 - 2) It was error to conclude the wetland was naturally created. Appellants contended it was unintentionally created when stormwater facilities were retroactively installed as part of a County road project.
 - 3) Department of Ecology's review was biased (with respect to Appellants' consultant), and the Appellants are entitled to unbiased review.

*Exhibit C-2.*¹¹

Critical Areas Information in the Record

¹¹ This abbreviated/paraphrased of the statements of alleged error in the appeal was accepted by the Appellants and the City during the first pre-hearing conference. It merges statements of error 2 and 3 from the appeal letter. *Record Document A; Exhibit C-2.*

3. The Robsons own the single-family residential parcel addressed as 9531 NE 140th Street in Kirkland, King County, Washington (the subject property).¹² The irregularly shaped approximately 1.5-acre subject property is currently improved with a single-family residence, garage, and a sport/basketball court, which are accessed by a driveway from a cul-de-sac in the northwest corner of the property. The east-most portion of the property abuts another cul-de-sac in a nearby segment of discontinuous NE 140th street. The majority of the subject property is unimproved and vegetated with native trees and shrubs, herbaceous vegetation, and ornamental species. Topography slopes down from west to east, steeply from north to south, and moderately from south to north, creating a feature described as a ravine by one critical area consultant (in Exhibit C-3) through the southern central portion of the site. The subject property is surrounded by single-family residential development including the Timberwood Subdivision which abuts the site to the west, the Morning Heights Division No. 1 subdivision to the east, and Poplar Lane No.2 to the south. The lots to the north were created at the same time as the subject property in Short Plat No. 977014. Immediately west of the subject ravine is Timberwood's Tract B, a forested open space/drainage easement tract that according to the face of the plat contained at the time of its 1974 subdivision an existing natural drainage course that lines up with the ravine on the Robsons' property. *Exhibits C-3, C-4 (Figures 1 and 2), and C-16; see Exhibit C-8, .pdf page 227; Google Maps site view.*
4. Pursuant to Kirkland Zoning Code (KZC) 90.105, in the course of reviewing a development application, the City of Kirkland's (City) Planning Official must determine whether a wetland exists on or within 300 feet of the subject property, and whether a stream exists on or within 125 feet of the subject property. If a critical area is identified through initial review, a critical areas report must be prepared to support the Planning Official's final determination. *KZC 90.105.* The critical area report must be prepared by a qualified professional. *KZC 90.110.2(b)(2); KZC 5.10.748.*
5. On July 29, 2019, Linda Robson filed a pre-submittal application with the City to initiate the process of developing a four-lot short subdivision of their property. With the application, Ms. Robson submitted a wetland determination for her property prepared by Wetland Resources Inc. (WRI) dated July 17, 2013.¹³ *City Staff Report; Dawn Nelson Testimony.* This document stated that WRI was hired by the Appellants to complete a site investigation and wetland delineation to locate jurisdictional wetlands and streams on and adjacent to the subject property. This wetland determination identified a Type 3 wetland on the property, with soil saturated to the surface at the time of the delineation, and several small/narrow ditches flowing throughout the wetland. The consultant stated that the water appeared to be moving downslope from the neighboring properties to the south, most of it eventually ending up in a "sewer catch basin" located on the Robson property, which is located within the Juanita Creek basin. This 2013 report indicated that at the time, Type 3 wetlands required a 50-foot buffer. The report did not delineate or

¹² The Robsons' property is a portion of Section 19, Township 26N, Range 05E, W.M.; also known as King County Parcel #1926059201. *Exhibits C-3 and C-7.*

¹³ Note, the short plat application is not in the record, but a conceptual plan of a short plat of the subject property is in the record at Exhibit A-7.a.

identify a stream on site. The report contains text only and does not contain any wetland rating data sheets, but it appears to have included a delineation map. *Exhibits C2 and C-7, .pdf page 163.*¹⁴

6. Mrs. Robson's submittal also included two figures prepared by Soundview Consultants depicting existing conditions on the subject property. Figure 1 depicted a Category IV wetland in the southern central portion of the property and indicated that it required a 40-foot buffer which extended offsite. The wetland and buffer encumbered approximately one-third of the parcel. Soundview Consultants' Figure 2 showed the "currently existing" wetland in green superimposed over a larger area in blue which the figure identified as the boundaries of the wetland delineated in a previous study, presumably the 2013 WRI delineation. The information from Soundview Consultants in the record is limited to these two figures; s no written report and no wetland rating data sheets are attached. *Exhibit C-4.*
7. Due to these indications that a wetland was present, City Staff notified the Robsons that a full critical area report would be required as part of the short plat application. Kirkland's critical areas ordinance (CAO) requires that a critical area report be prepared by a qualified critical area professional, defined at KZC 5.10.748, and states that an applicant must either fund a report prepared by the City or City's consultant or submit a report prepared by a qualified critical area professional and fund a peer review of that report by the City or City's consultant. *KZC 90.110.2.* The City uses The Watershed Company as a qualified critical area professional consultant to prepare critical area reports and provide peer review of reports by others, and Staff requested a cost estimate from them. The Robsons elected to have the required critical area report prepared by The Watershed Company. *Exhibits C-5 and C-6; City Staff Report.*
8. The Watershed Company submitted a Wetland Delineation Report, dated August 18, 2020, with a wetland delineation sketch, wetland determination data sheets, and wetland rating forms and figures. This report determined that the subject property contains one slope wetland (Wetland A) and one stream (Stream A) sourced from a seep shown in a photo identified as Figure 2 on page 6 of the report. It rated Wetland A as a Category III wetland with five habitat points, requiring a 105-foot buffer, and it rated Stream A as a perennial non-fish bearing Type-Np stream, requiring a 50-foot buffer located wholly within the wetland buffer. *See Exhibit C-6, Wetland Delineation Sketch.* The 150-foot wetland buffer is depicted as encompassing the majority of the subject property and extending offsite to the east, south, and west. *Exhibit C-6, Wetland Figure 2 (City's exhibit packet .pdf page 69).*
9. On October 20, 2022, the Robsons submitted a wetland survey prepared by Orca Land Surveying (dated August 31, 2020), which the City accepted as adequate for the CAO's

¹⁴ Note, the Appellants submitted a map/graphic in the record that Mr. Bredberg asserts was the map either used by or created by the consultants who prepared the 2013 WRI report. It is in the record in the City's exhibit packet at .pdf 153 with red lettering and inserted photograph by Appellants and again at .pdf 163 without lettering/inserted photo.

purposes. This survey maps the location of the delineated wetland boundary, shown as extending slightly offsite to the east in the southeastern corner of the subject property.¹⁵ It depicts a standard 105-foot wetland buffer (red hatched area) as well as a 10-foot building setback line (green hatched area) from the edge of the standard buffer. The 105-foot buffer occupies all of the southern portion of the property and extends offsite to the east, south, and west, while to the north the buffer and structure setback line extend nearly to the northern property boundary, leaving only a narrow sliver of the northwest corner of the property outside these encumbered areas. The majority of the existing residential improvements are within the standard buffer as depicted. This survey also depicts a reduced 78.75-foot buffer without a building setback line (orange shaded area), which would leave an unencumbered chunk of the northeastern corner of the site approximately 48 feet at its narrowest, and another unencumbered chunk of the northwest corner of the property; both of the resulting unencumbered chunks happen to touch the cul-de-sacs at either end of the site. It would also leave a very narrow stripe unencumbered along the western site boundary. The survey depicts a gravel access driveway to the stormwater facility in the ravine extending along the southern site boundary from the western cul-de-sac. At least three-quarters of the subject property remains encumbered by the reduced wetland buffer. *Exhibit C-7, .pdf page 205; Exhibit A-2.d, page A000147.*

10. The next critical areas document in the record is a report prepared by B & A Inc, dated October 19, 2022, addressing “wetland issues in ravine” on site. In this report, the Appellants’ expert Mr. Bredberg concluded that “[w]etlands are present, but were created from the actions related to road construction stormwater management. Reports have been prepared showing wetlands on the site and these reports are accurate and these wetlands are not regulated.” *Exhibit C-7, page 1.* This report concludes that:

[T]hat a wetland is present and it is “**unintentionally created as a result of the construction of a road, street, or highway.**” The construction occurred prior to **July 1, 1990**, but the evidence shows the wetland did not occur until after that date. As such, the wetlands in the ravine we see today are a result of road construction and were unintentionally formed after July 1, 1990. ...

It is agreed upon that a wetland exists. Three studies and surveys show this and they are considered accurate. The issue is whether the wetlands are jurisdictional.

Exhibit C-7, page 2 (bold in the original).

11. The October 2022 B & A Inc. report provided a large amount of background information, based on which Mr. Bredberg asserted (in summary) the following: a floodplain easement in the onsite ravine as shown in a 1979 short plat is one of a number of confusing easements; that the only source of water in the historical record is one notation of one seep in the south face of the ravine called out in a 1980 King County drainage line site plan; and that the April 1983 excavation of the ravine to install a stormwater facility removed previously existing silt caps from the faces of the ravine and constituted a reset

¹⁵ The survey does not identify whether Orca staff personally delineated the wetland or whether they are working from a prior delineation, and if the latter, which one. *Exhibit C-7, packet .pdf page 205.*

of “normal circumstances,” which must be established to determine if the wetland is regulated, and that as of the 1983 excavation, no source of water existed in the ravine aside from the stormwater feature; that due to excavation and soil compaction during construction, the subsurface flows were disrupted and decades later, rose to the surface and resulting in a wetland circa 2005 as evidenced by a King County sketch associated with a work order related to maintaining the stormwater system; and that the ravine is a relict glacial meltwater channel. In short, Mr. Bredberg concluded based on his review of the available information he found relevant that no wetlands were present onsite prior to 1990 and those existing as of his October 2022 report resulted from the installation of a stormwater detention system he contended was installed to control runoff resulting from road construction before 1990. *Exhibit C-7*.

