

IN THE COURT APPEALS OF THE STATE OF WASHINGTON

DIVISION II

REBECCA JULIAN and GRETCHEN BROOKS,

Petitioners,

vs.

CITY OF VANCOUVER, a municipal corporation, and WAYNE and
DELORES MONROE, individually and as a marital community

Respondents.

APPELLANTS' OPENING BRIEF

John S. Karpinski, Attorney for Appellants
2612 E. 20th Street
Vancouver, WA 98661
360.690.4500
WSBA #13142

FILED
COURT OF APPEALS
10 APR -7 AM 11:49
STATE OF WASHINGTON
BY [Signature]
COURT REPORTER

PM 4-5-10

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: DID THE CITY OF VANCOUVER/HEARING EXAMINER ERR BY FAILING TO REQUIRE A CRITICAL AREAS ORDINANCE (CAO) BUFFER FOR GARDEN CREEK’S CREEK UNDER VANCOUVER’S “COMPLETELY FUNCTIONALLY ISOLATED” TEST 4

ISSUE 1. CITY OF VANCOUVER/HEARING EXAMINER MADE UNAPPEALED FINDING THAT GARDEN CREEK’S CREEK WAS A “CRITICAL AREA” SUBJECT TO VANCOUVER’S CAO, VMC 20.740.110 4

ISSUE 2. VANCOUVER CODE REQUIRES A RIPARIAN BUFFER FOR THIS CLASS OF CREEKS 4

ISSUE 3. VANCOUVER CAO HAS A BUFFER SIZE REDUCTION, NOT A CAO EXEMPTION, FOR SITES THAT ARE “COMPLETELY FUNCTIONALLY ISOLATED” 4

ISSUE 4. HEARING EXAMINER PROPERLY OVERRULED CITY OF VANCOUVER’S USE OF THE “COMPLETELY FUNCTIONALLY ISOLATED” EXCEPTION AND REQUIRED A PROPER CAO BUFFER FOR THE NORTHERN PORTION OF GARDEN CREEK’S CREEK 4

ISSUE 5. THE HEARING EXAMINER ERRED BY RULING THAT THE “REMAINING PORTIONS” OF GARDEN CREEK’S CREEK WAS “COMPLETELY FUNCTIONALLY ISOLATED” AND DID NOT NEED A CAO BUFFER UNDER THE 2008 CAO CODE 4

ISSUE 6. STANDARD OF REVIEW SUPPORTS PETITION FOR REVIEW	5
III. STATEMENT OF THE CASE	5
IV. ARGUMENT	15
ISSUE 1. CITY OF VANCOUVER/HEARING EXAMINER MADE UNAPPEALED FINDING THAT GARDEN CREEK’S CREEK WAS A “CRITICAL AREA” SUBJECT TO VANCOUVER’S CAO, VMC 20.740.110	15
ISSUE 2. VANCOUVER CODE REQUIRES A RIPARIAN BUFFER FOR THIS CLASS OF CREEKS	17
ISSUE 3. VANCOUVER CAO HAS A BUFFER SIZE REDUCTION, NOT A CAO EXEMPTION, FOR SITES THAT ARE “COMPLETELY FUNCTIONALLY ISOLATED”	18
ISSUE 4. HEARING EXAMINER PROPERLY OVERRULED CITY OF VANCOUVER’S USE OF THE “COMPLETELY FUNCTIONALLY ISOLATED” EXCEPTION AND REQUIRED A PROPER CAO BUFFER FOR THE NORTHERN PORTION OF GARDEN CREEK’S CREEK	20
ISSUE 5. THE HEARING EXAMINER ERRED BY RULING THAT THE “REMAINING PORTIONS” OF GARDEN CREEK’S CREEK WAS “COMPLETELY FUNCTIONALLY ISOLATED” AND DID NOT NEED A CAO BUFFER UNDER THE 2008 CAO CODE	23
ISSUE 6. STANDARD OF REVIEW SUPPORTS PETITION FOR REVIEW	34
V. CONCLUSION	39
APPENDIX	41

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Anderson v. Pierce County</i> , 86 Wn.App. 290, 302, 936 P.2d 432 (1987)	36
<i>Cingular Wireless, LLC v. Thurston County</i> , 131 Wn.App. 756, 129 P.3d 300 (2006)	35
<i>City of Seattle v. State Dep't. of Labor and Indus.</i> , 136 Wn.2d 693, 698, 965 P.2d 619 (1998)	38
<i>City of Univ. Place v. McGuire</i> , 144 Wn.2d 640, 647, 30 P.3d 453 (2001)	35
<i>Clark County Natural Resources Council v. Clark County Citizens United, Inc.</i> , 94 Wn.App. 670, 677, 972 P.2d 941, <i>rev. den.</i> , 139 Wash.2d 1002, 989 P.2d 1136 (1999)	38
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992)	17
<i>Dykstra v. Skagit County</i> , 97 Wn.App. 670, 985 P.2d 424 (1999), <i>rev. den.</i> , 140 Wn.2d 1016, 5 P.3d 8 (2000)	36, 38
<i>Faben Point Neighbors v. City of Mercer Island</i> , 102 Wn.App. 775, 781-782, 11 P.3d 322 (2000)	39
<i>Hama Hama v. Shorelines Hearings Bd.</i> , 85 Wn.2d 441, 448, 536 P.2d 157 (1975)	37
<i>HJS Dev., Inc. v. Pierce County</i> , 148 Wn.2d 451, 467, 61 P.d 1141 (2003)	35
<i>Isla Verde v. City of Camas</i> , 146 Wn.2d 740, 752-52, 49 P.3d 867 (2002)	35

<i>Lakeside Industries v. Thurston County</i> , 119 Wn.App. 886, 83 P.3d 433 (2004), <i>rev. denied</i> 152 Wn.2d 1015 (2004)	10, 17, 24
<i>Mall Inc. v. City of Seattle</i> , 108 Wn.2d 369, 739 P.2d 668 (1987)	27
<i>McTavish v. City of Bellevue</i> , 89 Wn.App. 561, 564, 949 P.2d 837 (1998)	36, 37
<i>State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n</i> , 140 Wn.2d 615, 634, 999 P.2d 602 (2000)	37
<i>United Dev. Corp. v. City of Mill Creek</i> , 106 Wn.App. 681, 687-88, 26 P.3d 943 (2001)	35
<i>Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n</i> , 123 Wn.2d 621, 628, 869 P.2d 1034 (1994)	37

STATUTES

RCW 36.70C	1, 15
RCW 36.70C.130	34
RCW 43.21C.030(1)	35, 36

OTHER AUTHORITIES - Vancouver Municipal Code (“VMC”)

VMC 20.740.030(B)(1)(b)	20
VMC 20.740.060	8
VMC 20.740.110	4, 8, 15

VMC 20.740.110(A)(1)(e) (2008 code) 15, 17, 18
VMC 20.740.110(A)(1)(e)(4) (2005 code) 18

I. INTRODUCTION.

This is a case under the Land Use Petition Act (“LUPA”), RCW 36.70C et seq., regarding the development of the Garden Creek subdivision, near the Columbia River in Vancouver, Washington. The issue involves whether Vancouver, and Vancouver’s Hearing Examiner, followed Vancouver’s Critical Areas Ordinance (“CAO”) by exempting a majority of “Garden Creek’s” creek, a CAO protected watercourse, from Vancouver’s CAO buffer standards.

Garden Creek’s creek is an altered¹ but still functional² watercourse running through the Garden Creek site. It ends in Petitioner Julian’s nearby property, as it discharges into the Columbia River³. It has a few small culverts, and 78 feet of open watercourse in three (3) distinct sections. Hearing Examiner Decision at 27, CP 43.

¹See, e.g., Testimony of Biologist Tammy Mackey of 7/14/08, AR 21, Attachment 7 at 1.

²See, *Id* at 1 & 2, Testimony of Washington Fish and Wildlife, AR 17 and AR 23.

³Hearing Examiner Decision at 30, CP 45.

It is uncontested that the Garden Creek creek is subject to Vancouver's CAO. City of Vancouver's Decision of April 4, 2008, approving Garden Creek Short Plat (hereinafter "Decision") AR 1 at 12; Hearing Examiner Decision of September 10, 2008 (hereinafter Hearing Examiner Decision"), at 23, CP 38.

The City's Decision AR 1, ruled the entire creek was exempt from buffer requirements under the 2005 "completely functionally isolated" test. AR 1 at 11. This Decision referred to a City of Vancouver letter of June 18, 2007, AR 1.10, indicating the City's belief the Garden Creek creek was "completely functionally isolated" under the 2005 code. The Decision also claimed that a Washington Department of Fish and Wildlife (hereinafter "Fish and Wildlife") agreed with the CAO exemption. AR 1 at 12.

Julian timely appealed the Decision. AR 3. In response, the Hearing Examiner made a number of rulings⁴ favorable to Julian. To his credit he

⁴These rulings were in *dicta* due to the Hearing Examiner ruling that Julian had not properly exhausted her administrative remedies under Vancouver code by failing to provide detailed enough comments. Hearing Examiner Decision at 12 - 15, CP 28 - 30. The Hearing Examiner denied Julian's appeal on these procedural grounds at page 21 of his Decision, over the objection of the City. CP 36. The rest of the Hearing Examiner's rulings he made in *dicta*. See Hearing Examiner Decision at 22, CP 37. This *dicta* ruling also granted us substantial relief on other claims. Clark County Superior Court overruled the procedural issues and reinstated the *dicta* Hearing

overruled the City's finding of "completely functionally isolated" for the northern portion of the Garden Creek creek, and required a 150 foot buffer. Hearing Examiner Decision at 28, CP 43. However, the Hearing Examiner inconsistently did not protect the remaining 2 portions of the creek.

The issue on review is whether the City/Hearing Examiner erred in failing to require a CAO buffer for the rest of Garden Creek's creek. While this creek is far from in pristine condition, it still provides a number of wildlife habitat functions according to Fish and Wildlife, AR 17 & 23, our biologist, AR 21, attachment 7, and even Applicant's biologists, AR 5 at 4. A key function is the cool clean water that the site feeds into the nearby Columbia River. AR 17, at 1, AR 23 at 2. The cool, clean water from this area's spring fed tributaries are significant enough that Fish and Wildlife opened a fish hatchery in the general vicinity. AR 23 at 2. As Fish and Wildlife testified:" It is precisely this type of water quality that prompted the State to construct a fish hatchery in the general vicinity many years ago". *Id.* As the record will show, the Hearing Examiner used the wrong law, wrongly interpreted the law, misapplied law to fact, and made a decision not based on substantial evidence by exempting the rest of the creek from CAO buffer

Examiner's Decision. CP 340 - 345; CP 345-350, CP 460-470.

requirements. Thus, we respectfully ask this Court to reverse this Decision and remand this case to provide the CAO buffer protection this creek deserves.

II. ASSIGNMENTS OF ERROR.

ASSIGNMENT OF ERROR NO. 1: DID THE CITY OF VANCOUVER/HEARING EXAMINER ERR BY FAILING TO REQUIRE A CRITICAL AREAS ORDINANCE (CAO) BUFFER FOR GARDEN CREEK'S CREEK UNDER VANCOUVER'S "COMPLETELY FUNCTIONALLY ISOLATED" EXCEPTION TEST.

ISSUE 1. CITY OF VANCOUVER/HEARING EXAMINER MADE UNAPPEALED FINDING THAT GARDEN CREEK'S CREEK WAS A "CRITICAL AREA" SUBJECT TO VANCOUVER'S CAO, VMC 20.740.110.

ISSUE 2. VANCOUVER CODE REQUIRES A RIPARIAN BUFFER FOR THIS CLASS OF CREEKS.

ISSUE 3. VANCOUVER CAO HAS A BUFFER SIZE REDUCTION; NOT A CAO EXEMPTION, FOR SITES THAT ARE "COMPLETELY FUNCTIONALLY ISOLATED".

ISSUE 4. HEARING EXAMINER PROPERLY OVERRULED CITY OF VANCOUVER'S USE OF THE "COMPLETELY FUNCTIONALLY ISOLATED" EXCEPTION AND REQUIRED A PROPER CAO BUFFER FOR THE NORTHERN PORTION OF GARDEN CREEK'S CREEK.

ISSUE 5. THE HEARING EXAMINER ERRED BY RULING THAT THE "REMAINING PORTIONS" OF GARDEN CREEK'S CREEK WAS "COMPLETELY FUNCTIONALLY ISOLATED"

AND DID NOT NEED A CAO BUFFER UNDER THE 2008 CAO CODE.

ISSUE 6. STANDARD OF REVIEW SUPPORTS PETITION FOR REVIEW.

III. STATEMENT OF THE CASE.

A. BACKGROUND.

The “Garden Creek” Short Plat is a proposed subdivision of a 0.96⁵ acre parcel into 4 lots. This site contains an existing home, which is proposed to be removed. *Id.* Hearing Examiner Decision at 1, CP 16. A watercourse runs through “Garden Creek”. AR 4 at 1. It empties into the Columbia River adjacent to the appellant Julian property. Hearing Examiner Decision at 30, CP 45. The “Garden Creek” property has a lawn with trees that shade the creek. RP at 147. See also, diagram AR 21, attachment 4. The creek flows year round. Hearing Examiner Decision at 30, CP 45. The creek goes through the bottom of the site and sometimes overflows the culvert at the bottom (Columbia River side) of the Applicant’s property; overflowing Lieser Point Road. Hearing Examiner Decision at 37, CP 52. The creek has area the Monroes use for a seasonal pond. See AR 18 color photos on site page 1 &

⁵The project has been described as both 0.96 and 0.97 acres. Compare page 1 with Decision page 3. AR 1 at 1, 3.