12. Mr. Bredberg’s resume states he has a Master of Science degree in agronomy and 50 years professional experience as “Researcher, Soil Scientist, Wetlands Scientist, Botanist, Agronomist, Geomorphologist, Inventor.” *Exhibit A-2.3, page A000160*. While the City accepted the October 2022 B & A Inc. report, the City submitted that Mr. Bredberg does not appear to meet the City code’s definition of a qualified critical area professional because he does not appear to be a certified professional wetland scientist as defined in KZC 5.10.748 and as required in KZC 90.110.2(b)(2).¹⁶ Nevertheless, the City included the B & A Inc. report in the materials it reviewed to make the determination of whether the wetland at the Robsons’ property is regulated. *City’s Staff Report*.
13. The City’s definition of wetland is identical to that in state statute.¹⁷ Due to this shared definition, and in part because the Washington State Department of Ecology (DOE) is an agency with expertise in the delineation and protection of wetlands¹⁸, it is the City’s standard practice in cases where it is difficult to determine whether a feature is a regulated wetland to enlist technical assistance in reviewing the wetland reports from DOE Staff. In this case, the City provided DOE Staff with the October 2022 B & A Inc. report, all wetland delineations, determinations, and reconnaissance reports of the subject

¹⁶ The City indicated that it had searched the Society of Wetland Scientists database at <https://www.wetlandcert.org/forms.html> and Mr. Bredberg was not identified. *City’s Staff Report*. Despite the City making this assertion verbally and in writing, the consultant did not submit evidence that he is a certified professional wetland scientist.

¹⁷ The City’s CAO definition of “wetland” excludes (i) those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or (ii) those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. *KZC 5.10.985*. This definition is identical to the state of Washington’s definition of a “wetland.” *RCW 36.70A.030(48); RCW 90.58.030(2)(h); WAC 173-201A.020*.

¹⁸ Pursuant to *RCW 90.48.030*, the Washington State Department of Ecology is granted authority “to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington, including wetlands. According to DOE, as an independent regulatory authority with jurisdiction over Washington wetlands, the Department offers technical assistance to local governments as providers of best available science (BAS) and guidance for wetland management and protection. *Exhibit C-1.A*.

property, some historical aerial photos, and other relevant information and asked the DOE Staff's opinion on the following issues:

1. Did DOE think there was sufficient evidence available to determine that the wetland was in existence prior to July 1, 1990?
2. If no, did DOE think the wetland had been unintentionally created after July 1, 1990 as a result of the construction of a road, street, or highway?
3. If no, did DOE think the wetland had been "intentionally created from a non-wetland site, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, [or] detention facilities . . .?"

Exhibit C-8; City's Staff Report.

14. Department of Ecology Staff conducted at least three site visits, including a December 9, 2022 visit to observe ravines north of the subject property, a December 30, 2022 visit to observe the ravine immediately west of the subject property, and a March 9, 2023 visit to the subject property itself. DOE Staff also reviewed available information detailed in its memo. *See Exhibit C-1.A, .pdf pages 17-19.* Ultimately, DOE concluded there was insufficient information to determine whether a wetland was present on the subject property prior to July 1, 1990. Turning to the question of whether the existing wetland is exempt from regulation under one of the two exceptions in City and State definitions of wetland, DOE reviewed two sources containing substantially similar guidance and found the following statement instructive.

"The only situation where an artificial, non-jurisdictional wetland results from an unintentional action is when construction of a road (after July 1, 1990) inadvertently creates a new wetland."

Exhibit C-1.A, .pdf page 20. DOE construed this statement to mean that the road creating the wetland in question cannot have existed prior to July 1, 1990, and also that "new wetland" means no wetlands existed within or immediately adjacent to the footprint of the road prior to its construction. DOE determined that flowing water has been consistently present in the onsite ravine since at least the early 1980s, that all features around the subject property that could be considered a road, street, or highway were built prior to July 1, 1990, and that while there are roads around the subject property, none were directly resulting in water being impounded so as to create the wetland. Finally, DOE determined that there is no evidence to support a conclusion that the wetland was intentionally created. In sum, DOE Staff determined that the onsite wetland is not exempt from regulation under the exemptions in City or state definitions of wetland, and therefore that it is a regulated wetland. *Exhibit C-1.A.*

15. The June 6, 2023 Wetland and Stream Determination was issued following completion of the City's review of the information in all of the above identified reports and reviews. *City Staff Report; Exhibit C-1; Testimony of Dawn Nelson and Adam Weinstein.*

Appellants' Case

16. The Robsons purchased the property in December 1981, at which time it was 1.25 acres. In early 1983, King County installed the Timberwood drainage project in the ravine in the south portion of their property, and when it was “done, the property was completely dry.” *Linda Robson Testimony*. The Robsons reported that from the mid-1980s through “at least the mid-1990s,” they enjoyed free use of the whole property including the ravine, hosting parties and gatherings in the ravine making use of trails, camping, ziplining, and gathering around a picnic table and fire pit. The entire parcel was fenced. The family raised guide dogs for the blind, and the dogs were never muddy. The Robsons stated that the King County Timberwood drainage project significantly altered the ravine when it “connected the underground road drainage pipe in the greenbelt-ravine west of our property to a similarly sized drainage pipe that King County installed at the bottom of our ravine running east to the neighboring property.” Subsequently, former neighbors sold them one-quarter acre, increasing their parcel to 1.5 acres, and the Robsons began to plan a short plat in which they would create a parcel containing their residence and stay there, but sell off several other parcels. When the 2013 wetland report showed a wetland onsite, they realized the property was no longer dry and they first understood there was a problem. At the time, they couldn’t afford to pursue the plat they planned. Later, when they returned to their pursuit of a short plat, the Watershed Company delineation showed a wetland and buffer encumbering the majority of their property. *Exhibit A-2.d, page A000148; Linda Robson Testimony*.
17. Because of this history of use of the ravine, the Appellants did not agree with the Watershed Company’s wetland and stream delineation. They “sought a better qualified and more experienced opinion” and hired Anthony J. Bredberg of B & A Inc., who they stated, “has a history of correcting The Watershed Company’s errors in Kirkland and other cities.” They contended that Mr. Bredberg’s October 2022 report correctly details the lack of a stream and regulated wetlands onsite. (Its conclusions, presented in Findings 10 and 11, are not restated here.) *Exhibits A-2.a and A-12 (quotes from page 2); Linda Robson Testimony*.
18. On October 23, 2023, B & A Inc. provided to the Appellants a supplemental report entitled “Addendum Wetland and Stream Issues,” which was submitted to the City and the record of these proceedings on October 24, 2023. This addendum report forwarded new arguments not previously raised in the appeal letter or the previous B & A Inc. report.¹⁹ First, Mr. Bredberg argued that there is no stream on the subject property, but that the flowing water sometimes observed in the historical documentation meets the definition of “watercourse” in Kirkland Municipal Code (KMC) 15.04.360.²⁰ He

¹⁹ On November 3, 2023, one business day before the hearing, the City submitted a motion to strike, seeking to limit the scope of Appellants’ evidence and witness testimony on two grounds: because the appeal letter did not challenge the stream determination and because Appellants did not submit documents from two expert witnesses until just prior to hearing. *Record Document G; Stephanie Croll Argument*. At hearing, the City’s notion to strike was denied, and the Appellants were allowed to present all witness testimony and to argue the stream determination.

²⁰ KMC 15.04.360 “Watercourse” means a channel in which a natural flow of water occurs or has occurred either continuously or intermittently.

contended that because it meets said definition, it should be regulated under KZC 5.83 (Shoreline Management) rather than under KZC Chapter 5.90 (Critical Areas), under which streams are defined and regulated differently.²¹ As asserted in his October 2022 report, Mr. Bredberg characterized the subject ravine as a glacial meltwater channel, which typically has a sandy bottom. Mr. Bredberg contended that the 1983 site photos showing the ravine after it had been excavated for installation of the Timberwood drainage project and a 1982 letter from the King County Engineer provide proof of the sandy bottomed glacial meltwater channel, and argued that no stream ever flowed in this channel because water in it has historically infiltrated and traveled laterally subsurface down the slope. *Exhibit A-2.e pages A000163-68 and A-2.b page A000050-53.*

19. Further, the October 2023 Addendum revoked B & A Inc.'s previous agreement that the wet feature on the property is a wetland, though not regulated because it was created after July 1, 1990 by road construction, and argued instead that it is not a wetland. The addendum contended that the excavation of the ravine by the County in 1983 reset "normal circumstances" for the land as contemplated in the 1987 Federal Army Corps of Engineers Manual.²² Appellants contended that because of the 1983 excavation of the ravine and installation of a drainage project intended to dry the area, normal circumstances for the ravine are dry. Acknowledging that one seep was identified in the south bank of the ravine on the Timberwood plat map, Appellants contended that the 1983 drainage project drained the seep pursuant to an issued permit, thus establishing dry normal conditions for the ravine. Mr. Bredberg further contended that it was failure of the installed Timberwood drainage system that caused the water to enter the ravine and create what now appear to be wetland conditions. Because the drainage system in the ravine continues to be identified on the City's Public Works problem areas list and has been a relatively continuous "construction site" related to various drainage system repairs since at least 2005, the wet feature in the ravine meets the Army Corps manual definition of a waterfilled depression rather than that of a wetland. Mr. Bredberg concluded:

If the site is delineated under existing conditions, the evidence shows the area was dry in 1983; testimony of the Robsons will confirm it was still dry in the 1990's and City records do not show a water problem until 2005. Thus, the installation of the stormwater vault to handle road runoff created the wetland condition observed after the mid 90's, which was after July 1990. Concluding,

²¹ KZC 5.10.895 Stream: Areas where surface waters produce a defined channel or bed that demonstrates clear evidence of the passage of water, including but 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, provided there is evidence of at least intermittent flow during years of normal rainfall. Streams do not include irrigation ditches, canals, storm or surface water runoff devices, or other entirely artificial watercourses, unless they are used by salmonids or convey a naturally occurring stream that has been diverted into the artificial channel, or are created for the purposes of stream mitigation.

²² The October 2023 addendum quotes "User Notes" from the manual: "Normal Circumstances" has been further defined as "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." The determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alterations of wetlands hydrology and hydrophytic vegetation" and consideration of the "purpose and cause of the physical alterations to hydrology and vegetation." (This note is found in Exhibit A-9a, page A000423.)

the wetland was created after 1990 by road construction and as such is not regulated.

Exhibit A-2.e, page A000167.

20. In his hearing testimony addressing alleged errors 1 and 2 of the appeal, Mr. Bredberg confirmed his written assertion that road construction created the wetland, because the Timberwood plat did not provide enough stormwater retention, and the stormwater facility installed in the ravine was a retrofit of that earlier road construction. Mr. Bredberg testified that there was a wetland there before 1983, as shown in County photographs from 1982, and there may have been a stream, but these features were eliminated in the 1983 drainage construction project.²³ He contended that the Robsons' 1983 photos during construction of the stormwater facility were taken in April and they show no evidence of water in the ravine, despite April being a typically wet season in the area, and asserted that if seeps had been the source of the water that later affected the ravine, the sides of ravine would appear wet in the 1983 photos. He stated that there was no wetland in the ravine between 1983 and 1995, but that as of 2005, the ravine got too wet to bring in the big equipment to service the stormwater vaults. He stated that he has put the available information together to understand it forensically from a soil physics perspective, and that it is no surprise that it can take up to 20 years for water to find a new course after disturbances as altering as the 1983 stormwater facility construction. Asserting that County Public Works had to add gravel to the access road to service the stormwater facility in 2005, Mr. Bredberg contended that this should be considered evidence that the wetness was caused by the excavating of the ravine. If there are features present today that can be characterized as a wetland or stream, he testified that these evolved from failures of the drainage system. He also argued that any water present there now should be considered point discharge from road runoff, because the after the fact installation of the stormwater facility is evidence that the stormwater detention initially provided when the roads were built was insufficient. He testified that any side seeps currently feeding the ravine may be "existing conditions," but they do not negate the requirement to consider "normal circumstances" which were reset to dry as of the 1983 drainage project. Mr. Bredberg argued that the Robsons' property was damaged by the County and should be restored. *Anthony J. Bredberg Testimony.*
21. Mr. Bredberg disagreed with DOE Staff's conclusion that the only way to create a wetland with road construction is impoundment by a newly constructed road, contending that DOE's position is inconsistent with best available science. He concluded that the wetland reports relied upon by the City do not follow the federal manuals because they ignore that normal circumstances were established at the time of the 1983 drainage project done with the benefit of permitting. *Anthony J. Bredberg Testimony.*
22. On the third error alleged in the appeal, Mr. Bredberg contended that the City did not obtain a peer review by a qualified professional of his October 2022 report, and that none of the wetland studies relied upon by the City were prepared by persons with the

²³ Hearing record time stamp 2:42:20. And at time stamp 3:12:12: "Prior to '82, there were wetlands, but they were legally drained."

qualifications needed to peer review his report. He testified that the fact that DOE was asked to review his October 2022 report was inappropriate due to a letter about him that DOE provided to the City, presumably because that letter can be construed as calling into question his professional qualifications or opinions. He contended that the fact that the May 15, 2023 DOE letter does not mention his report means they did not consider it, that biologists are not qualified to peer review his work, and that without any refutation from a qualified professional, his report stands as unquestioned fact in the record. In his October 2022 report, Mr. Bredberg stated that lacking a soil scientist review of this report, his report is best available science and nothing short of a detailed report written by a peer would override his report. In apparent support of these assertions, Mr. Bredberg cites Washington Administrative Code (WAC) 365-195-905(3), (4), and (5).²⁴ *Exhibit A-2.a, pages A000018-19.*

23. The Appellants next offered the testimony of Lawrence Fisher, a fisheries biologist with a Master of Science in fisheries. Mr. Fisher prepared a report entitled Watercourse Assessment in the record at Exhibit A-5.a and testified on behalf of Appellants at hearing. Having reviewed the October 2022 B & A Inc. report and its attachments and having visited the site, Mr. Fisher agreed that drainage through the ravine has been buried in an underground system that was built by local government agencies to address drainage issues that resulted from surrounding residential development. Mr. Fisher submitted that because this drainage is buried and lacks an above-ground channel system, it does not meet the state and City of Kirkland definitions of a jurisdictional watercourse or stream. He stated that he did not see any documentation that a natural watercourse existed at the site prior to the development of the local area and construction of artificial stormwater conveyance systems to accommodate the drainage issues created by the development. Further, Mr. Fisher concurred with the conclusions in the October 2022 B & A Inc. report that the wetland on site, which is located over the top of the Timberwood stormwater vault, has resulted from the rise in groundwater levels due to soil compaction during the installation of the Timberwood Drainage Project in the ravine in 1983. Finally, Mr. Fisher corroborated observations reported by the Robsons and Mr. Bredberg that a new 12-inch diameter culvert had been installed in approximately 2017 or 2018 from the south side to the main buried culvert in the southeasterly portion of the onsite ravine, which all three parties alleged was apparently installed by the City of Kirkland on the

²⁴In additional detail, Mr. Bredberg wrote: “A peer review is required of this report and a biologist does not meet those requirements. Someone with background in soil geomorphology, soil water movement, soil classification, air photo interpretation, basic engineering, water design and forensic evaluation is needed to understand this report. If the City cannot find a qualified individual or team for the review, the author is available to explain the report. No one is allowed on the site for a review without the author present. If there is any disagreement on the factual findings presented, it may be easiest to go before the hearing examiner for an evaluation of the facts. It is imperative for any reviewer to read and understand the entire report. The section on methodology and Best Available Science (BAS) requires a forensic soil scientist/classifier/geomorphologist to perform a peer review.” *Exhibit A-2.a, page A000017.* He further stated: “Please note that a peer review is required to overturn conclusions of this report. Further, lacking a peer to review the work, the author is happy to take as much time as needed and answer all question in support of this report as long as the questioning comes from a qualified professional with expertise per the peer review. Any site visit must be accompanied by the author and any field work in his absence will not be accepted, period.” *Exhibit A-2, page A000028.*

Robsons' property without their permission and/or in the ravine, which the City now claims to be a regulated critical area. *Exhibit A-5.a(2), page A000059; Lawrence Fisher Testimony.*

24. On cross examination when was asked to look at Figure 2 from The Watershed Company report (Exhibit C-6, .pdf page 43), Mr. Fisher testified that the feature in the photograph looks like a tributary to him and that if it is still aboveground, it could be considered a jurisdictional stream. Looking at Figure 3 (same page), he testified that it appeared to be a trash rack on a stream culvert outlet; he was unable to say where these two photographed features are located on the Orca survey. He clarified that he could not say who installed the trash rack in the ravine and could not confirm when it was installed, only that he agreed with Mr. Bredberg that the City could have done it in maintaining the drainage facility and, that if this were a jurisdictional watercourse, permits would have been required to install it. *Lawrence Fisher Testimony.*

25. The Appellants next offered the testimony of David Kelley, whose resume indicates he holds a Master of Science in botany. Mr. Kelley reviewed the October 2022 B & A Inc. report, the City's June 6, 2023 wetland and stream determination, and the May 15, 2023 DOE letter. He testified for Appellants that he visited the site and observed wetland and vegetation conditions in the ravine. Acknowledging that there are different regulations at the federal, state, and local level, he stated that the issue is whether the wetland onsite is regulated. On the question of whether it has been a wetland since 1990, Mr. Kelley stated that there is not a wetland in Washington that results from one source of water. In his opinion, the system in that ravine is a "plumbed system", in which natural water was put into pipes. He opined that if there is a wetland there now, it has occurred since 1983, at which time it was a dry ravine, a glacial meltwater channel that had completely dried up rather than a ravine formed by stream. Mr. Kelley testified that road construction involves ditches and stormwater management, and that if roads had not been built, the homes could not have been built, and then the stormwater collection system would not have been necessary. He submitted that there would be no purpose for a road without the houses it serves, and that a lot of the water currently in the drainage system is from roadways, although there is no question there are other sources up water upslope that also contribute. He stated that the feature currently in the ravine does perform as a wetland. He submitted that the stormwater pipes are 10 to 12 feet underground, and yet there was still water in that system in August 2023 at the time of his visit. He submitted that the existing wetland on the surface is like leaky plumbing, and that the stormwater system installation, especially the construction of the clean out road and its retaining walls which themselves act as catchments, is all a complication of the construction of roads. Mr. Kelley disagreed with the DOE responses to the City's three questions and submitted that they should have peer reviewed the B & A Inc. report. Regarding whether there is a stream onsite, Mr. Kelley submitted that a stream is defined by bed and bank, which this watercourse lacks, and that there is no such thing as a 15-foot stream. He submitted that there are no fish issues with respect to the onsite drainage. On cross examination, Mr. Kelley testified that he did not write a written report because he was tasked with peer reviewing the B & A Inc. report; he didn't do data collection. He stated that the wetland onsite was likely created from construction of the stormwater vault, but that it was

designed to take that water away and not create a wetland, such that the resulting wetland might be due to age or failure of the underground system. He stated that the water that is there now has regulatory status and that work has been conducted in it (presumably the 2017-2018 trash rack) that was unpermitted. When asked about other sources of water in the ravine, he testified that construction of road must include stormwater management, and that it is common that stormwater systems handle water from multiple sources. When asked directly if the Timberwood drainage facility was installed to catch only road runoff, he submitted the opinion that it was definitely created to catch water from the road and other sources. *David Kelley Testimony.*