2 (See Appendix). See AR 21, attachment 4 (in Appendix) for diagram of pond area.

The creek has a few culverts on the site, and has 78 feet of “open watercourse”, creek unobstructed by culverts or other manmade obstruction.

Hearing Examiner Decision at 27, CP 42. These are:

...the remaining 78 feet of “open” watercourse on the site occurs in three discrete sections;

- (1) between the north boundary of the site and the northernmost culvert,
- (2) between the south end of the culvert and the parking area abutting the shop and house, and
- (3) in the portion of the area between the southern driveway and Lieser Point Road where the watercourse is not lined with culverts, plastic, concrete or other “armoring.”

The Applicant Monroes started this project in 2005 as a 2 lot short plat. AR 34. “Garden Creek” was not mentioned. The Applicant then obtained a Hydraulics permit from Washington Department of Fish and Wildlife for their proposed work in straightening the creek. AR 6. The Applicant Monroes failed to inform Washington Fish and Wildlife that this was part of a short plat proposal, and failed to go through SEPA for that review. See AR 16.

After obtaining the hydraulics permit, the Applicant then amended their City application from a two (2) unit to a four (4) unit short plat. AR 36 in April, 2006. Applicant then asked the City, for an exemption from a Critical Areas Ordinance (CAO) permit, as the creek on site was “completely functionally isolated” by the adjacent yard on site. The City exempted the project from a Habitat Permit and a 150 foot buffer because the Applicant claimed Garden Creek’s creek was “completely functionally isolated” *by the yard* adjacent to the stream. See AR 1.10. The letter, on its face, acknowledges the site was not 100% completely functionally isolated. AR 1.10 at 1. This conclusion was based on the “implied intent” of the code. Id. The Applicant, after receiving that “no required protection” letter, in October, 2007 then renamed the project “Garden Creek”. AR 37.

B. CITY DECISION.

On April 4, 2008 the City of Vancouver approved the Garden Creek Short Plat. (Hereinafter referred to as “the Decision”). The Decision, AR 1, decided many issues. The City vested this project back to the 2005 application. It had a 2005 heading on the Decision (AR 1 at 1), and the City testified it was using the 2005 code. AR 27 at 3. The City exempted the project from obtaining a CAO permit, but it did not exempt the project from

substantively meeting the CAO code protection standards of VMC 20.740.060. AR 1.10 at 1.

The City did not require compliance with the specific Wildlife Habitat ordinance standards of VMC 20.740.110.

The Applicant did not appeal any aspect of the permit. Julian filed a timely appeal. AR 3.

C. HEARING EXAMINER HEARING.

The hearing featured expert testimony of Washington Fish and Wildlife, who contradicted City staff's assertions that Fish and Wildlife agreed with the finding that the site was "completely functionally isolated".

AR 17. Fish and Wildlife said:

The June 6, 2008 Staff Recommendation/Appeal of Staff Decision for this project states, "The City of Vancouver has determined the drainage course on the site is functionally isolated." It goes on to say, "Washington Department of Fish and Wildlife (WDFW) also agreed with this assessment after visiting and assessing the site and issuing an HPA permit to the applicant."...There were no field notes, memos, letters or SEPA documents indicating WDFW thought this drainage course was "functionally isolated". Issuance of the HPA should not be interpreted as concurrence of that determination....Therefore, WDFW does not feel the stream is "functionally isolated". AR 17 at 1 & 2. (See Appendix).

Fish and Wildlife also supported a larger buffer, AR 17, page 2. In a follow up letter, Fish and Wildlife indicated it was their statutory job to determine

if a water body was a natural water course/stream, and the Garden Creek creek was a “water of the state”. AR 23, page 1. Fish and Wildlife also noted their permit did not allow a stream crossing, an amended permit would be required. *Id.*

Julian introduced the expert testimony of Tammy Mackey, fisheries biologist. She indicated the Garden Creek creek on the site had “clearly performed many important functions” under Vancouver CAO. AR 21, attachment 7, at 1. (See Appendix).

Julian also introduced testimony of Bob Rodgers, drainage engineer. Mr. Rodgers’ testimony who personally traced on site the stream back to a natural stream section upstream. AR 29, Rodgers Report, page 1.

D. HEARING EXAMINER DECISION - PROCEDURAL.

At the Hearing, the Hearing Examiner brought up *sua sponte* whether Julian had properly exhausted her administrative remedies, i.e., whether she commented in enough detail under Vancouver City Code. Julian had filed timely comments and appeals. The Hearing Examiner ultimately ruled against Julian on whether her appeal was procedurally proper. This issue has been reversed by Clark County Superior Court. CP 340-345, 345-350, CP 460-470. The Superior Court’s proper Decision was not appealed, so the

propriety of our appeal is no longer at issue. *Lakeside Industries v. Thurston County*, 119 Wn.App. 886, 83 P.3d 433 (2004), *rev. denied* 152 Wn.2d 1015 (2004).

E. HEARING EXAMINER DECISION - SUBSTANTIVE.

The Hearing Examiner made a number of rulings favorable to Julian and relevant to this case, *in dicta*. These *dicta* decisions were reinstated by the Superior Court as noted above. The Examiner found that the property was subject to the CAO, Hearing Examiner's Decision at 23, CP 38, that a 150' buffer applied, Hearing Examiner's Decision at 39, CP 45, that 78 feet of open creek was not physically isolated, Hearing Examiner's Decision at 27, CP 43, and that the northern portion of the site was improperly exempted from CAO buffers under the completely functionally isolated standard. Hearing Examiner's Decision at 28, CP 43.

First, the Examiner's Decision at 23, CP 38, ruled the project was subject to Vancouver's Critical Areas Ordinance (hereinafter "CAO"). He also noted the on-site stream was a "natural watercourse modified by humans".

The examiner finds that the City determined that, although a critical areas permit is not required, this development is subject to the CAO. ...The CAO applies to "Water bodies including lakes, streams, rivers, and naturally occurring

ponds.” 20.740.110.A(1)(c). The definition of “stream” in VMC 20150.040B provides “streams also include natural watercourses modified by humans.” HE Final Order at page 23, CP 38.

This finding was not appealed.

Second, the Hearing Examiner finds that none of the 78 feet of open water course is physically isolated under Vancouver code:

- b. As noted in Exhibit 4, the remaining 78 feet of “open” watercourse on the site occurs in three discrete sections;
- (1) between the north boundary of the site and the northernmost culvert,
 - (2) between the south end of the culvert and the parking area abutting the shop and house, and
 - (3) in the portion of the area between the southern driveway and Lieser Point Road where the watercourse is not lined with culverts, plastic, concrete or other “armoring.” See Exhibit 38. The examiner finds that these portions of the watercourse are not physically isolated from the adjacent Riparian Management Area and Riparian Buffer by existing impervious areas. Therefore, these sections of the watercourse do not comply with the first part of VMC 20.740.110.A(1)(e). Hearing Examiner’s Decision at 27, CP 43, (numbering and emphasis added).

This finding was not appealed.

Third, regarding one of the main issues of the case, the Examiner ruled the northern part of the Garden Creek creek was not “completely functionally isolated”. Hearing Examiner Decision at 28, CP 43:

"The examiner finds that the riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not "completely functionally isolated." Based on the photographs in the record, this segment of the watercourse and associated riparian area extend onto the adjacent property to the north for quite some distance. See Exhibit 38 and the photos attached to Exhibits 18 and Attachment 1 of Exhibit 29. This contiguous riparian area appears large enough to allow the interaction and mutual influence between the watercourse and the riparian area that the Riparian Management Area and Riparian Buffer are intended to protect. There is evidence of “rock armoring” along a portion of the on-site section of this watercourse segment. See Attachment 3 of Exhibit 28. However there is no substantial evidence that these piles of rock constitute an “impervious surface” sufficient to isolate the watercourse from the abutting riparian area. Hearing Examiner Decision at 28, CP 43.

This finding was not appealed.

Fourth, the Examiner went on to rule the proper buffer of the Garden Creek creek was 150': a 100' Riparian Management area, and a 50' riparian buffer. Hearing Examiner's Decision at 30, CP 45:

c. The examiner finds that the watercourse is subject to the 100-foot Riparian Management Area and a 50-foot Riparian Buffer required by the 4th section of VMC Table 20.740.110-1. ...Therefore the examiner finds that the watercourse on the

sites does “[c]onnect via surface water to another stream or river...” CP 45.

On that basis, he required a 150' buffer for the northern portion of the site.

c. The examiner finds that the riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated.” ...Therefore the applicants should be required to modify the preliminary plat to provide a 100-foot Riparian Management Area and a 50-foot buffer adjacent to the segment of the watercourse between the northern end of the northern culvert and the north boundary of the site. Hearing Examiner’s Final Order at 28, CP 43.

This finding was not appealed.

Finally, the Examiner conceded that the two remaining riparian areas “may serve some limited riparian function”. Hearing Examiner Decision at 29. CP 44. (This appears inconsistent on its face with his conclusion that the two areas are completely functionally isolated. See below).

The Examiner also made other rulings favorable to Julian that are not at issue in this appeal. This includes the requirement of a downstream analysis for stormwater leaving the site. Hearing Examiner Decision at 37, 38 & 43; CP 52, 53 & 57.

Unfortunately, the Hearing Examiner also made a few unfavorable findings and conclusions. First, he did not protect the central and lower creek

sections with a buffer, a key error. Hearing Examiner's Decision at 23, CP 38.

Second, the Hearing Examiner ruled the 2008 code amendment to the "completely functionally isolated" test applied, against the City's interpretation that the 2005 code applied, and despite the fact this issue was not appealed. Hearing Examiner Decision at 23, CP 38.

4. The examiner finds that this application vested on or after January 15, 2008, the date the applicants submitted the application. Therefore the application is subject to the current version of VMC 20.740.110.A(1)(e)(A), adopted on October 1, 2007, which the City argued implements Mr. Eiken's interpretation in Exhibit 1.10.

Third, the Hearing Examiner ruled that the remaining portions of the creek on the site met the 2008 test for "completely functionally isolated". Hearing Examiner Decision at 26, CP 41.

a. The examiner finds that the majority of the watercourse on the site is completely functionally isolated from the adjacent Riparian Management Area and Riparian Buffer areas by existing impervious surfaces.

Finally, the Examiner found the two remaining sections of the watercourse "completely functionally isolated". Hearing Examiner's Decision at 29, CP 44. This is despite the Hearing Examiner previously finding the two sites are "not physically isolated by impervious surfaces from

the adjacent Riparian Management Area and Riparian Buffer”. Hearing Examiner Decision at 29, CP 44, and finding that these areas “may serve some limited riparian functions”. *Id.*

Petitioners appealed to Superior Court. The Superior Court properly struck down the Hearing Examiner’s procedural ruling, and reinstated the Examiner’s “dicta”, Decision as a final order in this case. See Supplemental Order on Memorandum Decision, CP 345 - 350.

IV. ARGUMENT.

ASSIGNMENT OF ERROR NO. 1: DID THE CITY OF VANCOUVER/HEARING EXAMINER ERR BY FAILING TO REQUIRE A CRITICAL AREAS ORDINANCE (CAO) BUFFER FOR GARDEN CREEK’S CREEK UNDER VANCOUVER’S “COMPLETELY FUNCTIONALLY ISOLATED” TEST.⁶

ISSUE 1. CITY OF VANCOUVER/HEARING EXAMINER MADE UNAPPEALED FINDING THAT GARDEN CREEK’S CREEK WAS A “CRITICAL AREA” SUBJECT TO VANCOUVER’S CAO, VMC 20.740.110.

This is an appeal under Washington’s Land Use Appeal Act, LUPA RCW 36.70C. The error in this case was the failure of the City of Vancouver and its Hearing Examiner to protect Garden Creek’s creek with a Critical

⁶The Examiner used the 2008 Code in his Decision, VMC 20.740.110A(1)(e). See Hearing Examiner’s Decision at 25 (CP 39).

Area Ordinances buffer, even though the City and Hearing Examiner found Garden Creek's creek subject to the City's ordinance. See, Hearing Examiner Decision at 23, CP 38.

Step one in this analysis is: is this watercourse/stream a critical area under Vancouver's Critical Areas Ordinance (CAO)? The answer is clearly yes. The City made a finding⁷ this site's stream was a critical area, and so did the Hearing Examiner, so Vancouver's CAO applies.

The City's April 4, 2008 Decision states:

Finding: The area is still a critical area; AR 1, Decision at 12.
The City's April 4, 2008 Decision goes on to find:

Finding: The stream course... the area is still considered a riparian management area and riparian buffer. As such they still must be protected to insure that whatever functions are there are not lost. AR 1 at 13.

This was not appealed by Applicant Monroe. The Hearing Examiner held:

The examiner finds that the City determined that, although a critical areas permit is not required, this development is subject to the CAO. ...The CAO applies to "Water bodies including lakes, streams, rivers, and naturally occurring ponds." 20.740.110.A(1)(c). The definition of "stream" in VMC 20.150.040B provides "streams also include natural

⁷The Hearing Examiner did not make separately denominated findings that could be easily denoted for appeal. It is our intent to appeal each contrary finding of the Hearing Examiner/City of Vancouver on the CAO issue here. We do not appeal the SEPA issue.

watercourses modified by humans.” Hearing Examiner Final Order at 23, CP 38.

Neither of these findings were appealed by the Applicant, Monroe or the City. Unappealed findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) . See also, *Lakeside Industries v. Thurston County*, 119 Wn.App. 886, 83 P.3d 433 (2004), *rev. denied* 152 Wn.2d 1015 (2004).

ISSUE 2. VANCOUVER CODE REQUIRES A RIPARIAN BUFFER FOR THIS CLASS OF CREEKS.

Vancouver’s code for critical areas for streams requires a riparian management zone and a buffer to protect regulated watercourses, such as this one. VMC 20.740.110A(1)(e) requires riparian buffers for regulated watercourses. This section says:

“Riparian Management Areas and Riparian Buffers. The regulated areas include the land from the ordinary high water mark to a specified distance as measured horizontally in each direction. The Riparian Management Areas is adjacent to the lake, stream or river, and the Riparian Buffer is adjacent to the Riparian Management Area. Hearing Examiner Decision at 25.

As the watercourse on site is perennial. (Hearing Examiner Decision at 30, CP 45) and connects to the Columbia River (*Id.*), it requires a 100 foot

Riparian Management Area plus a 50 foot Riparian buffer under City Code.

Hearing Examiner Decision at 30, CP 45. As the Hearing Examiner found:

c. The examiner finds that the watercourse is subject to the 100-foot Riparian Management Area and 50-foot Riparian Buffer required by the 4th section of VMC Table 20.740.110-1. Again, these issue were not appealed and are now *verities*. Cowiche , *supra*, *Lakeside*, *supra*.

ISSUE 3. VANCOUVER CAO HAS A BUFFER SIZE REDUCTION, NOT A CAO EXEMPTION, SITES THAT ARE “COMPLETELY FUNCTIONALLY ISOLATED”.

Vancouver code has an exception to size of buffers required contained in its completely functionally isolated test. There are two (2) versions of this test, VMC 20.740.110A(1)(e)(4), the original 2005 version the City used was in place when the project was originally applied for, and VMC 20.740.110(A)(1)(e), a 2008 amendment the Hearing Examiner used.

The original 2005 exemption, VMC 20.740.110A(1)(e)(4) stated:

If impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the lake, stream, or river, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. An example would be an existing industrial paved area and warehouses in the Riparian Management Area and buffer.

In 2008, it was modified to say:

VMC 20.740.110.A(1)(e). This section provides:

When impervious surfaces from previous development completely functionally isolate the Riparian Management Area of the Riparian Buffer from the waterbody, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the waterbody is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science. (Emphasis added.)

It is important to note that neither of these ordinances are an exemption to CAO regulation. Instead, they merely reduce the size of the buffers from the code determination.

In the 2005 code, if the test is met the “regulated area” goes from “the ordinary high water mark” to “the impervious surfaces”.

In the 2008 code, if the test is met the “regulated area” goes from “the ordinary high water mark” to “the impervious surface” or be “adjusted to reflect site conditions and sound science”.

Under both codes, the water body is still CAO regulated and buffer protected, with a buffer to at least the ordinary high water mark or further. However, the City used this as an exemption for the Garden Creek creek entirely and for the permitting requirements.

The City of Vancouver has determined that the drainage course on the site is functionally isolated based on a previously submitted habitat assessment and a thorough review of the issue. The city has also determined that, as such, this drainage course is not a critical area and a critical

areas permit will not be required for this project. Washington Department of Fish and Wildlife also agreed with this assessment after visiting and assessing the site and issuing a HPA permit to the applicant.

The drainage course is not currently providing any fish and wildlife habitat functions, is “functionally isolated”, and is not considered a “critical area”, so development of this project will not degrade any critical area functions.

Finding: The area is still a critical area; however, being functionally isolated allows the applicant to development next to the steam without impacts. Decision at 12, emphasis in original.

Since this drainage course is “functionally isolated” and is not classified as a “fish and wildlife conservation area, this chapter is not applicable to this project.”⁸ AR 1 at 13.

ISSUE 4. HEARING EXAMINER PROPERLY OVERRULED CITY OF VANCOUVER’S USE OF THE “COMPLETELY FUNCTIONALLY ISOLATED” EXCEPTION AND REQUIRED A PROPER CAO BUFFER ON NORTHERN PORTION OF GARDEN CREEK’S CREEK.

In this case, the City of Vancouver, in a letter of June 18, 2007, AR 1.10, wrote a letter to the Monroes indicating the City would process the project as if the Garden Creek site was *entirely exempt* from CAO buffer requirements under the 2005 “completely functionally isolated’ test. AR 1.10 at 1. This letter indicated that the site was entirely functionally isolated due

⁸The City also claimed the Garden Creek development was exempt under VMC 20.740.030B(1)(b), but the development obviously adds impervious surfaces to the Riparian areas. The Examiner did not rule on this issue.

to previous development. *Id.* This was even though the letter on its face indicated that at least 10% of the site did not meet the test.

The habitat assessment you submitted demonstrates that approximately 90 percent of the stream on your property meets the above description for being functionally-isolated due to impervious surfaces. The remaining 10 percent, while not physically isolated as part of this stream-riparian system, is still functionally isolated consistent with the intent of the code language. AR 1.10, page 1.

The City of Vancouver's Decision of April 4, 2008, AR 1 at 12, officially exempted Garden Creek entirely from the CAO buffer requirements. *Id.* The Decision noted "Washington Department of Fish and Wildlife also agreed with this assessment...". *Id.* Julian timely appealed.

On Julian's appeal, Washington Department of Fish and Wildlife testified that it did not agree with the City's claim of "completely functionally isolated" nor was it even contacted by the City. AR 17 at 1. Washington Department of Fish and Wildlife said at AR 17 at 1-2:

...There were no field notes, memos, letters or SEPA documents indicating WDFW thought this drainage course was "functionally isolated". Issuance of the HPA should not be interpreted as concurrence of that determination....Therefore, WDFW does not feel the stream is "functionally isolated".

In fact, Fish and Wildlife thought this creek had substantial habitat functions that warranted protection.

We agree that this particular stream has been severely impacted by development. But, it still possesses the basic characteristics of cool clean water, which is the basis for good fish habitat. Due to the any fish passage barriers there is most likely no use by any anadromous species. Additionally, due to manipulations of the creek by man, any suitable resident fish habitat is limited.

On the other hand, macro-invertebrates produced in or near the stream could and most likely are transported to downstream areas where fish are present. Also, the mouths of these tributaries to the Columbia River, of which there are several in the general vicinity, serve as important cold-water refuse for salmonids. Therefore, WDFW does not feel the stream is “functionally isolated”. AR 17, 1 & 2.

In the Hearing Examiner’s Decision at 28, CP 43, he makes the key ruling that the project is not exempt from the Habitat Ordinance. Thus, the northern riparian area as delineated on page 27-28 of the Decision is properly subject to the Wildlife Habitat Ordinance, and a 150' protected area.

c. The examiner finds that the riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated.” ...Therefore the applicants should be required to modify the preliminary plat to provide a 100-foot Riparian Management Area and a 50-foot buffer adjacent to the segment of the watercourse between the northern end of the northern culvert and the north boundary of the site. Hearing Examiner’s Final Order at 28, CP 43.

This was not appealed and is a *verity* on appeal. *Cowiche, supra, Lakeside, supra.*

////

ISSUE 5. THE HEARING EXAMINER ERRED BY RULING THAT THE “REMAINING PORTIONS” OF GARDEN CREEK’S CREEK WAS “COMPLETELY FUNCTIONALLY ISOLATED” AND DID NOT NEED A CAO BUFFER UNDER THE 2008 CAO CODE.

A. 2005 STANDARD PROPER, REQUIRES BUFFER HERE.

The City vested this project to 2005, and this was not appealed. Yet, the Examiner found the project was vested to the newer 2008 code, and ruled based on the 2008 code. This is improper. The 2005 code says:

If impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the lake, stream, or river, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. An example would be an existing industrial paved area and warehouses in the Riparian Management Area and buffer.

The 2008 code says:

VMC 20.740.110.A(1)(e). This section provides:
When impervious surfaces from previous development completely functionally isolate the Riparian Management Area of the Riparian Buffer from the waterbody, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the waterbody is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science. (Emphasis added.)

The City vested this project to the 2005 standards. The City Decision approving the project, uses the vesting date of the 2005 preapp, PRJ2005-

0182. AR 1, page 1. The City's June 18, 2007 "functionally isolated" letter uses the 2005 Definition, AR 1.10. The City's Decision officially ruling on the Garden Creek creek referred to the June 18, 2007 letter, which uses the 2005 code. AR 1 at 11. The City in its closing brief said the 2005 code "was in effect". AR 27, page 2. Ironically, right after ruling the applicant cannot challenge the CAO ruling for failure to appeal HE Decision at 23, CP 38, the Hearing Examiner allowed the Applicant to appeal the vesting date... without an appeal. *Id.* This is inconsistent with Washington law. See, *Lakeside Industries v. Thurston County*, 119 Wn.App. 886, 83 P.3d 433 (2004), *rev. denied* 152 Wn.2d 1015 (2004).

Here, the Hearing Examiner adopted the 2008 test, ignoring the lack of appeal. Hearing Examiner Decision at 23, CP 38. He said:

The examiner finds that this application vested on or after January 15, 2008, the date the applicants submitted the application. Therefore the application is subject to the current version of 20.740.110.A(1)(e)(4), adopted on October 1, 2007, which the City argued implements Mr. Eiken's interpretation in Exhibit 1.10.

The Hearing Examiner did not rule on the compliance of the project based on the 2005 test. He did make it clear he thought the 2008 amendment was a substantial change. The Hearing Examiner stated:

I. The appellants argue that this provision requires more than a mere culvert, driveway or paved area, noting the example of “an existing industrial paved area and warehouses” in the prior version of the ordinance. However the City Council chose to delete this example from the current version of the Code. Decision at 26, emphasis added.

The Examiner went on to specifically rule on the project using the 2008 code, and not on the 2005 test. See Hearing Examiner Decision at 25, CP 40 (using 2008 code).

Here, the Examiner found two (2) stream segments not completely physically isolated, but completely functionally isolated. Hearing Examiner Decision at 27, CP 42. Regarding the two areas at issue, the Hearing Examiner said:

a. The examiner finds that the majority of the watercourse on the site is completely functionally isolated from the adjacent Riparian Management Area and Riparian Buffer areas by existing impervious surfaces. Hearing Examiner Decision at 26, CP 41.

The examiner further finds that the remaining two sections... are completely functionally isolated. Hearing Examiner Decision at 29, CP 44.

The examiner further finds that the remaining two sections of the watercourse on the site that are not physically isolated by impervious surfaces from the adjacent Riparian Management Area and Riparian Buffer,... Hearing Examiner Decision at 29, CP 44, (emphasis added).

As the Hearing Examiner found the two sections of the Garden Creek creek were not isolated by impervious surfaces, these two creek portions do not meet the 2005 test on its face. This finding of no physical isolation by impervious surfaces was not appealed, and is therefore a verity on appeal. *Cowiche, supra, Lakeside, supra*. Therefore, if the 2005 test applies the City/Hearing Examiner erred.

B. HEARING EXAMINER ERRONEOUSLY FOUND “COMPLETE FUNCTIONAL ISOLATION” WHILE FACTS SHOWED SITE’S FUNCTIONS.

The Hearing Examiner ruled that the two remaining portions of the 78 feet of open creek in Garden Creek creek were not physically isolated by impervious surfaces, yet still met the 2008 test for completely functionally isolated. Hearing Examiner Decision at 27, CP 42. He stated:

The examiner further finds that the remaining two sections... are completely functionally isolated.

The 2008 standard is:

VMC 20.740.110.A(1)(e). This section provides:
When impervious surfaces from previous development completely functionally isolate the Riparian Management Area of the Riparian Buffer from the waterbody, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the waterbody is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science.

In order to properly make that Decision, the Examiner must find the two creek portions to be completely functionally isolated. Since “completely” and “isolated” are not separately defined in City code, they should be interpreted by their “common and ordinary” meaning. *Mall Inc. v. City of Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987). “Completely” means total or absolute. AR 34. Isolated means “occurring alone or once, unique” according to Webster’s on line Dictionary 4/5/10. So for a site to be completely functionally isolated is to have no functions under the 2008 code.

So what are the functions under the Vancouver code? VMC 20.740.020A says:

Section 20.740.020 General Provisions

A. No Net Loss of Functions

"Activity shall result in no net loss of functions and values in the critical areas. Since values are difficult to measure no net loss of functions and values means no net loss of functions. The beneficial functions provided by critical areas include, but are not limited to water quality protection and enhancement; fish and wildlife habitat; food chain support; flood storage; conveyance and attenuation of flood waters; ground water recharge and discharge; erosion control; and wave attenuation. These beneficial functions are not listed in order of priority. This chapter is also intended to protect residents from hazards and minimize risk of injury or property damage."