26. Finally, the Appellants offered the testimony of Erik Ainsworth, a Professional Engineer who in addition to his testimony submitted a letter in the record addressing “wetland issues in the ravine” dated October 27, 2023. Mr. Ainsworth performed a site visit in February 2023 during which he dug two excavator test pits and had the soils analyzed. *Exhibit A-10.g.* He determined that the soil in the bottom of the ravine is an imported silt fill material installed when the Timberwood drainage project was constructed. His letter mentioned that while onsite he observed several active [seeps] from the south slope of the ravine. Mr. Ainsworth submitted that both the amount of stormwater and the characteristics of the drainage likely changed over time as development became increasingly dense around the location of the ravine, which he said could explain why the ravine was reported to have been dry in the 1980s and then became wet in the 1990s. He noted that residential development is often accompanied by decrease in native forest cover, which would cause previously infiltrated precipitation to instead flow subsurface to the ravine. Mr. Ainsworth concluded that the fact that an access road was built to access part of the Timberwood drainage facility in the ravine but not provided with mitigation for its own stormwater runoff both caused runoff from the access road to contribute to the volume of water in the ravine and affected previously present subsurface water flows causing them to surface in the ravine, and that therefore the wetland is manmade and not a natural feature. On cross examination, Mr. Ainsworth was asked how installation of the Timberwood drainage project meets the code’s wetland exception, which requires construction of a road. He said that roads generate runoff and that the system installed in the ravine mitigates road runoff from surrounding roadways and that the pipes installed by King County in the ravine were installed to manage road runoff. He testified that had a proper road been built to the facility with stormwater mitigation, the wetland would not have developed. *Erik Ainsworth Testimony.*

City’s Case

27. Addressing alleged error 1 as stated in the appeal, which contended that the City erred in determining that a wetland existed onsite prior to July 1, 1990, the City submitted that the wetland and stream determination under appeal expressly did not conclude that a wetland existed on the subject property prior to July 1, 1990, but instead concluded that there is substantial evidence that water has been flowing across the property from west to east since well before 1990. The City pointed to the following historical sources of information.

- The Morning Heights street and storm drain plan and profile, approved by King County in May 1968, shows an open watercourse then flowing across the southern portion of the subject property, entering approximately 70 feet from the south property line and flowing through the ravine to a point approximately 60 feet west and 80 feet north of the southwest corner of the Morning Heights boundary. At that location, which the City submitted would be near the front entry of the residence at 9717 NE 140th Street, is a note that identifies a “Temp. 12 From Spring to C.B” [temporary 12-inch pipe from spring to catch basin]. Another note identifies a “spring” further up the ravine approximately 155 feet west and 70 feet north of the southwest corner of the Morning Heights boundary, which would be on the subject property just east of the currently delineated wetland. (*See Exhibit C-9*)
- The Timberwood road and storm drainage plan, approved by King County in June 1974, shows an “Existing Natural Drainage Course” flowing from west to east through a ravine in Timberwood “Tract B” that continues into the subject property. (*See Exhibit C-10*) The Timberwood Subdivision recorded in 1974 also identifies an “Existing Natural Drainage Course.” (*See Exhibit C-11*)
- The storm drainage design plan for Short Plat 977014, which created the subject property, was approved by King County in May 1977 and last revised in October 1978. This approved plan shows a drainage easement in the same area as the watercourse identified in the previous two documents. Note 3 on this stormwater at document states, “The 25-year flood plain lies within the Drainage Easement.” (*See Exhibit C-12*)
- A July 29, 1982 letter from King County Road Engineer Paul Hooper to Blaine Peeler, owner of 9718 NE 139th Street (southeast of the subject property), identifies the watercourse flowing through Timberwood Tract B as a stream, stating: “A small stream flows through the ‘Tract B’ portion of the plat. It is subject to significant changes in water volumes because of rain, hillside springs, and other surface water conditions.” This letter noted that the small stream discharged to the Juanita Creek System and that it had created vertical sand banks of six to eight feet in height that needed to be addressed due to their acting as a public safety concern. (*See Exhibit C-13*)
- Photos submitted by the Appellants of the 1983 Timberwood drainage project in progress on their property – which Appellants assert show no evidence of water in the ravine – in fact show standing water despite the clearly recent excavation, which the City submits suggests the existence of seeps or springs. One photo shows puddled water underneath a black corrugated pipe (see Exhibit A-2.b, page A000051), while another shows puddled water near a concrete structure and water flowing out of a pipe on the left middle portion of the photo (see Exhibit A-2.b, page A000052).

The City submitted that these documents indicate the area where the wetland is now delineated was known to contain natural springs and surface water flows as far back as

1968. *Exhibits C-9, C-10, C-11, C-12, and C-7, .pdf pages 109-111*²⁵; *City's Staff Report; Dawn Nelson Testimony.*

28. Considering all of the foregoing evidence, including the WRI and The Watershed Company wetland reports, the Soundview Consultants map, the Orca survey, the B & A Inc. report, and DOE's technical assistance memorandum, the City concluded that it is not possible to determine whether or not there was a wetland present on the property prior to July 1, 1990. *Exhibits C-1 and City Staff Report; Dawn Nelson Testimony.*
29. Addressing alleged error 2 (*City erred in determining that the wetland was intentionally created, when the wetland occurred as a result of construction of roads in the surrounding development which were built without adequate stormwater management and had to be served by the after-the-fact drainage project in the ravine, which drainage system is the result of and an integral part of road construction, and the resulting unintentionally created wetland is unregulated*), the City disputes the Appellants' theory of the origin and regulatory status of the existing wetland. To understand the water in the ravine, City of Kirkland Surface Water Manager Kelli Jones conducted a review of available information on the Timberwood drainage facility in the subject ravine. From the record, Ms. Jones reported that the Timberwood subdivision (approved in 1974) was designed with two stormwater discharge points into open space Tract B (see Exhibit C-17, .pdf page 238). The Timberwood drainage project on the subject property in 1984 created a fully piped system for all drainage from that subdivision, both the natural flows and stormwater runoff, that had historically flowed across Timberwood Tract B and into the subject property.²⁶ Subsequently, in the "mid-2000s," two catch basins were installed in the subject ravine at the east end of the system. The drainage project in the subject ravine was accessed by a maintenance road which, according to King County records, was 170 feet long by 14 feet wide and constructed of concrete paver blocks with a maximum grade of 16% between the last structure of the detention tank system and the eastern NE 140th Street cul-de-sac. The record contains a "facility sketch" prepared in May 2005 depicting the catch basins to be installed. A note on this figure stated: "Will need to put in some type of sub drainage to stabilize access road – due to area being wet – fed with springs. Could use new catch basins to tie drainage into." *Exhibits C-17 (.pdf page 236) and C-21.* No information was submitted indicating when or if this work was completed by King County.
30. The record includes a 2009 permit application submitted by the Robsons to King County to "connect into an existing piping, add a catch basin and backfill an open ditch within a County easement area." *Exhibit C-17, .pdf page 237.* There are no drawings or plans attached to the permit, and it is not clear when or by whom the work was done. Additional King County records include County inspection reports from 2005 through 2010 in which it was noted that the access road to the east end of the Timberwood

²⁵ The undersigned notes that the copy of these photographs in the Appellants' exhibits are clearer. *See Exhibit A-2b, pages A000051-52.*

²⁶ This is understood to be the same project the Appellants' materials refer to as the 1983 Timberwood drainage project. Of note, the "as built" plans for the project are dated July 1984. *Exhibit C-14.*

drainage system near the eastern 140th Street cu-de-sac needed to be rebuilt, and the catch basins (identified as CS/CB-1) were serviced. *Exhibit C-17, .pdf pages 235-377.*

31. The Timberwood Subdivision was designed to send its collected stormwater runoff to Tract B. Because available documents did not include the original drainage calculations from either the 1974 Timberwood subdivision or the 1984 drainage repair project, Ms. Jones used the current stormwater design manual (the 2021 King County Surface Water Design Manual (KCSWDM) to calculate the runoff volumes directed to Tract B by the Timberwood plat. For installation of new drainage systems, the KCSWDM requires a new piped system to be able to convey and contain the 25-year storm event. For previously installed piped systems not being replaced as part of development, the KCSWDM requires existing systems to be able to convey and contain the 10-year storm event, which is a smaller capacity than the 25-year event. Ms. Jones determined that Timberwood Discharge point 1, in the west end of Tract B, drains a total of 5.1 acres, of which 2.7 acres were calculated to be impervious, and that Discharge point 2 near the east end of Tract B drains a total of 5.4 acres, of which 2.1 acres were calculated to be impervious. Using a continuous hydrologic model (MGS Flood, an approved model in the 2021 KCSWDM), Ms. Jones calculated the anticipated flow volume for the 25-year storm event to be 5.8 cubic feet per second (cfs). The Timberwood drainage facility is sized to handle 7.5 cfs, which is a larger capacity than current stormwater regulations require. *Exhibits C-17 and City Staff report; Kelli Jones Testimony.*
32. Additional relevant circumstances surrounding the Timberwood drainage project are included in City maintenance records for the facility since the subject property was annexed from the County in 2011. The City identifies the system as a “Drainage Concern Line” because the topography of the ravine (approximately 13% to 16% grade) means that heavy equipment cannot be used at the (western) catch basin 2. The entire drainage line is walkable; equipment can be hand carried to catch basin 2, and that catch basin could be “flex tubed” from the end of the gravel access road, but this has not needed to be done since annexation. The drain line is self-cleaning because of the steepness. Since annexation, the City has regularly inspected and maintained the system and there have been no failures. The City has received two drainage complaints since annexation, including one from the Appellants. Both the stormwater facility in the subject ravine and the upgradient facility in Timberwood Tract B were inspected 2023, with neither triggering maintenance. The Timberwood drainage facility is functioning properly. *Exhibit C-17; Testimony of Kelli Jones and Dawn Nelson.*
33. In response to the Erik Ainsworth report dated October 27, 2023, the City clarified that any maintenance work conducted on the access road was performed by King County; the City has not performed any road maintenance since annexation, much less performed any maintenance of the road without required permits. City Staff submitted that if the access road needed to be maintained or regraded in the future, the City’s Public Works Department would work with the Planning and Building Department to meet code regulations for working within a sensitive area buffer. *Exhibit C-21.*