There are eleven (11) functions are spelled out in the code⁹

What does the record say about these functions in Garden Creek's creek? It clearly shows many of these functions exist in and adjacent to, the creek. First, Fish and Wildlife testified that:

We agree that this particular stream has been severely impacted by development. But, it still possesses the basic characteristics of cool clean water, which is the basis for good fish habitat. Due to the many fish passage barriers there is most likely no use by any anadromous species. Additionally, due to manipulations of the creek by man, any suitable resident fish habitat is limited. Several in the general vicinity, serve as important cold-water refuge for salmonids. On the other hand, macro-invertebrates produced in or near the stream could and most likely are transported to downstream areas where fish are present. Also, the mouths of these tributaries to the Columbia River, of which there are several in the general vicinity, serve as important cold-water refuge for salmonids. *Id.* AR 17 at 1 - 2.

Biologist Tammy Mackey said:

My assessment of the creek and the associated riparian area is that it serves to convey storm water, reduce water velocities, filter potential pollutants, and regulate water temperature through shading. While I did not do a macro-invertebrate survey, previous assessments have indicated that macro-invertebrates are present on the site. This would indicate some function as food chain support, maybe for salmonids but probably for water fowl or amphibians. There is some erosion control function as well. The aquatic

⁹The code list is not intended to be exclusive: "including, but are not limited to". VMC 20.740.020A.

vegetation helps filter sediment out of the water and the wider section of the creek would allow for some settling of sediment as the water slows and then moves through the culvert.

These functions all have the potential to improve water quality before the water reaches the Columbia River. In areas where the creek flows across natural substrate there may be some infiltration of water into the ground, and some nutrient transfer. Mackey Report at page 2, AR 21, attachment 7 at 2.

Mackey finds that four (4) functions found by Fish and Wildlife: 1) water quality protection function, 2) water quality enhancement function, 3) food chain support function, and 4) wildlife habitat functions. She also finds 5) erosion control and 6) groundwater recharge functions. *Id.*

Even the Applicant's experts note some level of functions in 9 of their 13 functions categories. Applicant's 6/8/06 field study AR 5, page 4 gives the site points for 13 functions in nine (9) separate wildlife habitat function categories.

These include:

Stream Flow Influence, Vegetative Cover;
Influence on Water Temperature & D.O., Canopy Cover, Riffles;
Control of Sedimentation, Slope/Vegetative Cover;
Control of Stream Pollution, Vegetative Cover;
Contribution to Food Web, Canopy Cover, Dominant Tree Species;
Structural Stream Diversity, Pools, Riffles;
Structural Complexity, Native Woody Plant Species, Multiple Canopy

Layers;

Abundant Food Sources, Native Woody Plant Species;
Available Water, Hydrological.

Ten (10) of these are clearly buffer functions:

Stream Flow Influence, Vegetative Cover
Canopy Cover
Slope/Vegetative Cover
Vegetative Cover
Canopy Cover
Dominant Tree Species
Native Woody Plant Species
Multiple Canopy Layers
Native Woody Plant Species Exhibit 5, page 4.

In fact, this site provided something in 9 of 11 habitat functions. Nine of 11 functions!

Finally, nowhere in the applicants' 6/6/6 LDC Design Group Site Assessment AR 4, or 6/6/6 LDC Design Group Riparian Habitat Field Rating AR 5, do they even *claim* that the Garden Creek site is completely functionally isolated. Instead, they argue the site has low quality functions. That is not complete functional isolation code compliance. How did the Applicants Monroe cure this? They hired different biologists. See AR 18.

We question how the presence of a small road culvert, or even a few culverts can eliminate all habitat functions of the property. How does the culverts stop the filtration and water quality protection and enhancement in between? The habitat and food chain support? The attenuation of floodwaters? Groundwater recharge and discharge? Erosion control? Stream

cooling by the big tree over the pond? Stream cooling by the big trees at the bottom of the site? See AR 21, attachment 4 (in Appendix). How does a culvert on either end stop these functions? Simply, it doesn't, and to rule as such is an error of law, application of law to fact, and it is not supported by substantial evidence.

This construction is supported by the example in the 2005 law¹⁰, where the exception should apply to areas such as existing industrial paved areas and warehouses in the Riparian Management Area and Buffer.

How does the Hearing Examiner justify this Decision? By saying these remaining areas are “relatively small” and have “structurally altered banks”. Hearing Examiner’s Decision at 29, CP 44.

These two well vegetated exemption areas are found in pictures AR 18-1 and 18-3. The Examiner finds these two (2) sections exempt from the protections of the CAO and code because they:

...are completely functionally isolated. These areas may serve some limited riparian function, because the lack of abutting impervious surfaces allows contact, interaction and mutual influence between the watercourse and the adjacent riparian area. However these riparian areas are relatively small. The northern section, between the northern culvert and the driveway abutting the shop, is roughly 30 feet long. The

¹⁰This was edited out of the 2008 code.

southern section is much shorter. These small riparian areas are physically isolated from upstream and downstream riparian areas by existing culverts and other impervious surfaces. ...Given the small size and physical isolation of these riparian areas and based on the multiple environmental analyses in the record, the examiner finds that the applicants demonstrated that these areas are completely functionally isolated and a Riparian Management Area and Riparian Buffer should not be required consistent with sound science. The appellants failed to sustain their burden of proof to the contrary. Hearing Examiner's Decision at 29, CP 44, emphasis added.
This is error.

The "structurally altered banks" are simply someone's yard. See AR 18, Applicant's on-site pictures, page 1 (in Appendix). There is nothing in the code to show yards/lawns are intended to be exempt from habitat protection. The Examiner/Applicant says these are exempt because they are small sized, yet there is no "small sized" exemption in the code, and the section he protected on the northern part of the site was small.

The trees and even the culverts here on site shade the stream, cooling the water temperature... a key habitat function. See map AR 21, Attachment 4, (in Appendix). Second, the driveway and two culverts here is far from the "existing paved area and warehouses" example in the 2005 Code. There is nothing that says that this exception even covers something as small as a routine as a road culvert. Third, the Code only calls for this exemption when

the site is “completely” functionally isolate(d) under either the 2005 or 2008 code, and the facts simply do not support that.

Fish and Wildlife supports the remaining functions in their letter of July 10, 2008 (See AR 21, Attachment 3 at page 1 - 2) says:

We agree that this particular stream has been severely impacted by development. But, it still possesses the basic characteristics of cool clean water, which is the basis for good fish habitat. Due to the many fish passage barriers there is most likely no use by any anadromous species. Additionally, due to manipulations of the creek by man, any suitable resident fish habitat is limited. several in the general vicinity, serve as important cold-water refuge for salmonids. On the other hand, macro-invertebrates produced in or near the stream could and most likely are transported to downstream areas where fish are present. Also, the mouths of these tributaries to the Columbia River, of which there are several in the general vicinity, serve as important cold-water refuse for salmonids. *Id.*

More specifically, for the middle segment, (see AR 18, page 1 picture, (in Appendix), page 3 this is a stream/pond next to the yard. See AR18, picture #1. How is this isolated? This is just like the stream was next to the pond some 10 feet further north the Examiner found not completely functionally isolated. It is the same yard! If the Decision that the northern part was proper (and it was not appealed so it is a verity), why is the yard 100 feet away from the stream a protected buffer; but just 10 feet further south, the same yard touching the stream/pond is not protected?

More specifically regarding the southern section, the southern stream has areas of no impervious surface that is shaded by four (4) large trees. See AR 18, picture 3, AR 21, attachment 4 (showing the tree locations - both in Appendix). The buffer there should be extended to include protecting the trees and the shaded area.

These creek portions are not functionally isolated. The testimony of Fish and Wildlife, AR 17 & 23, Tammy Mackey, AR 21, attachment 7, and even the functional analysis of Applicant's original biologists, AR 5 at 4 supports our position, and opposes the City/Hearing Examiner's finding of functional isolation of the stream. See Exhibit 17.

ISSUE 6. STANDARD OF REVIEW SUPPORTS PETITION FOR REVIEW.

A. LUPA.

The standard of review in LUPA actions is governed by RCW 36.70C.130. Here we request relief from the court may grant relief under the following four (4) standards:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless.
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is clearly erroneous application of the law to the facts.

RCW 36.70C.130(1).

Standards (a) and (b) present questions of law for which the accepted standard of review is *de novo*. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.d 1141 (2003) (the court reviews questions of law *de novo* to determine whether the land use decision was supported by fact and law); *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). Standard (c) presents a factual determination, requiring the Court to look at the record and determine whether the decision was supported by substantial evidence. *United Dev. Corp. v. City of Mill Creek*, 106 Wn.App. 681, 687-88, 26 P.3d 943 (2001). To conclude that “substantial evidence” supports the factual findings, “there must be a sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true.” *Isla Verde v. City of Camas*, 146 Wn.2d 740, 752-52, 49 P.3d 867 (2002). Standard (d) requires the Court to consider where the local jurisdiction properly applied the law to the facts and to determine whether the decision was clearly erroneous. *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756,

129 P.3d 300 (2006). A decision is clearly erroneous when the court is “left with a definite and firm conviction that a mistake has been committed.” *Anderson v. Pierce County*, 86 Wn.App. 290, 302, 936 P.2d 432 (1987).

Julian is entitled to relief under standards (a), (b), (c) and (d) contained in RCW 36.70C.130(1), thereby requiring this court to reverse the Hearing Examiner’s approval of this project, and approval of our SEPA appeal.

B. CASELAW ON DEFERENCE.

The Hearing Examiner here claimed no deference to the City’s interpretation of its code. Hearing Examiner Decision at 17, CP 32. We anticipate a claim of “deference” to the Hearing Examiner’s interpretation of City Code. However, the decisions here are is flawed on their face, and no amount of discretion can cure clear error. See, *Dykstra v. Skagit County*, 97 Wn.App. 670, 985 P.2d 424 (1999), *review denied*, 140 Wn.2d 1016, 5 P.3d 8 (2000).

Construction of a statute is a question of law and is reviewed de novo. *McTavish v. City of Bellevue*, 89 Wn.App. 561, 564, 949 P.2d 837 (1998). When a statute is unambiguous, construction is not necessary and the plain meaning controls. *McTavish*, 89 Wn.App. at 565, 949 P.2d 837. Where a

statute is ambiguous, the agency's interpretation is accorded deference in determining legislative intent. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Absent ambiguity, however, there is no need for the agency's expertise and deference is inappropriate. *Waste Management*, 123 Wn.2d at 628, 869 P.2d 1034. In the court lies the ultimate authority to interpret a statute. *Waste Management*, 123 Wn.2d at 627, 869 P.2d 1034.

As municipal ordinances are the equivalent of a statute, they are evaluated under the same rules of construction. *McTavish*, 89 Wn.App. at 565, 949 P.2d 837.

Of course, agencies are permitted to fill in statutory gaps through rulemaking. See *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 634, 999 P.2d 602 (2000) (holding that agencies are permitted to fill in gaps and interpret a statute when it is ambiguous); *Hama Hama v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). However, the courts have expressly limited this authority to clarifying ambiguities in a statute which necessitates gap-filling. In no case is an agency permitted to engage in statutory interpretation "to 'amend' the statute." *Hama Hama*, 85 Wn.2d at 448, 536 P.2d 157. Moreover, agencies are not

permitted to create exemptions that are not permitted by the statute: such efforts at statutory 'construction' are viewed with extreme skepticism.

In this case, there are no requirements in conflict, and the most reasonable interpretation of the code can be given effect. *See City of Seattle v. State Dep't. of Labor and Indus.*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998). ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." (citations omitted)). For example, it is either "completely functionally isolate(d); or not. There is thus nothing to interpret, and the plain language of the code must be enforced.

It is beyond question that the City is bound by the ordinances as written. *See, e.g., Dykstra v. Skagit County*, 97 Wn.App. 670, 677, 985 P.2d 424 (1999) (local government entity's prior erroneous enforcement of a land use regulation does not foreclose proper exercise of authority in subsequent cases), *review denied*, 140 Wn.2d 1016, 5 P.3d 8 (2000). In *Clark County Natural Resources Council v. Clark County Citizens United, Inc.*, 94 Wn.App. 670, 677, 972 P.2d 941, *review denied*, 139 Wash.2d 1002, 989 P.2d 1136 (1999), the court explained:

Although a court will defer to an agency's interpretation when that will help the court achieve a proper understanding of the

statute, ‘it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law.’ Here, in our view, the Board misread the statute and exceeded its authority. If we were to defer to its ruling, we would perpetuate, not correct, its error. Under these circumstances, we hold that deference is not due. (Emphasis added.)

In this case, the Hearing Examiner/City's interpretation violates basic statutory interpretation principles and would also raise concerns of fundamental fairness in. *See, Faben Point Neighbors v. City of Mercer Island*, 102 Wn.App. 775, 781-782, 11 P.3d 322 (2000) (rejecting City’s interpretation where inequities would result).

V. CONCLUSION.

We respectfully request the Court:

1. Reverse the approval of this short plat.
2. Remand for imposing a Vancouver CAO riparian buffer for the two remaining portions of open creek in Garden Creek’s creek, so that the creek

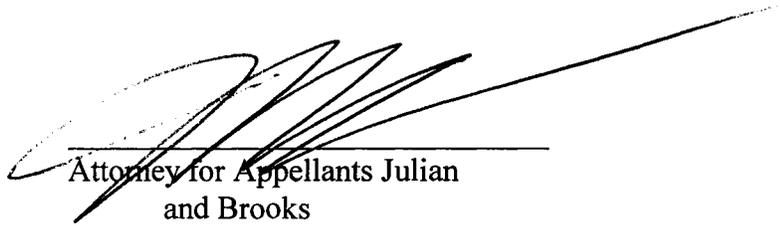
////

////

has a complete CAO buffer north of the pond culvert, and a southern buffer sufficient to protect the creek and the trees that provide shade..

DATE: April 4, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John S. Karpinski', is written over a horizontal line. The signature is stylized and extends to the right.

Attorney for Appellants Julian
and Brooks

John S. Karpinski
2612 E. 20th Street
Vancouver, WA 98661
360-690-4500
WSBA #13142

APPENDIX.

- CP1 - Hearing Examiner's Decision
- AR 18 - On-site pictures of July 11, 2008 - page 1 & 2 (color)
- AR 1.10 - City of Vancouver letter of 6/18/07
- AR 21, attachment 4 - Grading/tree removal diagram of proposed Garden Creek short plat, with existing creek, pong, and creek shading trees to be removed noted.
- AR 21, attachment 7- Report of Tammy Mackey, Biologist (3 pages)
- AR 17 - Letter from Washington Department of Fish and Wildlife of 7/10.08 (2 pages)
- AR 23 - Letter from Washington Department of Fish and Wildlife of 7/15/08 (2 pages)

dmk Julian Crt Apps Opening Brief Fnl.040410.wpd

**BEFORE THE LAND USE HEARINGS EXAMINER
OF CITY OF VANCOUVER, WASHINGTON**

Regarding an appeal by attorney John Karpinski)
of an administrative decision conditionally)
approving a four lot short plat at 1801 SE Lieser)
Point Road in the City of Vancouver, Washington)

FINAL ORDER
PRJ2005-01862 and
APL2008-00001
(Garden Creek - Appeal)

A. SUMMARY

1. The applicants, Wayne & Delores Monroe, requested approval of preliminary plat to divide 0.96 acres into four lots. The property is located at 1801 SE Lieser Point Road; also known as Tax Lot 166795-000. (the "site"). The site and surrounding properties are zoned R-4 (Low Density Residential). The site is currently developed with a single-family detached dwelling and an accessory structure (shop). The applicants proposed to remove all of the existing structures and divide the site into four lots, subject to the Tier I Infill Standards.

2. The City planning official conditionally approved the application by decision dated April 1, 2008 (PRJ2005-01862/PLD2008-00002) (the "planning official's decision"). Exhibit 1.

3. On April 15, 2008 attorney John Karpinski filed a written appeal of the planning official's decision on behalf of Rebecca L. Julian and Gretchen Brooks (the appellants). Exhibit 3. The appeal alleges procedural SEPA violations and violations of the City development code. The appellants argued that:

a. The site is partially "covered by water." Therefore the SEPA categorical exemption of WAC 197-11-800(1)(b) is inapplicable;

b. The City improperly segmented its SEPA review by failing to consider the impacts of additional stormwater runoff generated by construction of homes on the proposed lots;

c. The project violates substantive SEPA;

d. The proposed development does not provide adequate stormwater detention and treatment;

e. The proposed roads and parking are inadequate;

f. The development violates Vancouver Municipal Code ("VMC") 20.320.040;

g. The development violates other sections of the VMC listed at p. 4 of the appeal;

- h. The development is inconsistent with the City's comprehensive plan;
- i. The City's notice of application failed to include all of the information required by VMC 20.210.050.E; and
- j. The development violates the public interest requirement of RCW 58.17.110.

4. City of Vancouver Hearing Examiner Joe Turner (the "examiner") conducted an open record public hearing regarding the appeal. City planning staff (the "City") recommended that the examiner deny the appeal and affirm the planning official's decision. See the "Appeal of Staff Decision Staff Recommendation" dated June 6, 2008 (the "Appeal Staff Report"). Representatives of the appellants, the appellants' attorney and three other interested parties testified in support of the appeal. The applicants' attorney and consultants testified in opposition to the appeal and in support of the application and the planning official's decision.

5. Based on the findings and discussion incorporated herein, the examiner concludes that:

- a. The City SEPA official's determination that this short plat development is exempt from SEPA was not "clearly wrong." Therefore the examiner must affirm the City's determination that this short plat application is exempt from SEPA;
- b. This application has not been improperly segmented to avoid SEPA review;
- c. The proposed development will not cause significant adverse impacts to the environment; and
- d. Because the appellants failed to file a proper appeal based on issues raised during the public comment period the examiner has no jurisdiction to consider the non-SEPA, Code compliance, issues raised in the appeal.

6. The examiner also addressed the non-SEPA, Code compliance, issues raised in the appeal in order to avoid the necessity of a remand in the event the examiner's determination that the appeal is invalid is reversed on appeal. However those findings are entirely dicta, unless the appeal is determined adequate upon further appeal.

B. HEARING AND RECORD HIGHLIGHTS

1. The examiner received testimony at public hearing about this appeal on July 15, 2008.¹ All exhibits and records of testimony are filed at the City of Vancouver. At the beginning of the hearing, the examiner described how the hearing would be conducted and how interested persons could participate. The examiner disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the examiner of selected testimony and evidence offered at the public hearing.

2. City planner Patti McEllrath summarized the Appeal Staff Report and the planning official's decision.

a. She noted that the planning official determined that the critical areas on the site are functionally isolated. Therefore a critical areas permit is not required. However the development is still subject to the City's critical areas ordinance.

b. She argued that the proposed short plat is exempt from SEPA pursuant to WAC 197-11-800(6).

c. She argued that the proposed development complies with the stormwater ordinance, with one exception. The applicants proposed to provide a ten-foot-wide drainage easement adjacent to the on-site watercourse. VMC 14.25 requires a 15-foot easement dedicated to the City of Vancouver on one side of the watercourse. Condition of approval 23 of the planning official's decision requires the applicants modify the final plat to provide a 15-foot easement.

d. The proposed development, as modified by the conditions of approval in the planning official's decision, complies with the parking and street improvement requirements of the Code. The applicants submitted a revised preliminary plat that demonstrates the feasibility of compliance with those conditions.

e. She argued that the applicants are not required to demonstrate compliance with the City's comprehensive plan, because such compliance is not required by the Code.

f. She argued that the notice of application included all of the information required by VMC 20.210.050.E.

g. She argued that compliance with the approval criteria of the Code is sufficient to demonstrate compliance with the public interest standard of RCW 58.17.110.

¹ The City originally scheduled the appeal hearing for June 17, 2008. However the appellants' attorney filed a Motion on June 10, 2008 requesting the examiner continue the hearing to July 15, 2008 "[t]o facilitate settlement negotiations, and other good reasons." Exhibit 11. the examiner granted the Motion and continued the hearing to July 15, 2008 by order dated June 12, 2008. Exhibit 13.

3. City planning review manager Chad Eiken summarized his Memorandum dated June 18, 2007. Exhibit 1.10. He noted that VMC Title 20 authorizes the planning official to make reasonable interpretations of the Code. In this case he interpreted the Code to find that the proposed development is exempt from the city's critical areas ordinance. Based on the report of the applicants' biologist, the watercourse on the site has been highly altered. Ninety percent of the on-site portion of the watercourse is located in a culvert or adjacent to an impervious surface area, creating a functionally isolated segment of the watercourse. The watercourse on the site does not provide any critical area functions. Therefore a critical areas permit is not required. The Washington Department of Fish and Wildlife ("WDFW") issued a hydraulic permit ("HPA") allowing realignment of the watercourse, indicating that WDFW do not view the watercourse as important habitat.

4. City surface water engineer Mike Swanson testified that the VMC 14.25.220(d)(7)(D) requires a 15-foot-wide access easement on one side of all watercourses in order to allow access for emergency maintenance purposes. This is required by conditions of approval 23 and 26.

a. He noted that the proposed development is exempt from the City's stormwater ordinance, because it will create less than 2,500 square feet of additional impervious surface area. VMC 14.25.100(a)(1). In addition, 14.25.350(b)(2) exempts small residential projects from certain stormwater regulations and allows the submittal of an "abbreviated stormwater plan," provided the development complies with certain requirements. However the development must still meet all applicable standards of the Code. In this case the City required that the applicants submit a stormwater plan due to issues with the on-site watercourse. The applicants' stormwater plan was subject to substantial review by City staff. The planning official's decision properly concluded that the proposed development will comply with all applicable stormwater regulations. The applicants' stormwater plan exceeds the requirements of the Code.

b. He opined that the applicants' stormwater plan is consistent with the geotechnical report. The geotechnical report did not include a full infiltration analysis. The City does not allow roof runoff to be discharged to the street in this area.

5. Attorney John Karpinski appeared on behalf of the appellants Rebecca L. Julian and Gretchen Brooks and summarized his Hearing Memorandum, Exhibit 21. He also submitted analyses of the stormwater and traffic impacts of the proposed developments. Attachments 1 and 5 of Exhibit 21.

a. He argued that the proposed development is subject to SEPA. A portion of the site is "covered by water," the on-site watercourse. Therefore development on this site is not subject to the SEPA exemption of WAC 197-11-800(6). In addition, the HPA is part of the proposal and requires SEPA review. Therefore the entire project is subject to SEPA review. The City is improperly segmenting SEPA review.

i. He argued that the proposed development also violates substantive SEPA. Construction of four homes in the riparian area on this site will have adverse environmental impacts that must be considered, even though the Code and procedural SEPA do not consider such impacts.

ii. He argued that WAC 197-11-158, cited by Mr. Morasch, is inapplicable in this case. This section requires that the City make certain specific findings in order for the exemption to apply. The City did not do so in this case.

b. He argued that the City is not following its stormwater ordinance.

c. He argued that VMC 20.740.110 requires a Riparian Buffer and a Riparian Management Area on both sides of the on-site watercourse. The entire site is within the Riparian Management Area, which is “essentially a no touch area.” VMC 20.740.110.A.1.e(1)(4) allows a reduction in the Riparian Management Area “when impervious surfaces from previous development completely functionally isolate the [Riparian Management Area] from the waterbody...” The City’s interpretation ignores the word “completely.” He submitted a copy of the dictionary definition of “completely.” Exhibit 24. He argued that this provision requires a significant barrier, such as an industrial parking lot or similar large-scale impervious area, based on the example in VMC 20.740.110.A(1)(e)(4)(A). The impervious areas on this site are not large enough to “completely functionally isolate the [Riparian Management Area]...” from the on-site watercourse. The applicants only demonstrated that portions of the watercourse are isolated and/or of poor quality. The applicants’ biologist’s report noted that the on-site watercourse does serve some functions. That is not sufficient to justify complete exemption from the critical areas ordinance. If the watercourse is not completely functionally isolated, then the development is subject to the critical areas ordinance.

d. The proposed development does not comply with the critical areas ordinance, VMC 20.740.060. The applicants made no effort to avoid or minimize impacts to the critical area on the site. The applicants only proposed to mitigate actual impacts to the watercourse. The applicants did not offer any mitigation for the impacts caused by construction of homes in the Riparian Management Area. The City ignored the impacts of the homes by focusing its review on the creation of lots through the subdivision process and ignores the impacts of residential construction on the lots.

i. He argued that the Code requires preservation of trees in critical areas where feasible. The applicants proposed to remove existing trees adjacent to the watercourse, which provide shading of the watercourse, reducing water temperatures. The applicants proposed to remove these trees. The applicants’ biologist’s report failed to consider this impact. The watercourse and the trees do provide some critical area functions.

e. He argued that the proposed development does not comply with the City's stormwater ordinance.

i. He noted that the planning official's decision appears to grant an exception to the easement requirement of the stormwater ordinance, VMC 14.25. However the City relied on the exception process of VMC 20.255.040, which does not apply to VMC 14.25.

ii. The development does not provide any water quality treatment.

iii. The development does not meet the standards for small residential projects or an abbreviated stormwater plan. The stormwater report does not include complete maps of the drainage basins. The applicants' biologist claims that the on-site watercourse originates near Mill Plain Boulevard. Therefore the drainage basin must extend to Mill Plain Boulevard.

iv. VMC 14.25.350.a(1)(A) requires the use of "roof downspout systems" for discharge of roof runoff in order to qualify as a small residential project. However the applicants have not proposed to do so. The term "roof downspout system" as defined by the Code requires infiltration of stormwater. The applicants' geotechnical report expressly states that infiltration is not feasible on this site.

v. The applicants must still comply with the water quality and quantity control requirements of VMC 14.25.210 and .220. The proposed development will increase the volume of stormwater runoff leaving the site, increasing the risk of downstream flooding.

f. He argued that the proposed roads and parking are inadequate, based on Attachment 5 of Exhibit 21. The National Fire Code requires a minimum 26-foot-wide fire access lane. Lieser Point Road does not comply with the cul-de-sac length and turnaround requirements of the VMC. The 90-degree curve west of the site may limit emergency vehicle access to the site.

g. He argued that the appellants made a good faith effort to participate in the administrative review process, which should be sufficient to comply with VMC 20.210.130.A(4). The appellants are private citizens, not attorneys. Therefore they should be held to a lower standard, citing *Citizens for Mt. Vernon v. City of Mt. Vernon*. 133 Wn.2d 861, 947 P.2d 1208 (1997). In addition, the Notice of Application provided by the City did not include all of the information required by VMC 20.210.050.E.

h. He argued that the proposed development does not comply with the public interest requirement of RCW 58.17.110. Compliance with the VMC is not *per se* sufficient to demonstrate compliance with RCW 58.17.110.

i. He argued that VMC 20.320.040.A and B expressly require compliance with the City's comprehensive plan. The term "plans" as used in these sections can only refer to the City's comprehensive plan. The proposed development is inconsistent with several sections of the comprehensive plan.

j. He disputed the findings in the July 8, 2008 letter from ELS, the applicants' biologist. Exhibit 18 (the "ELS letter"). Mr. Karpinski argued that the watercourse on site is a "stream," not a stormwater drainageway as alleged by the applicants. The watercourse is not entirely artificial. According to the applicants' geotechnical report, the water in the watercourse is from groundwater, not entirely surface stormwater runoff. The ELS letter claims that the water in the watercourse is "not cool, clear water..." However they never measured the temperature of the water. There is nothing in the record to support the applicants' claim that 95 percent of the watercourse is located in an undefined channel.

k. He argued that the applicants cannot waive vesting. In order to take advantage of new regulations the applicants must withdraw the current application and reapply, citing *Friends of the Law v. King County*.

l. He opined that additional SEPA analysis may be required to address the stormwater issues. The development is exempt from compliance with the stormwater ordinance. Therefore any stormwater impacts must be addressed through SEPA.