34. Addressing Appellants' contention that failure of the Timberwood drainage project is the source of the water currently in the wetland feature onsite, the City disagreed. Based on review of these records, the City determined that the water in the subject ravine is not the result of any failure of the Timberwood drainage project, but rather appears to be from seeps, springs, and/or natural drainage onto the property. Addressing Appellants' contention that Timberwood drainage project was installed to deal with runoff from the roads in the Timberwood subdivision, the City disagreed. As discussed in Ms. Jones' report, the Timberwood subdivision conveys runoff from 10.5 acres of both impervious and pervious surfaces to the ravine. All of the road runoff from Timberwood roads is piped into the stormwater facilities in Tract B and the subject ravine, which as discussed above are functioning properly. Further, stormwater runoff from the roads in the Poplar Lane No. 2 subdivision to the south is also piped to a stormwater system, which the City submitted suggests that it is not road runoff that feeds the seeps that have been observed over decades in the south face of the ravine. The water in the ravine, which is a low point in the vicinity, predates both construction of the Timberwood subdivision's roads and the Timberwood drainage project. *Testimony of Dawn Nelon and Kelli Jones; Exhibits C-14, C-15, C-16, and C-17 and City's Staff Report.*
35. Addressing Appellants' contention that earthwork that occurred during construction of the Timberwood drainage project changed site hydrology, thus causing the wetland to form onsite, the City contended that the drainage project drains the entire Timberwood subdivision, not just its roads. As noted above, more than half of the area draining into the facility is pervious surface area. *Kelli Jones Testimony; Exhibit C-17.* The City argued that while Mr. Bredberg appeared to be comfortable asserting that all of the water in the Timberwood drainage project resulted from construction of that subdivision's roads, the Appellants' other witnesses were not, noting that Mr. Kelley testified that the drainage system had to take into account other waters going into that system (besides road runoff) and that Mr. Ainsworth testified that every project has water from other sources, that he didn't know how many houses are going into that pipe, and that the determination of what percentage of the runoff must be from roads to meet the wetland definition exception was a legal question. The City contended that the Appellants did not – and cannot – show that all of the water sent to the Timberwood drainage system on the subject property is from the roads of the Timberwood subdivision. Further, the City argued there is no evidence to support Appellants' assertion that installation of the Timberwood drainage system has – by itself - created the current wetland. On this point, the City argued finally that even if excavating the ravine and compacting the native soils to install the facility eventually contributed flows to the site, the Appellants can only claim that construction of the Timberwood drainage facility was one cause of the wetland, not the only cause, and this would not meet the exemption in the definition of a regulated wetland even if that definition included retrofit drainage facilities years after road construction. *Exhibit C-22; Testimony of Anthony J. Bredberg, David Kelley, and Erik Ainsworth.*²⁷

²⁷ The City's closing brief provides time stamps to the testimony cited.

36. Further addressing appeal issue 2, the City called out that the Timberwood drainage project (as-built plans dated 1984) was installed approximately five or more years after the roads of the subdivision (Timberwood subdivision recorded 1974) were installed. The City argued that a stormwater drainage project more than five years after road construction is not “construction of a road, street, or highway” as contemplated in the KZC 5.10.985. The City argued that Appellants’ position requires adding words (such as “stormwater facilities to drain roads serving other development”) to the exemption in the definition, which they contend is improper. The City contended that the drafters of Kirkland’s critical areas regulations could have identified stormwater drainage facilities later constructed to serve roads previously built, or runoff from residential development generally, as preconditions that exempted a wetland from regulation, but the drafters did not do so. The City urged that the examiner should decline to add words to the exemption that were not included by the legislative body. *Exhibit C-22*.
37. Addressing the “new” argument raised by Mr. Bredberg at hearing (and in his October 23, 2023 addendum) that under the federal definition of wetlands, the wet feature onsite today does not meet the definition of wetland when considering “normal circumstances” as intended by the 1987 Army Corps of Engineers Wetland Delineation Manual, the City offered the following.²⁸ Highlighting Mr. Bredberg’s testimony that normal circumstances became “dry” at the time the 1983 excavation for the drainage project removed the previous sources of water, and that the major alteration of the site at that time “with the benefit of a permit” reset normal circumstances for the site to “dry,” the City contends this is inconsistent with what the Manual actually says. The City quoted the following language from the Manual:

The definition of wetlands contains the phrase "under normal circumstances," which was included because there are instances in which the vegetation in a wetland has been inadvertently or purposely removed or altered as a result of recent natural events or human activities. Other examples of human alterations that may affect wetlands are draining, ditching, levees, deposition of fill, irrigation, and impoundments. When such activities occur, an area may fail to meet the diagnostic criteria for a wetland. Likewise, positive hydric soil indicators may be absent in some recently created wetlands. In such cases, an alternative method must be employed in making wetland determinations.

Exhibit A-9.a, page A000423. The City asserted that the Manual directs a wetland investigator to use a different section (Section F rather than Section D) when “normal circumstances” have been altered recently, which they contended is opposite to the reading forwarded by Mr. Bredberg. The City argued that the Manual uses the phrase “under normal circumstances” and “atypical situations” in the context of wetland delineations on sites that are *missing* one of the three wetland indicators (including wetland vegetation, hydric soils, or wetland hydrology) due to a recent disturbance, and that the “normal circumstance” would be the condition *before* the disturbance occurred. The Manual directs a wetland reviewer to proceed to Section F “if there is evidence of

²⁸ The City objected to this argument being allowed at hearing because it was not raised in the appeal letter and should not be considered within the scope of the appeal. The objection was overruled and the City was invited to respond to the argument in writing after the hearing.

recent significant vegetation alteration due to human activities or natural events. Otherwise, [proceed to step 6 in Section D].” *Exhibit A-9.a, page A000460*. The City noted that in several places when direction is given to use recent resources, the time frame suggested is “(within five (5) years)... .” *Exhibit A-9.a, pages A000459 and A000475*. Finally, the City contended the Manual includes in the determination of “normal circumstances” consideration of “the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed.” *Exhibit A-9.a, page A000423*. The wetland on the subject property has exhibited all three wetland indicators since at least 2013 and was not “recently disturbed” in a way that removes or alters any of the wetland indicators since before 2013 at the earliest. The City disagrees that the “1983 reset” asserted by Mr. Bredberg remains in effect after 2013 at the latest, contending there is nothing in the Manual supporting Appellants’ position that the 1983 conditions will always be the normal circumstances for the subject property. Finally, the City argued that because no recent disturbances were documented in any of the reports that obscured the wetland indicators, current site conditions should be used in the wetland determination. *Exhibit C-22*.

38. Of note, the Manual’s Section F, in addressing atypical situations and trying to ascertain normal circumstances in “*Man-induced wetlands*” states the following:

Procedures described in Subsection 4 are for use in delineating wetlands that have been purposely or incidentally created by human activities, but in which wetland indicators of one or more parameters are absent. For example, road construction may have resulted in impoundment of water in an area that previously was nonwetland, thereby effecting hydrophytic vegetation and wetland hydrology in the area. However, the area may lack hydric soil indicators. *NOTE: Subsection D is not intended to bring into CE jurisdiction those manmade wetlands that are exempted under CE regulations or policy.* It is also important to consider whether the man-induced changes are now the “normal circumstances” for the area. Both the relative permanence of the change and the functioning of the area as a wetland are implied.

Exhibit A-9.A, page A000493 (emphasis in the original)(emphasis added).

39. Addressing the final appeal issue (*allegation that DOE staff is biased against Mr. Bredberg and that the City’s wetland and stream determination is thus also biased/ that Appellants are entitled to an unbiased third-party review of the B & A Inc. report*), the City submitted that the October 2022 B & A Inc. report submitted by Appellants does not meet the criteria for a critical area report established in KZC 90.110.4, in particular because it does not contain any documentation of wetland rating or delineation or stream classification. Again, the City noted that KZC 90.110.2 requires a critical area report to be prepared by a qualified critical area professional as defined in code. For review of potentially regulated wetlands, the code requires a wetlands and streams qualified professional who is certified as a professional wetland scientist pursuant to KZC 5.10.748(1)(a). The City searched the Society of Wetland Scientists database online at <https://www.wetlandcert.org/forms.html> and did not find certification for Mr. Bredberg.