6. Sally Dillon testified on behalf of Jimmy Sadri. She argued that the watercourse on the site is not "completely isolated." The watercourse flows into a critical area 20 feet south of Lieser Point Road. She expressed concerns with the proposed lot sizes.

7. Attorney Steve Morasch, biologist Key McMurray and engineer Eric Golemo testified on behalf of the applicants, Wayne & Delores Monroe.

a. Mr. Morasch summarized the applicants' legal arguments and responded to Mr. Karpinski's testimony.

i. He argued that the appellants failed to demonstrate that "[t]he specific issues raised on appeal were raised during the period in which the record was open" as required by VMC 20.210.130.A(4). Ms. Julian submitted an e-mail to the City. Exhibit 1.12. The e-mail stated that "I have concerns that I feel need to be addressed." However they did not raise any specific issues. In addition, the City did not receive the appellants' e-mail until after the comment period closed. The Notice of Application states that "comments on the project will be received until 5 p.m., Tuesday, March 4, 2008." Exhibit 1.8. The City received Ms. Julian's e-mail at 5:11 p.m., on March 4, 2008, 11 minutes after the comment period closed.

ii. He argued that the general reference to "plans" in VMC 20.320.040.A and B is not sufficient to incorporate the comprehensive plan as an approval criteria.

iii. He argued that the proposed development is exempt from SEPA pursuant to WAC 197-11-800(6). The exception for “lands covered by water” only applies to “waters of the state.” WAC 197-11-756. If the watercourse on the site is not a “natural water course” then the exception does not apply and the development is exempt from SEPA.

iv. Even if the development is subject to SEPA, the DNS threshold applies. Based on the findings in the Staff Report, the development will not cause any significant adverse environmental impacts. The watercourse on the site is completely isolated, with no buffer between the watercourse and adjacent pavement. The watercourse is contained within culverts, rip rap and plastic liners that completely isolate the watercourse from the adjacent lands. Therefore there are no adverse environmental impacts. The proposed development will actually improve the environmental quality on the site. Therefore, if the development is subject to SEPA, a DNS is appropriate in this case.

v. He noted that the applicants obtained an HPA permit from WDFW. The appeal deadline for that permit expired, so the approval is final. The City has no authority to impose a condition of approval requiring that the applicants restart the HPA application process at this point.

vi. He argued that the applicants could waive their vesting rights and apply the recently adopted amendments to VMC 20.740.110. and any other ordinance amendments adopted since the application originally vested. *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005) prohibits selective waiver of vesting. But it does not prohibit complete waiver.

b. Ms. McMurray summarized her analysis of the watercourse flowing through the site and responded to questions from the parties’ attorneys.

i. She argued that the watercourse is not a “natural water course” as defined by RCW 77.55. It is “entirely artificial.” The watercourse has been extensively manipulated. It is not a natural drainage course. It is a manmade ditch. The City’s schematics always refer to the watercourse as a “drainage ditch.” The watercourse begins north of Highway 14 and flows through a number of culverts before reaching the site. Approximately 1/2 of the on-site watercourse is located in underground culverts. There is only 75 feet of open watercourse channel on the site. She testified that, in her opinion, the culvert, plastic liner and riprap are all “impervious surfaces” as used in VMC 20.740.110.A.1.e(1)(4). She did not find any groundwater springs feeding the watercourse. She disagreed with the statement in the applicants’ geotechnical report that the watercourse is fed by springs. The only place that groundwater could reach the watercourse is on the site and she did not observe any groundwater there. However she agreed that 10 percent of the water in the watercourse could be from groundwater. The City’s stormwater plans do not show any springs in the area, only stormwater culverts and catch basins. This watercourse is not shown on the Department of Natural Resources (“DNR”) stream maps. The property owner measured the temperature of the watercourse at 68 degrees, which is above the lethal temperature for native fish species.

ii. She noted that WDFW issued the HPA for a “drainage ditch” not a stream or “waters of the state.” The HPA describes the project as “re-route ditch/straighten stream channel...” Exhibit 6. According to the applicants, WDFW initially refused to issue an HPA for this project because the watercourse is not a “water of the state” requiring an HPA permit.

c. Mr. Golemo responded to the appellants’ transportation and stormwater analyses, Attachments 1 and 5 of Exhibit 21.

i. He argued that the proposed development makes adequate provisions for emergency vehicle access and turnaround. The Fire Marshall approved the proposed access plan for the development. The applicants are required to install automatic fire sprinklers in two of the homes in order to mitigate for the restricted access. He testified that Fire Department can open the gate on Lieser Point Road south of the site in order to access the emergency vehicle turnaround. The gate does not create a barrier to emergency vehicle access. In addition, there is an existing turnaround to the north, between the site and Evergreen Highway.

ii. He noted that conditions of approval 23 and 26 of the planning official’s decision require that the applicants provide a 15-foot-wide access and maintenance easment on one side of the on-site watercourse as required by VMC 14.25.220(d)(7)(D). The City did not approve an exception to this standard.

iii. He argued that the proposed short plat will not create more than 2,500 square feet of new impervious surface area. Therefore the development is exempt from the stormwater ordinance pursuant to VMC 14.25.100(a)(1). Runoff from roof areas is not included in the analysis, because such runoff is not exposed to contaminants. The development is also subject to the regulations for “small residential projects” set out in VMC 14.25.350. The applicants will utilize roof downspout systems for stormwater disposal as required by VMC 14.25.350.(b)(1)(A). The applicants will conduct infiltration testing on the site to confirm the feasibility of such infiltration systems. He agreed to a condition of approval to that effect. VMC 14.25.340(2) also provides an exemption for single family homes 15,000 square feet or smaller that are constructed with roof downspout systems.

(A) He argued that infiltration is feasible on this site. The appellants are misinterpreting the findings in the applicants’ geotechnical report. The applicants’ geotechnical engineers did not conduct a full geotechnical analysis with infiltration test pits or groundwater measurements. They merely conducted a preliminary review to determine the feasibility of the proposed development. The report merely outlines potential problems with infiltration. The surface soils on the site consist of “tight” silts, which likely cause visible surface ponding on the site. However the site is underlain by sandy Type B soils. The Code allows infiltration facilities in Type B soils at an assumed rate of 10 inches per hour without any infiltration testing. Infiltration tests were previously conducted on neighboring properties and confirmed that infiltration is feasible in this area.

(B) He opined that the standards in VMC 14.25.350 are intended to reduce the upfront costs for small residential projects. However the development is still required to comply with all applicable regulations. The purpose of the preliminary stormwater report is to determine the feasibility of complying with the stormwater regulations. The applicants can revise the plan as necessary during final engineering review, subject to City approval of the final design.

iv. He argued that the applicants are not required to conduct a downstream analysis pursuant to VMC 14.25.220(b)(3). The development will discharge surface water off-site, via the on-site watercourse. However the subdivision is exempt from compliance with this provision, because it will create less than 2,500 square feet of new impervious surface area. VMC 14.25.220(a)(1). The drainage calculations are based on the existing capacity of the downstream culverts. The proposed subdivision will maintain or increase the amount of downstream capacity, by reducing the amount of impervious surface area on the site.

v. He testified that the applicants' stormwater plan shows adjacent stormwater facilities as required by VMC 14.25.420(1)(A). The applicants are not required to show upstream stormwater facilities because the development will not impact such facilities. The stormwater report includes an estimate of the volume of runoff from this site as required by VMC 14.25.420(4)(a). The hydrographs included in the stormwater report show volumes in acre-feet.

vi. He testified that the applicants are willing to conduct additional analyses on the site to address the appellants' concerns. The applicants will increase the size of the on-site culverts if necessary to ensure adequate conveyance capacity is available. If necessary the applicants can detain stormwater on the site in an underground pipe beneath the existing driveway. However the current proposal is adequate to comply with the Code.

vii. He argued that all of the lawn areas on the site are "impervious surfaces" as defined by VMC 20.150.040.B and as used in VMC 20.740.110(a)1(E)(4).

8. City concurrency manager Ahmad Qayoumi responded to the report from Bruce Schaefer, the appellants' traffic engineer, Attachment 5 of Exhibit 21.

a. He noted that Mr. Schaefer's report addresses stormwater and habitat issues. However there is no substantial evidence that Mr. Schaefer is an expert in these areas. Mr. Schaefer is a professional traffic engineer. Therefore those portions of his report should be stricken from the record.

b. He argued that the majority of Mr. Schaefer's transportation analysis is subjective opinion. He did not provide any calculations or other evidence to substantiate his opinions. Mr. Schaefer notes that the development will cause a 300 percent increase in net traffic. However he does not address the impact of the additional traffic on the capacity of the streets serving the site. Mr. Schafer noted the sharp, 90-degree, curve on Lieser Point Road north of the site. However he did not conduct any analysis comparing the turning movements of emergency vehicles to the radius of the curve. There is no support for Mr. Schafer's conclusion that the proposed development will create a hazard. He agreed with Mr. Golemo that the Fire District can open the gate on Lieser Point Road and access the turnaround south of the site.

9. Assistant City attorney Linda Marousek responded to legal issues raised in the appeal and asked questions of several witnesses.

a. She submitted an e-mail from the Vancouver Fire Marshall approving access to Lots 2 and 3 site with less than 20 feet of access width, provided the applicants install automatic fire sprinklers in the homes on these lots. Exhibit 26.

b. She noted that the appellants have the burden of proof on appeal, pursuant to VMC 20.210.120.B(4). Mr. Karpinski's questions are not facts sufficient to support the appellants' burden of proof.

c. She noted that the HPA permit and associated SEPA review are not before the examiner. The appeal period for the HPA permit expired.

d. The applicants are not required to demonstrate compliance with the comprehensive plan because the plan has not been expressly adopted as an approval criterion. The reference to "plans" in VMC 20.320.040.A and B means the various "plan districts" set out in VMC 20.610 through 20.660. When the Code intends to refer to the comprehensive plan it says so explicitly.

e. She argued that the City's land division regulations implement RCW 58.17.110. Compliance with the land division regulations is sufficient to show that the development is in the public interest.

10. Area resident William Corn testified that the creek on the site is currently at capacity, based on his observations. Any additional runoff from this site will cause the watercourse to flow over the top of the road. He testified that erosion is a problem under existing conditions. Any increase in runoff will exacerbate the problem. He argued that the two 90-degree curves on Lieser Point Road create hazardous "blind spots." Additional traffic generated by the proposed development will exacerbate the hazards. He testified that he was not aware of any history of accidents on this road.

11. Area resident Alan Sheasgreen reiterated Mr. Corn's concerns that additional runoff from this development will exceed the capacity of the existing culverts and cause the watercourse to flow across the road during larger storm events.

12. At the end of the hearing the examiner held the record open subject to the following schedule:

a. Ten calendar days, until July 25, 2008, for all parties to submit additional evidence;

b. An additional week, until August 1, 2008, to allow all parties an opportunity to respond to the new evidence;

c. An additional two weeks, until August 15, 2008, to allow the applicants to submit a final argument; and

d. A final week, until August 22, 2008, to allow the appellants to submit a final argument. The record in this case closed at 5 p.m. on August 22, 2008.

C. DISCUSSION

Record Objections:

1. The appellants argued that the applicants included legal arguments in their “post hearing evidence” submittal, Exhibit 28. The appellants moved to strike that evidence from the record as “[b]eyond the scope of the open record.” The examiner denies the appellants’ motion. The examiner held the record open subject to the above schedule. Although the initial submittal periods were established for submittal of additional evidence, the examiner did not prohibit the submittal of additional argument during that period. In any case, the applicants could have included such arguments in its final argument, submitted at the end of the open record period. By submitting these arguments earlier in the process the applicants enhanced the appellants’ ability to respond to the arguments. The fact that the applicants’ technical consultants, rather than the applicants’ attorney, raised the arguments is irrelevant.