The City's Planning Manager testified that there is no code provision that triggers a requirement for third party review of Mr. Bredberg's reports, which do not contain critical area delineations. *Dawn Nelson Testimony; City Staff report.*

40. Addressing DOE involvement and the allegation of bias, the City's Director of Planning and Building testified at hearing that City of Kirkland hosts many wetlands and streams, and the exceptions that exclude wetland from being regulated (KZC 5.10.985) are called upon frequently. It is not uncommon for the City to have to decide whether wetlands existed before 1990. In close cases, it is the City's standard protocol to seek Department of Ecology assistance when deciding if the exceptions apply. He testified that DOE's expertise is reliable; however, he stated that the City does not always agree with DOE. City Staff makes an independent determination, and DOE's conclusion is only one piece of information considered. The City understands what is at stake for property owners in these determinations, and they take them seriously. In this case, Mr. Weinstein testified that he disagrees with the B & A Inc. reports' conclusions that the wetland in question was the result of road construction. He also disputes there was any bias involved either in the City's decision to request assistance from DOE or from DOE in their conclusion. Based on his experience, he agrees with Ms. Nelson's determination, primarily because sources of water are documented to have been in the ravine well before 1990. *Adam Weinstein Testimony.*
41. Finally, the City argued: that Appellants' challenge to the determination that there is a stream onsite is untimely, as it was not argued in the appeal nor even identified in exhibits submitted by the pre-hearing exhibit exchange deadline; that Mr. Bredberg's assertion that there is in fact no wetland onsite is untimely, as it was not in the appeal and not forwarded until the pre-hearing document exchange deadline; and that the only issue properly within the scope of the appeal is whether there is a regulated wetland on the subject property. *Exhibits City Staff Report and C-22; Stephanie Croll Argument.* Addressing the stream specifically, the City contended that Appellants' witness Lawrence Fisher stated in his testimony that there is a stream on the property that outfalls into the culvert inlet where a trash rack has been installed.²⁹ *Exhibit C-22, citing Lawrence Fisher Testimony at approximately time stamp 2:19:00.*

Appellant Rebuttal and Final Arguments

42. Appellants did not offer rebuttal witnesses or testimony after City witnesses responded to their witnesses' testimony, and in fact declined to call their last witness despite that witness having been logged into the virtual meeting all day. Because of their late disclosure of their Exhibit A-10, the City was afforded a post-hearing response to the evidence in that exhibit (and the City submitted Exhibits C-18 through C-21). Because the Appellants bear the burden of proof, they were afforded an opportunity to respond to the City's post-hearing exhibits, which Appellants did. First, Appellants contended that

²⁹ Mr. Fisher testified, "If that wasn't where the stream was, they wouldn't put a trash rack on that culvert." *Hearing Recording 2:18:27.* Answering Ms. Croll's questions about the location of the delineated stream, Mr. Fisher testified, "Just because they said that's the only place there's a stream, doesn't mean they're correct. It looks like they are incorrect." *Hearing Recording 2:19:18.*

Exhibits C-18, C-19, and C-20 support their claim of bias on the part of the City against Mr. Bredberg, if not the Appellants themselves. This finding acknowledges this assertion.³⁰ Next, Appellants response noted that Kelli Jones did not identify herself as a professional engineer, nor did the City call her out as an expert witness. As to the substance of Exhibit C-21, Appellants contended that its contents support their position that the construction of the Timberwood drainage project caused the wetland that has been delineated on their property, asserting that had the ravine contained any regulated critical areas, King County’s robust critical areas ordinance would have prohibited the project from proceeding without at least permitting. *Exhibit A-11*.

43. Also in their rebuttal, Appellants raised again the issue that the City did not admit to having installed a culvert, trash rack, drainage ditches, and rip rap check dams in or around the ravine in approximately 2017, stating that Exhibit C-21 is careful to limit the discussion of that memo to access road. In apparent support of their assertion that the City installed the improvements and is for some reason not admitting it, Appellants cite their Exhibit A-3.b (page A000224), which contains a November 18, 2020 email from their neighbor Rose Jackson to City Staff Desiree Goble containing two videos. The first video, said to be from March 2017, shows water sheet flowing down from the subject property onto the neighbors parcel, and the email states that the video was taken before the neighbors asked the City for help with the runoff. The second video, said to have been filmed in July 2020, purports to show the same area with no runoff, and the email states that it was taken after “the new drain that was installed a couple years ago on our property near the property line and easement.” *Exhibit A-3.b, page A000224*. In their rebuttal statement, the Appellants contended that the City installed the drainage improvements and is hiding the fact of having done so. *Exhibit A-11*. No other communication with the neighbor who submitted the email and videos was provided in the record by either party.
44. In their closing argument, in addition to further arguing that the City installed a ditch, rip rap, culvert, and a trash rack on their property – and disclosing that this is the subject of the public records request they have been awaiting – the Appellants forwarded the following procedural adequacy-related arguments (among others).³¹
 - The Appellants alleged that the City altered documents, in one example referring to City’s packet page 221 of 243, stating that the blue line indicating stream location is

³⁰ In their closing argument, the City explained that Exhibits C-18, C-19, and C-20 were provided in response to the appeal’s allegation of bias by DOE and City Staff against Br. Bredberg and/or Appellants, for the purpose of showing that while Appellants alleged bias against Mr. Bredberg, he in turn engaged in allegedly threatening communications to the Assistant City Attorney. *Exhibit C-22*.

³¹ For the first time in post-hearing closing argument, the Appellants made clear that they expect to find evidence in City records that the City did in fact install these improvements in the ravine without permits in the PRA disclosures, and these are the documents (or at least a portion of the documents) they had hoped to be able to add to the record that they believed would be capable of affecting the outcome of the appeal.

not original and that the City has not disclosed who added it.^{32, 33} Appellants alleged that documents shown on the overhead screen and in the virtual meeting at hearing that had poor resolution, and which were practically illegible to witnesses, had been “altered” by the City, to the detriment of Appellants’ case.^{34, 35}

- The Appellants contended that slow disclosure of the public records requested prevented Mr. Fisher from seeing the neighbors’ video of water sheet flowing on their property, that he was confused in his testimony, and that the City’s slow disclosure otherwise hampered their ability to defend the appeal.³⁶
- The Appellants claimed that Mr. Bredberg’s testimony was cut short and that he was unable to present his testimony as intended.^{37, 38}

³² In the packet the Examiner has worked from, this document appears to be page 223 of 245, which the undersigned takes to mean the Appellants’ copy of the packet does not start with the two-page agenda.

³³ The undersigned understood that the blue line had been added for the purpose of illustrating where the City believed the stream to be delineated by The Watershed Company in its 2020 delineation as shown on the 1974 plan. It was not clarified on the record who added the blue line or why; however, the undersigned did not believe that the City offered the 1974 storm plan with blue line purporting it to be an accurate depiction of the original plan in King County records, but rather believed that the City offered the marked document as an illustrative exhibit only.

³⁴ In one example of this claim: “Mr. Bredberg attempted to testify on the details with the as-built site plan and a series of historical photos overlaid onto the site plan (Bates# A000183). However, the city altered the exhibit while in their custody such that it was illegible at the hearing. As a result, his testimony was cut short and of little value, lacking his exhibits. The original exhibits submitted to the city are of high resolution and details readily legible.” *Exhibit A-12, page 9*. Mr. Bredberg’s testimony regarding this exhibit, which is actually Appellants’ page A000183, begins in the recording at approximately time stamp 2:49:50.

³⁵ Another example of this claim: “Bates# A000709 is from the Ainsworth report. The document was illegible for the Hearing Examiner at the hearing after the city altered it. We had to take our original exhibit and forward it to the City and Hearing Examiner.” *Exhibit A-12, page 18*. The Examiner noticed during advance preparation for the hearing that the document at A000709 was illegible, which is common when documents are compressed for virtual submission, and had requested a legible copy of this page at the outset of the hearing and again during Mr. Ainsworth’s testimony.

³⁶ The undersigned notes that Mr. Bredberg had the email with the videos at the time he prepared his October 23, 2023 Addendum, and all Appellant witnesses could have been sent the email prior to the hearing if the Appellants wanted them to speak to it. No Appellant request to share the video at hearing was denied.

³⁷ Regarding Appellants’ contention that Mr. Bredberg’s testimony was cut short: The City had objected to testimony on the topic of there being no wetland on the property as outside the scope of the appeal, because the issue was not raised in the filed appeal (and in his 2022 report, Mr. Bredberg expressly stated that the site currently contains a wetland). The undersigned sustained the objection and asked that his testimony be restricted to the errors alleged in the appeal, and thus rather than have testimony explaining why there is not a wetland onsite, directed him to proceed to testimony addressing whether any wetland that exists onsite is the result of road construction. On the recording: *Time stamp 2:45:39*: Mr. Bredberg: “If that’s the one question we are down to, let’s move this ahead.” Examiner: “Can we go to that question?” Mr. Bredberg: “Absolutely.”

³⁸ At the conclusion of his initial testimony, the undersigned asked Mr. Bredberg if he had any other testimony to present. *Time stamp 3:26:04*. He replied, “I don’t believe so.” The undersigned asked Ms. Robson if she had any further topics she wanted Mr. Bredberg to address. *Time stamp 3:26:20*. She replied, “I don’t think so.” Following cross examination, the undersigned asked, “Are you complete with your testimony?”, to which Mr. Bredberg replied, “If we’re done, we’re done.” Ms. Robson then said, “Ok, we’re done.”

- Appellants contended they were surprised that the Examiner expected hearing testimony to complete in one day and that the manner of communication about this at hearing was confusing and intimidating to them, and they perceived it as bias against them.³⁹
- Appellants’ closing argument contained the following statement: “Due to the continued late PRR, we, as the appellants, moved forward with the hearing on November 6, 2023, under duress.”⁴⁰ *Exhibit A-12, page 26.*

Exhibits A-12 and A-13.

45. Addressing the substance of the errors alleged on appeal, Appellants’ closing argument included the following summations of their arguments:

- They maintained there is no stream on their property, citing records in evidence including King County work orders related to the ravine and the 2013 WRI wetland delineation, none of which identify a stream; they provided citations to City and State definitions and argument as to how those definitions should be applied to the evidence about their property. In their final argument, Appellants stated: “In summary, the stream issue is settled by the Rose Jackson video.” *Quote from Exhibit A-13, page 4.*
- Speaking to the sources of water in the ravine and citing Ms. Jones’ pre-hearing analysis (Exhibit C-17), the Appellants argued: “There is clear agreement that the Timberwood Drainage Repair was designed and installed to manage discharge from the roads of the subdivision and as such meets the intent of the definition “result of the construction of a road, street, or highway.” *Exhibit A-12, page 8.*
- While the drainage repair was after-the-fact, it was a repair of a previously deficient road stormwater design. *Exhibit A-12.*
- The stormwater system was created as part of road construction. If there were no road then there would be no need for the detention system. If there were houses and no road there would be no detention system. The road construction created the need for the detention system. *Exhibit A-13, page 6.*
- For a wetland to be regulated, the wetland had to be present prior to July 1990. The small seep was present in 1982, drained in 1983, and stayed dry until after the mid-90s. It was well after the mid-90’s that the area became wet. *Exhibit A-12, pages 8-9.*
- Construction of the Timberwood drainage project made deep cuts on the sides of the ravine and exposed outlets for the water to eventually discharge. ... Had the

³⁹ This expectation of the undersigned was discussed at both pre-hearing conferences and stated in writing in both pre-hearing scheduling orders. *Record Documents A and F.*

⁴⁰At both pre-hearing conferences, the City offered to continue the hearing date after November 6, to allow Appellants to obtain the materials expected to be disclosed on November 8 to include them in their case preparation, and Appellants repeatedly declined to continue the hearing until after November the 8th. *Record Documents A and F.*

ravine been left undisturbed, the native soil cap would have prevented the water from daylighting and making the area wet. This is a common occurrence along road cuts of streets and highways. The excavations alter the flow of subsurface water, and it is not an immediate impact. In this case, it was at least two decades for the subsurface water to find its way to the excavated sides of the ravine.

Exhibit A-12, pages 8-9, 11.

- Appellants asserted: “[There] appears to be a collaboration between DOE and the city to avoid addressing the facts of the B & A report with an actual peer review. We see this as highly irregular that our consultants’ report was accepted by the city and supposedly reviewed, yet there is no evidence of any review.” *Exhibit A-12, page 21.*

Exhibits A-12 and A-13.

CONCLUSIONS

Jurisdiction

Pursuant to Kirkland Zoning Code 145.60(4), appeals of determinations by the Planning and Building Director may be appealed to the Hearing Examiner.

Criteria for Review

Pursuant to KZC 145.95, the person filing the appeal has the responsibility of convincing the Hearing Examiner that the Planning and Building Director made an incorrect decision.

Pursuant to KZC 145.105, in an open record appeal, the Hearing Examiner shall consider all information and material within the scope of the appeal submitted by persons entitled to participate in the appeal and shall: a) affirm the decision being appealed; b) reverse the decision being appealed; or c) modify the decision being appealed. The decision of the Hearing Examiner is the final decision of the City.

Additional Applicable Zoning Code Provisions

KZC 90.110, Critical Area Report

1. General – An application for a development permit that includes a critical area and/or its buffer, except those exempted pursuant to KZC 90.35, shall provide a critical area report that uses the best available science to evaluate the proposal and all probable impacts.
2. Preparation of Report
 - a. The critical area report shall be prepared by a qualified critical area professional.
 - b. The applicant shall either:
 - 1) Fund a report prepared by the City or the City’s consultant; or
 - 2) Submit a report prepared by a qualified critical area professional approved by the City. In addition, fund a peer review of the critical area report by the City or the City’s consultant.

KZC 5.10.748 Qualified Critical Area and Shorelines Professional (definition)

A qualified professional for critical areas and shorelines projects shall have a minimum of five (5) years of experience in the pertinent scientific discipline and experience in preparing critical area or shoreline reports. A qualified critical area or shorelines professional must have obtained a Bachelor's degree in biology, engineering, geology, environmental studies, fisheries, geomorphology, or a related field. The Planning Official may require professionals to demonstrate the basis for qualifications and shall make the final determination as to qualifications. A qualified professional must meet the following specific professional requirements, dependent upon the type of critical area on the subject property or shoreline project that is proposed:

1. Wetlands and streams qualified professional:
 - a. Shall be certified as a professional wetland scientist; and
 - b. Have at least five (5) years of full-time work experience delineating wetlands using the state or federal manuals, preparing wetland reports, conducting function assessments, and developing and implementing mitigation plans.

KZC 5.10.985, "Wetland"

"Wetland" or "wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate conversion of wetlands. (RCW 36.70A.030) (Ord. 4701 § 1, 2020; Ord. 4551 § 4, 2017; Ord. 4252 § 1, 2010)

KZC 145.70 Participation in the Appeal

Only those persons entitled to appeal the decision under KZC 145.60 may participate in the appeal; provided, that the applicant may submit a written response to an appeal filed by an appellant, regardless of whether the applicant filed an appeal. These persons may participate in either or both of the following ways:

1. ...
2. By appearing in person, or through a representative, at the hearing and submitting oral testimony directly to the Hearing Examiner. The Hearing Examiner may reasonably limit the extent of the oral testimony to facilitate the orderly and timely conduct of the hearing.

KZC 145.75:

The appeal will be an open record appeal hearing. The scope of the appeal is limited to the specific elements of the Planning and Building Director's decision disputed in the letter of

appeal, and the Hearing Examiner may only consider comments, testimony and arguments on these specific elements.

Kirkland Hearing Examiner Rules of Procedure

2.B. When questions of practice and procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process.

7. Presiding Official

The Hearing Examiner conducting the hearing has the duty to ensure a fair and impartial hearing, to take all necessary action to avoid delay in the proceedings, to gather facts necessary for making the decision, and to regulate the course of the hearing and the conduct of the parties and others so as to maintain order.

Applicable/Cited State Regulations

RCW 36.70A.030(48)

“Wetland” or “wetlands” means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas created to mitigate conversion of wetlands.

WAC 365-195-905, Criteria for determining which information is the “best available science”

- (1) This section provides assessment criteria to assist counties and cities in determining whether information obtained during development of critical areas policies and regulations constitutes the "best available science."
- (2) Counties and cities may use information that local, state or federal natural resource agencies have determined represents the best available science consistent with criteria set out in WAC 365-195-900 through 365-195-925. The department will work with state agencies to identify resources that meet the criteria for best available science. Such information should be reviewed for local applicability.
- (3) The responsibility for including the best available science in the development and implementation of critical areas policies or regulations rests with the legislative authority of the county or city. Cities and counties must conduct a best available science review when updating critical area regulations. The complexity of the review should reflect the scope of the amendment. When feasible, counties and cities should consult with a qualified scientific expert or team of qualified scientific experts to identify scientific information, determine the best available science, and assess its applicability to the relevant critical areas. The scientific expert or experts may rely on their professional judgment based on experience and training, but they should use the criteria set out in WAC 365-195-900 through 365-195-925 and any

technical guidance provided by the department. Use of these criteria also should guide counties and cities that lack the assistance of a qualified expert or experts, but these criteria are not intended to be a substitute for an assessment and recommendation by a qualified scientific expert or team of experts.

- (4) Whether a person is a qualified scientific expert with expertise appropriate to the relevant critical areas is determined by the person's professional credentials and/or certification, any advanced degrees earned in the pertinent scientific discipline from a recognized university, the number of years of experience in the pertinent scientific discipline, recognized leadership in the discipline of interest, formal training in the specific area of expertise, and field and/or laboratory experience with evidence of the ability to produce peer-reviewed publications or other professional literature. No one factor is determinative in deciding whether a person is a qualified scientific expert. Where pertinent scientific information implicates multiple scientific disciplines, counties and cities are encouraged to consult a team of qualified scientific experts representing the various disciplines to ensure the identification and inclusion of the best available science.
- (5) Scientific information can be produced only through a valid scientific process. To ensure that the best available science is being included, a county or city should consider the following:
 - (a) Characteristics of a valid scientific process. In the context of critical areas protection, a valid scientific process is one that produces reliable information useful in understanding the consequences of a local government's regulatory decisions and in developing critical areas policies and development regulations that will be effective in protecting the functions and values of critical areas. To determine whether information received during the public participation process is reliable scientific information, a county or city should determine whether the source of the information displays the characteristics of a valid scientific process. When weighing scientific information contained in the record for inclusion, counties and cities must weigh the scientific information contained in the record based on its scientific validity. The characteristics generally to be expected in a valid scientific process are as follows:
 1. Peer review. The information has been critically reviewed by other persons who are qualified scientific experts in that scientific discipline. The criticism of the peer reviewers has been addressed by the proponents of the information. Publication in a refereed scientific journal usually indicates that the information has been appropriately peer-reviewed.

Conclusions Based on Findings

1. For the purpose of entering conclusions on the instant appeal, the errors alleged in the appeal boil down to two questions:
 - Does the record support a conclusion that the City erred in determining the subject property contains a regulated wetland and stream?
 - Does the record support a conclusion that bias against Appellants and/or their consultant improperly influenced the City's June 6, 2023, wetland stream determination?