2. The appellants note that the applicants raised a number of new legal issues in their closing argument that were not raised at the public hearing. The appellants argue that these issues exceed the “[p]roper scope of closing” and move to strike these new issues. p 6 of Exhibit 31. The appellants argue that the applicants should be restricted to the specific issues raised at the appeal hearing, citing *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 947 P.2d 1208 (1997). The examiner denies the appellants’ motion.

a. The express purpose of the open record period was to allow all of the parties an opportunity to submit additional evidence and argument. The examiner held the record open until August 15, 2008, to allow the applicants to submit a final argument summarizing all of the legal issues in support of their case. The examiner did not impose any limitations on the issues that the parties could raise in that argument. The examiner only prohibited the submittal of additional evidence at this stage of the process.

b. The examiner finds that the *Mount Vernon* case is inapplicable. Nothing in the Code prohibits the applicants, or the appellants, from raising new legal issues in their final argument and the appellants failed to cite any case law supporting such a limitation. In any case, the appellants had an opportunity to respond to these new issues in their own final argument, submitted one week after the applicants' final argument.

c. The appellants may argue that the examiner is holding them to a higher standard than the applicants. However the examiner is simply applying the requirements of the Code. As discussed below, the Code expressly limits appeals of Type II decisions to issues raised during the administrative review process. The Code does not impose a similar limitation on issues that may be raised in a parties closing argument, limiting the closing to the specific issues raised during the public hearing.

3. The applicants objected to those portions of Mr. Schaefer's report, Attachment 5 of Exhibit 21, discussing stormwater and critical area issues. The applicants note that there is no evidence that Mr. Schaefer is an expert in analysis of stormwater or critical areas. Therefore the applicants moved to strike those portions of the report that discuss potential stormwater and critical areas impacts of the development. The examiner denies the applicants' motion. The applicants are correct that there is no evidence in the record that Mr. Schaefer is an expert in analysis of stormwater or critical areas. However his lack of expertise only affects the weight of his testimony. It does not make it irrelevant. The examiner will give the same weight to Mr. Schaefer's testimony on these issues as he would to the testimony of any other lay person.

Procedural Issues:

4. The examiner finds that the appellants failed to comply with the applicable procedural requirements for an appeal, because they failed to raise any issues during the initial comment period.

a. This is an appeal of a Type II decision by the City planning official. Therefore it is subject to the procedural requirements of VMC 20.210.130. VMC 20.210.130.A(4) requires that the appeal include "A statement demonstrating that the specific issues raised on appeal were raised during the period in which the record was open."

b. The examiner finds that the text of the code must be interpreted to give meaning to all of the word and to avoid rendering any language superfluous. *City of Seattle v. Williams*, 127 Wn.2d 341, 349, 908 P.2d 359 (1995). The requirement that the appeal demonstrate that the specific issues raised on appeal were raised during the public comment period serves no purpose if the issues that may later be considered were not correspondingly limited. To hold otherwise, and allow the appellants or other parties to raise new issues that were not specifically raised during the public comment period, would render VMC 20.210.130.A(4) superfluous.

There is no reason to require that an appellant demonstrate that the specific issues raised on appeal were raised during the public comment period if any party may raise any other issues at the appeal hearing. Therefore the examiner finds that the appeal hearing must be limited to the specific issues raised during the public comment period in order to give meaning to the words in VMC 20.210.130.A(4).

i. As the courts have held, “This rule is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking.” *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). This rule is intended to ensure the efficiency of the administrative review process and:

[f]urther the purposes of: (1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

Id at 122 Wn.2d 669.

This is consistent with the stated purposes of the City’s decision-making procedures, to “assure prompt review of development applications...” VMC 20.210.010.A(1). To ignore this requirement would allow opponents of a project to bypass the administrative review process altogether and raise all issues of concern during a subsequent appeal process, defeating the purpose of the Type II review process.

c. In this case the City received two written comments; a letter from the Clark County Health Department, Exhibit 1.11, and an e-mail from Rebecca Julian, Exhibit 1.12. The Health Department letter noted the apparent absence of evidence of existing wells or on-site sewage systems or other “environmental health concerns” on the site. Ms. Julian’s e-mail stated that she had “[c]oncerns that I feel need to be addressed.” However the e-mail did not elaborate on those concerns or otherwise raise any specific issues with the proposed development. Based on these comment letters, the examiner finds that none of issues raised in the appeal were raised during the initial comment period.

i. The facts in this case clearly differ from the facts in *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 947 P.2d 1208 (1997), cited by the parties. This is not a question of whether the appellants raised technical, legal arguments with enough specificity to preserve them for appeal. With the exception of the Health Department, no one raised *any* issues at all during the two-week public comment period provided by VMC 20.210.050.G.

d. The appellants argue that they should be allowed more leeway in their appeal due to the short (two-week) public comment period and the lack of a public hearing. “Since City had the lowest possible process, only the minimum administrative response was required.” P 5 of Exhibit 31. The examiner agrees. However the appellants failed to meet even this minimum requirement. The appellants did not raise any issues at all during the public comment period. A mere statement of unspecified “concerns” is not sufficient to preserve any issues for appeal.

e. The appellants note that VMC 20.210.050.E(6) requires that the public notice include “An indication that failure of any party to address the relevant approval criteria with sufficient specificity may preclude subsequent appeals on that issue.” The appellants argue that use of the term “may” in this section makes the requirement to raise issues during the initial comment period discretionary. The examiner disagrees. The plain language of this provision is consistent with the caselaw and the above interpretation. This section does not state that failure to raise an issue altogether may preclude subsequent appeals on that issue. The term “may” applies to the determination of whether a party raised an issue with sufficient specificity. A determination of adequate specificity is clearly a discretionary determination that depends on the facts in the particular case. However failure to raise an issue altogether is a different matter that does not require the exercise of discretion.

f. The examiner finds that the City has no authority to waive this jurisdictional requirement and accept an incomplete appeal. The applicants have a due process right to rely on the procedural requirements of the Code.

g. The examiner finds that the appellants failed to raise any specific issues during the public comment period. Therefore they waived their right to raise any issues on appeal and the examiner has no jurisdiction to consider any issues other than SEPA compliance, which is subject to a separate appeal process, VMC 20.790.640. However, for the sake of completeness and in the event the above determination is reversed on appeal, the examiner will endeavor to address all of the relevant issues raised in this proceeding.

h. The examiner finds that the appellants’ failure to raise any issues during the public comment period does not affect their SEPA appeal. The Code clearly treats SEPA appeals separately from appeals of the underlying land use decision.² SEPA determinations are subject to a separate appeal process as set out in VMC 20.790.640. Unlike the appeal process set out in VMC 20.210.130, this section does not require a statement that the issues raised on appeal were raised during the public comment period.

² See, e.g., VMC 20.790.640.D, which requires consolidation of appeal *hearings*, and VMC 20.790.640, which establishes a process for SEPA appeals separate from the process set out in VMC 20.210.130 for appeals of land use decisions.

5. The examiner finds that the Notice of Application provided in this case was sufficient to comply with the requirements of the Code and to fulfill due process requirements. “One of the basic touchstones of due process in any proceeding is notice reasonably calculated under all the circumstances to apprise affected parties of the pending action and afford them an opportunity to present their objections.” *Barrie v. Kitsap County*, 84 Wash.2d 579, 584-85, 527 P.2d 1377 (1974). The examiner finds that the Notice of Application provided in this case was adequate to comply with this requirement. As discussed below, any omissions in the Notice of Application did not affect the public’s ability to participate in the City’s administrative review process in any way. Therefore, to the extent the Notice of Application was in error, the error was harmless.

a. VMC 20.210.050 requires the City to mail notice of Type II applications to the persons and organizations listed in VMC 20.210.050.F. VMC 20.210.050.E requires that the Notice of Application include certain information. The appellants allege that the Notice of Application provided in this case, Exhibit 1.8, was inadequate and failed to include all of the required information. Specifically the appellants allege that the notice did not include:

- i. [A] list of project permits included with the application, as well as the identification of other permits not included in the application, to the extent known to the city. VMC 20.210.050.E(2);
- ii. The identification of any existing environmental documents that may be used to evaluate the proposed project. VMC 20.210.050.E(4); and
- iii. An indication that all evidence relied upon by the planning official to make the decision shall be contained within the record and is available for public review. Copies of this evidence can be obtained at a reasonable cost from the planning official. VMC 20.210.050.E(7).

b. The Notice of Application does not mention the HPA permit issued by WDFW. The examiner assumes that this is an “[o]ther permit[s] not included in the application...” that should have been listed in the Notice of Application pursuant to VMC 20.210.050.E(2). However any error was harmless and did not affect the public’s ability to participate in the HPA review process. WDFW had already issued the HPA and the appeal period had expired before the City issued the Notice of Application in this case.³ Therefore, even if the City had listed the HPA permit in the Notice of Application, the appellants would not have had an opportunity to participate in the HPA review process or appeal the issuance of the HPA.

³ WDFW issued the HP on January 1, 2006. The appeal period expired on February 1, 2006. The City issued the Notice of Application on February 19, 2008, 18 days after the expiration of the appeal period for the HPA.

c. The City's "Official Determination Regarding CAO Applicability" is an existing environmental document that may be used to evaluate the proposed project. This document should have been noted in the Notice of Application pursuant to VMC 20.210.050.E(4). The examiner is uncertain whether the "WDFW Hydraulic Review" noted in the appeal is an "[e]xisting environmental document[s] that may be used to evaluate the proposed project." VMC 20.210.050.E(4). There is no evidence that the City relied on this review in evaluating the short plat application. It appears the City relied on the HPA permit itself, rather than the Hydraulic Review that led to issuance of the HPA. However, assuming the City was required to mention these documents in the Notice of Application, failure to do so was harmless error. There is no evidence that the City's failure to list these documents in the Notice of Application affected the public's ability to participate in the review process in this case or otherwise impact anyone's rights. Both of these documents were included in the City's planning file and available for public review as expressly stated in the Notice of Application.

d. The examiner finds that the Notice of Application did include the statement required by VMC 20.210.050.E(7). See the third paragraph on p 2 of Exhibit 1.8. This text of the Code is included almost verbatim in the Notice of Application. Therefore the examiner finds that the Notice of Application complies with VMC 20.210.050.E(7).

e. The appellants withdrew their SEPA notice issue. See fn 10 of Exhibit 21.

f. The appellants may again argue that the examiner is holding them to a higher standard than the applicants. However the examiner is simply applying the requirements of the Code and state law. Compliance with the public notice requirements is subject to the harmless error standard, whereas compliance with the appeal requirements is a jurisdictional requirement. Even if the appeal were subject to the same, harmless error, standard, the examiner cannot find that failure to raise any issues during the public comment period is harmless error, because it precludes the City from addressing the issues during the Type II process and undermines the integrity of administrative decision-making process.

6. There is a dispute about whether the examiner is required to defer to the City's reasonable interpretations of the applicable ordinances. However the examiner finds that it is unnecessary to resolve that dispute in this decision. The examiner analyzed the appeal based on the plain meaning of the words in the Code and the applicable canons of construction where ambiguities exist. The examiner did not give any deference to the City's interpretations, with the exception of the SEPA determination as required by RCW 43.21C.090.

Procedural SEPA:

7. There is a dispute about whether this application is exempt from SEPA pursuant to WAC 197-11-800(6)(a), which provides that “The following land use decisions shall be exempt [from SEPA]:

Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection.

There is no dispute that the proposed land division is a “short plat... pursuant to the procedures required by RCW 58.17.060...” However there is a dispute about whether the site constitutes “[l]ands covered by water...”

a. WAC 197-11-756 provides "Lands covered by water" means lands underlying the water areas of the state below the ordinary high water mark, including salt waters, tidal waters, estuarine waters, natural water courses, lakes, ponds, artificially impounded waters, marshes, and swamps."

b. There is clearly a watercourse on the site, which “covers” a portion of the site. However it is unclear whether the watercourse constitutes a “natural water course” or otherwise qualifies as “water areas of the state.” There is a substantial amount of conflicting evidence in the record regarding this issue, including evidence about the source of the water in the watercourse on the site, whether it is from groundwater or surface stormwater runoff.

i. The examiner finds that the watercourse does carry some groundwater. As Mr. Rodgers noted, the watercourse was flowing through the site on July 29, 2008. P 1 of the Rodgers Engineering “Preliminary Engineering Report (Part II),” Attachment 1 of Exhibit 29.⁴ LDC, the applicants’ consultant opined that “[t]he hydraulic input for the watercourse consists of groundwater permeation through old alluvial deposits and direct runoff from precipitation events.” P 1 of Exhibit 4. However the watercourse also carries a significant amount of surface stormwater runoff. “Water levels rise quickly in response to precipitation events in the area...[and] a perennial source of groundwater input may be absent in summer months.” P 3 of Exhibit 4. “[A] series of catch basins and culverts...are the source of the water in the ditch.” P 2 of Exhibit 18. The watercourse has always been referred to as a stormwater ditch. *Id.* Mr. Rodgers and WDFW both noted that the area around the site is “known for springs.” P 7 of Attachment 1 of Exhibit 29 and Exhibit p 2 of Exhibit 23. However there is no evidence of springs within this drainage course or any evidence of a surface connection between this watercourse and any springs that may exist in the area.