2. Regarding whether the wetland and stream determinations were in error:
 - a. The Appellants submitted two critical areas reports from consultants that delineated a wetland on their property and two maps or surveys that field-identified the location of the wetland and the associated buffer. They turned in one report (plus an addendum) from a consultant who disputed that there is a wetland on their property based on historical site alterations, but did not assess the wetland and stream for current ratings and contained no field data for the two features. The Appellants offered witness testimony and letters at hearing from professionals refuting the Planning Official's determination who did not prepare their own critical areas reports including independent data collection, delineations, and ratings of the features onsite. While this evidence is properly considered in the context of an appeal, it is not capable of overturning the two formal critical area reports, the survey, and the site conditions map.
 - b. Appellants' assertion that the City did not consider the conclusions in Mr. Bredberg's reports is not supported by substantial evidence in the record. City witnesses testified that they did consider it, and that because it called into question the delineations in the reports, they sought additional review from Department of Ecology, which agency has jurisdiction over waters of the state and implements regulations that contain an identical definition of wetland to that in the City Code, including identical exceptions. The City included the October 2022 B & A Inc. report in the materials forwarded to Department of Ecology. That the May 2023 DOE technical assistance memorandum doesn't specifically respond to or mention the assertions in the B & A Inc. report is not evidence that the City neglected to consider the information in the report. DOE's treatment of the report is addressed in conclusion 3 below.
 - c. To adopt Appellants' theory of the case, it is necessary to conclude that the definitional exception (*a wetland is not regulated if it was unintentionally created as a result of the construction of a road, street, or highway*) as stated in KZC 5.10.985 intended to include construction of after-the-fact storm drainage remediation projects necessary to address runoff from a residential subdivision, even when drainage remediation projects are installed 10 years after approval of that plat's storm plan and 10 years after final plat recording⁴¹, and even when the drainage remediation project in question handles runoff from more pervious area than impervious area. Even considering Appellants' argument - that but for construction of the roads in Timberwood subdivision, the drainage project would not have been needed, and thus the soil regime in the ravine would not have been massively altered in 1983 - it is impossible to ignore the available records demonstrating that water had been present in the ravine in sufficient quantity for it to be identified as a spring that needed to be piped in 1968, as an existing natural drainage course in 1974, as a 25-year flood plain within a drainage easement in 1977, and as a stream capable of cutting six- to eight-foot vertical banks in 1982. All of the subdivisions touching the property, including the short plat that created the subject parcel, left the ravine open to receive flowing

⁴¹ In contemporary practice, final plat approval is typically not granted until after roads and other infrastructure is installed. The record presented does not identify when the Timberwood subdivision's roads were constructed.

- water. The Planning Official's determination that the water feeding the currently existing wetland has been documented to be present since at least 1968 is supported by substantial evidence.
- d. Giving maximum credence to Appellants' alternative theory – that the 1983 excavation of the ravine to construct the Timberwood drainage project necessarily reset “normal circumstances” as contemplated in the 1987 Army Corps of Engineers Wetland Delineation Manual and that 1983 is the date that must be the reference point for establishing normal circumstances for the property – the definitional exemption from regulated wetlands in KZC 5.10.985 is capable of being read multiple ways, which means it is ambiguous and properly subject to interpretation.
 - e. Washington courts have long held that in close calls, decisionmakers should give “great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.” *Morin v. Johnson*, 49 Wn.2d 275, 279 (1956). In a local land use context, deference is owed to the local legislative body's construction of an ordinance, as well as any administrative official – e.g., planning director, etc. – with either express or implied authority to enforce and/or interpret the municipality's land use regulations. *Pinecrest Homeowners' Ass'n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 290 (2004).
 - f. Having reviewed the Appellants' evidence and argument and the DOE manual's language on consideration of “normal circumstances,” the undersigned is not persuaded that Appellants' interpretation of normal circumstances is correct. The manual directs a wetland delineator *in cases where one of the wetland indicators is absent* to consider whether the site has been *recently* significantly altered. In more than one place, the Manual states that five years constitutes “recent” for the purpose of determining normal circumstances. The Appellants did not forward evidence of significant alteration in the ravine after 1983. The wetland was first delineated onsite in 2013, 10 years prior to the wetland determination under appeal. Considering deference owed to the Planning Official's interpretation of the code, DOE's similar interpretation, and the significant historical documentation showing the ravine to have been considerably wet prior to the 1983 excavation, the undersigned concludes that the Planning Official did not err in determining there is a wetland on site.
 - g. The record is less clear cut with respect to the presence of a regulated stream on the subject property. While a stream is delineated in the 2020 Watershed Company report, it does not show up as a delineated feature subject to regulation in any other document, and is otherwise not called a stream by any official source after the 1982 King County Engineer letter. Appellants' evidence regarding whether there is a stream onsite is mixed, with one expert witness appearing to testify that the delineated feature is a stream that is longer than the 15 feet stated the Watershed Company delineation. Based on the record submitted, the evidence does not support a conclusion that the stream delineation was in error. Note, there is little practical impact resulting from the stream determination because the delineated stream and its entire buffer fit within the boundaries of the wetland and its buffer, and because the

wetland is regulated, any question as to the presence of a seasonal, non-fish bearing stream within the wetland is effectively moot.⁴²

3. Addressing the final alleged error – that Department of Ecology’s review was biased (with respect to Appellants’ consultant), and the Appellants are entitled to unbiased review, the following conclusions are entered.
 - a. On the topic of alleged DOE bias in the role as third party reviewer, a pre-requisite question is whether Appellants are in fact “entitled” to any third party review. Appellants have not provided citation to any provision in the Kirkland zoning code that supports their claim of entitlement to third party review beyond that provided in this case. The code creates an affirmative duty on the part of the developer to either pay for a report prepared by the City or the City’s consultant, or to provide their own consultant report and pay for a peer review of their report by a third party peer reviewing consultant. These provisions do not create an affirmative duty on the part of the City to obtain a third party peer review prior to issuance of the Planning Official’s determination. *KZC 90.110.2(b)*. The Washington Administrative Code provisions cited by Mr. Bredberg do not in fact establish any third party review requirement in the City of Kirkland. The regulations promulgated under the Growth Management Act serve to guide cities and counties in adopting regulations that appropriately address best available science. With respect, there is no legal support in the record or otherwise known to the undersigned, and the Appellants have not provided any citation to authority, that requires Mr. Bredberg’s reports to be peer-reviewed by other soil scientists.
 - b. The record demonstrates that, as a standard practice, the City consults with DOE on cases involving complicated wetland determinations because DOE is an agency with jurisdiction over waters of the state that implements an identical definition of wetland. The City didn’t deviate from standard procedure in seeking review from DOE. The determination of whether there is a regulated wetland on this site was not treated differently *by the City* than other complex wetland determinations.
 - c. At the City’s request, DOE reviewed the information available to the City and concluded that the wetland on the Robsons’ property does not satisfy either exception from the definition of regulated wetland and that it is therefore regulated. The only items of evidence pointing to a potential DOE bias are an email from DOE staff stating that the state agency has a policy of not conducting site visits with the Appellants’ consultant and a letter from 2014 serving as the basis for that policy. Nothing in the record conveys disdain for or rejection of the written information by Mr. Bredberg. There is no evidence that the same staff members who were involved in the events leading to the 2014 letter were involved in the instant DOE review of the subject wetland. While both parties have submitted exhibits and argument attempting to demonstrate a history of difficult relations between Mr. Bredberg and various

⁴² While it is arguable that evidence contesting the delineated stream should have been excluded pursuant to *KZC 145.75*, because Appellants were *pro se*, the undersigned “erred on the side of caution” in letting the evidence in the record in an attempt to even the playing field.

government officials and other professionals, the decision in the instant appeal must be based on credible evidence in the record related to the land use issue in question: are the critical areas on site regulated. On balance, the evidence submitted does not demonstrate that DOE's review of the materials addressing the subject property was affected by bias.

4. It is necessary to address the allegations of unfair process other than alleged DOE bias. While they were represented by legal counsel at the time of the first pre-hearing conference, Appellants have been acting *pro se* for the bulk of these proceedings. They have freely acknowledged that they are not familiar with the land use hearing process or the applicable law, both of which are complicated and can be difficult to understand even for practitioners and professional developers.

It is the impression of the undersigned that the majority of the Appellants' perception of unfairness results from their lack of familiarity with the process. Examples include the blue line on the 1968 plat map in the City's exhibits, and the documents too difficult to read or clearly show images as a result of being digitized, being construed as "altered documents" with bad intent. Those who frequently participate in land use hearings are familiar with illustrative exhibits and have experience with digitized documents being difficult to see clearly and having to be provided in a better format after a hearing. Other examples include: not taking to heart the repeated instructions of the undersigned at both pre-hearing conferences and in both scheduling orders for the parties to be concise in presentation of evidence such that it could be completed in one day; not understanding that the examiner's role includes determining the appropriate scope of the appeal and ensuring evidence outside the scope is not presented; and the expectation that an examiner can compel disclosure of public records under a Public Records Act request.

The Appellants have a lot riding on the outcome of the appeal. Ms. Robson indicated at one point that the proposed short plat of the subject property is the Appellants' retirement plan and that their understanding is that the June 6, 2023 wetland and stream determination, if upheld, would restrict the potential number of lots to two, while the conceptual plan in the record shows five lots.⁴³ Because of their lack of representation, and taking the neutral role of the examiner position very seriously, the undersigned attempted at every stage to explain the process so the Appellants understood their rights and responsibilities and took all efforts to ensure the process complied with applicable City regulations and rules, and with the principle of due process.

5. With respect, all arguments not addressed and evidence not relied on were found not to be relevant to the question of whether there was error in the decision appealed from and/or were found not to be credible.

⁴³ This document does not speak to the potential short plat and should not be construed as addressing the approvability of any specific number of lots or any short plat.

DECISION

Based on the preceding findings and conclusions, the appeal has failed to meet its burden of showing that the June 6, 2023 wetland and stream determination was issued in error.

The appeal is denied.

Decided March 7, 2024.



Sharon A. Rice
Kirkland Hearing Examiner *pro tem*

Pursuant to 145.105.4, the decision by the Hearing Examiner is the final decision of the City.

Pursuant to KZC 145.110, the action of the City in granting or denying an application under this chapter may be reviewed pursuant to the standards set forth in RCW 36.70C.130 in the King County Superior Court. The land use petition must be filed within 21 calendar days of the issuance of the final land use decision by the City. For more information on the judicial review process for land use decisions, see Chapter 36.70C RCW.