⁴ This attachment does not include page numbers and includes multiple title pages. Therefore the examiner counted pages from the beginning of the attachment, including the photographs and title pages, to determine the correct page references for this document.

ii. In addition, the watercourse has been significantly altered, if not created, by human activities. "A minimum 95 percent of the drainage ditch runs through culverts of various sizes and materials." P 2 of Exhibit 18. "The entire length of the watercourse traversing the Monroe property has structurally altered banks which impede the area's ability to form and maintain proper fish and wildlife habitat." P 2 of Ex 4. WDFW "[a]gree[s] that this particular stream has been severely impacted by development" and the stream has been manipulated by man. p 1 of Exhibit 17. Mr. Rodgers testified that he observed an approximately 300-foot reach of natural stream canyon north of the site. p 7 of Attachment 1 of Exhibit 29. The examiner accepts this testimony as evidence, but not as expert testimony. There is no evidence in the record that Mr. Rodgers is an expert in stream biology. See Exhibit 25.

c. The planning official, acting as the SEPA official, determined that this short plat application is exempt from SEPA pursuant to WAC 197-11-800(6)(a).⁵ The SEPA official expressly concluded that the watercourse traversing the site is not a "natural stream," finding that "the watercourse traversing the Monroe Property can be best described as a conduit for stormwater and ground water originating from upstream sources" p.11 of the planning official's decision. The examiner must accord the SEPA official's determination "substantial weight." RCW 43.21C.090.

An agency's determination that a proposal is categorically exempt falls within this statute because it is a finding that environmental review is not required; therefore, a finding of exemption is given substantial weight. See RCW 43.21C.110(1)(a).

Clallam County Citizens for Safe Drinking Water v. City of Port Angeles 137 Wn.App. 214, 151 P.3d 1079, 1084 (2007).

The examiner must review the SEPA official's decision under a "clearly erroneous" standard," and may only reverse the City's determination if he is "left with the definite and firm conviction that a mistake has been made. " that the City made a mistake" *Id.* (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 114 Wash.2d 169, 176, 4 P.3d 123 (2000)).

d. Given the conflicting evidence in the record, and giving substantial weight to the SEPA official's determination, the examiner cannot find that the City SEPA official was "clearly wrong" in concluding that this site does not constitute "[l]ands covered by water..." as used in WAC 197-11-800(6)(a). Therefore the examiner must affirm the City's determination that this short plat application is exempt from SEPA.

⁵ WAC 197-11-800(6)(a) provides:

Except upon lands covered by water, the approval of short plats or short subdivisions pursuant to the procedures required by RCW 58.17.060, but not including further short subdivisions or short platting within a plat or subdivision previously exempted under this subsection.

8. The examiner finds that this application has not been improperly segmented to avoid SEPA review.

a. The short plat application is exempt from SEPA as discussed above.

b. The exemption for developments that generate less than 2,500 square feet of impervious surface, VMC 14.25.100(a)(1), is not a SEPA exemption. To the extent it applies in this case, it only provides an exemption from the City's stormwater ordinance.

c. The HPA permit application should have been subject to SEPA review. See Exhibit 23. However WDFW, not the City, would have been the lead agency for that review and WDFW would have been required to consider the impacts of the proposed short plat as part of that review. The City is not required to subject this otherwise exempt short plat to SEPA review merely because the applicants previously obtained an HPA permit that should have been subject to SEPA.

i. Although the HPA permit was improperly exempted from SEPA review, that determination was not appealed and is now final. The City is not required to remedy the prior error by another agency subjecting this otherwise exempt short plat application to SEPA review.

ii. WDFW argued that the applicants may need to obtain approval of a modification of the HPA permit to accommodate the proposed watercourse crossings. See Exhibit 17. It is unclear whether the modification will be subject to additional SEPA review. If it is, WDFW can consider the proposed short plat during that review. The applicants cannot proceed with construction of the proposed short plat unless and until WDFW issues a revised HPA, including any additional SEPA review, or determines that a modification is not required. Any changes to the approved short plat required as a result of the revised HPA permit and any associated SEPA review, must be approved by City pursuant to applicable procedures.

(A) The applicants argue that the HPA permit included approval of the crossings. Exhibit 19. The examiner has no jurisdiction to resolve that issue.

Substantive SEPA

9. The appellants allege that the proposed development should be denied on substantive SEPA grounds, because the majority of the proposed building envelopes are located in the Riparian Management Areas or Riparian Buffer and no mitigation is proposed for those impacts. However the examiner finds that the appellants failed to sustain their burden of proof that the proposed development will have any probable significant adverse environmental impacts. The majority of the riparian areas on this site are already significantly impacted by development. See the Existing Conditions plan. Largely as a result of that existing development, the watercourse and riparian areas on this site provide very little environmental function. See Exhibit 5.

Given the extremely limited functions on this site, the examiner cannot find that the development will have a significant adverse impact on the environment. To the contrary, examiner finds that the proposed development will not have any probable significant adverse environmental impacts. The applicants proposed a variety of plantings in the watercourse section in the north end of the site, which will maintain and potentially improve the functional value of the watercourse and riparian area on the site. See the applicants' Landscape Plan, Sheet 7 of 7. Therefore the examiner finds that the proposed development will not have any probable significant adverse environmental impacts.

D. CONCLUSION

1. Based on the above findings and discussion, the examiner concludes that:

a. The planning official, acting as the SEPA official, determined that this short plat application is exempt from SEPA pursuant to WAC 197-11-800(6)(a) and the appellants failed to sustain their burden of proof that that determination was clearly erroneous. The examiner further finds that the development, as conditioned, will not have any probable significant adverse environmental impacts. Therefore the SEPA appeal should be denied; and

b. The appellants failed to file a proper appeal based on issues raised during the public comment period. Therefore the examiner has no jurisdiction to consider the issues raised in the appeal other than the SEPA issues addressed above. Therefore the appeal should be denied and the planning official's decision regarding compliance with applicable VMC criteria should be affirmed.

E. DECISION

Based on the findings, discussion, and conclusions provided or incorporated herein and the public record in this case, the examiner hereby denies the appeal, APL2008-00001, and affirms the planning official's decision in PRJ2005-01862 and PLD2008-00002 (Garden Creek) subject to the conditions of approval in the planning official's decision.

F. ADDITIONAL DICTA DISCUSSION

1. Because the appellants failed to file a proper appeal based on issues raised during the public comment period, the examiner has no jurisdiction to consider the Code compliance issues raised in the appeal. Therefore the following discussion is purely dicta, and the examiner has no authority to impose the additional conditions of approval included in the following discussion, unless the examiner's determination regarding the validity of the appeal is reversed on appeal.

Appeal of the Critical Area Determination Letter

2. The examiner finds that planning official's Critical Area Determination Letter (Exhibit 1.10) is not a separate Type I decision that is no longer subject to appeal.

a. There is no substantial evidence that the applicants filed a Type I application and paid a separate application fee for this determination as required by VMC 20.210.040.B. The letter does not include a reference to an appeal period as required by VMC 20.210.040.F(5).

i. The applicants argue that an appeal statement is unnecessary because they waived their right to appeal this determination pursuant to VMC 20.210.040.G. However there is no evidence that the applicants submitted a written waiver to the planning official that would cause the decision to become final on the day it was signed and eliminate the need for an appeal period. VMC 20.210.040.G.

b. In addition, it would be inappropriate for the planning official to utilize the Type I decision process to make this determination. VMC 20.740.040.A(1)(b) authorizes the planning official to interpret the exact location of the critical area boundary. This section further provides that "A person who disagrees with the interpretation may appeal the interpretation pursuant to Section 20.255.020(D)." However VMC 20.210.130.B(1) limits appeals of Type I decisions to the applicants and the property owner. Therefore use of the Type I review process would inappropriately exclude other persons who disagree with the interpretation from filing an appeal of the planning official's determination.

c. This is consistent with VMC 20.740.040.B, which provides that certain listed activities "[s]hall be processed as a Type I permit pursuant to VMC 20.210.04. VMC 20.740.040.B(1). "All other activities proposed within any critical area or buffer shall be reviewed according to the procedures of the underlying land use application." VMC 20.740.040.B(2). Interpretation of the exact location of the critical area boundary is not included in the list of activities subject to Type I review in VMC 20.740.040.B(1). Therefore it must be "[r]eviewed according to the procedures of the underlying land use application." VMC 20.740.040.B(2).

d. The examiner finds that the planning official's June 18, 2007 letter was merely a preliminary decision regarding the interpretation of the exact location of the critical area boundary on this site, to the extent it applied, given the subsequent Code amendments adopting the interpretation. That preliminary decision was incorporated into the planning official's April 1, 2008 decision regarding the short plat application pursuant to VMC 20.740.040.B(2). The planning official's determination of the location of the critical area boundary may be appealed as part of the short plat decision.

Critical Areas Ordinance

3. The applicants argue that this development is not subject to the City's Critical Areas Ordinance (the "CAO"), because the watercourse on the site does not meet the criteria for fish and wildlife habitat conservation area. p 5 of Exhibit 30. The examiner finds that the City determined that, although a critical areas permit is not required, this development is subject to the CAO. See p 11 of Exhibit 1. The applicants did not appeal that determination and it is now final. The appellants have no standing to challenge that determination at this point in the proceeding.

a. The examiner finds that the planning official's finding that the site is subject to the CAO is consistent with the finding that the development is exempt from SEPA. The SEPA exemption of WAC 197-11-800(6)(a) is based on "lands covered by water," which WAC 197-11-756 defines as "natural water courses..." However the CAO applies to "Water bodies including lakes, streams, rivers, and naturally occurring ponds." 20.740.110.A(1)(c). The definition of "stream" in VMC 20150.040.B provides "streams also include natural watercourses modified by humans." Given the different definitions that apply under SEPA and the CAO, the planning official could reasonably find that the site is exempt under SEPA but remains subject to the City's CAO.

4. The examiner finds that this application vested on or after January 15, 2008, the date the applicants submitted the application.⁶ Therefore the application is subject to the current version of VMC 20.740.110.A(1)(e)(A), adopted on October 1, 2007, which the City argued implements Mr. Eiken's interpretation in Exhibit 1.10.

a. The City held three pre-application conferences regarding this application, on November 10, 2005, April 6, 2006 and October 11, 2007. The first two pre-applications expired because the applicants failed to file the application within one year from the date of the pre-application conferences pursuant to VMC 20.210.080.J. Therefore only the October 11, 2007 pre-application is relevant in determining the contingent vesting date.

⁶ VMC 20.210.080.A provides that an application is vested "[o]n the date a fully complete application is filed with the city." It appears that the application was complete when filed, since the City did not request any additional information and issued a fully complete letter on February 12, 2008. Exhibit 36.

b. The applicants submitted a request for a third pre-application conference on September 19, 2007. If the pre-application submittal included the items listed in VMC 20.210.080(D)(1)-(6) and the application, filed on January 15, 2008, was “substantially the same proposal” as the City reviewed at the October 11, 2007 pre-application conference, then the application vested on September 19, 2007. VMC 20.210.110.B provides;

An application which is subject to a pre-application conference shall contingently vest on the date a complete pre-application is filed, if a fully-complete application for substantially the same proposal is filed within 180 calendar days of the date the review authority issues its written summary of the pre-application conference, and provided the pre-application submittal met the requirements of 20.210.080(C).”

The language of this provision is clearly mandatory, an application “shall contingently vest” if the listed criteria are met. However the examiner finds that the applicants’ pre-application submittal was not sufficiently complete so as to trigger contingent vesting.

i. The fact that the City accepted the pre-application submittal and held a pre-application conference is not *per se* evidence that the pre-application submittal was sufficient to qualify for contingent vesting under VMC 20.210.110. VMC 20.210.080.C provides: “Review for completeness of the pre-application submittal will not be conducted by staff at the time of submittal and completeness is the responsibility of the applicant.”

ii. However the City is required to determine whether the pre-application submittal was sufficiently complete so as to trigger contingent vesting as part of the pre-application summary and include a statement to that effect in the pre-application summary. VMC 20.210.080.H(5)(e). The October 11, 2007 pre-application conference summary, Exhibit 35, did not include the required statement. Therefore the examiner must find that the pre-application submittal was not sufficiently complete to trigger contingent vesting and the application vested when the applicants submitted a complete application, on or after January 15, 2007.

c. The planning official’s decision does not address vesting in any way. The decision refers to the City’s prior determination that the riparian buffer is entirely functionally isolated due to previous development. See p 11 of Exhibit 1. However the decision does not address whether the application is based on Mr. Eiken’s interpretation or the revised language of VMC 20.740.110.A(1)(e)(A), which codified that interpretation.

d. The applicants note that VMC 20.210.110.C authorizes an applicant to “opt out” of vesting and choose to subject its development to later adopted ordinances. However that section requires that the applicants;

[D]emonstrate how later enacted ordinance(s) will benefit both the project, and the city while maintaining consistency with the comprehensive plan...[and] demonstrate that use of later enacted ordinances will not conflict with other ordinances the development remains subject to and will not be significantly detrimental to the health, safety, or general welfare of the city.

However there is no substantial evidence that applicants requested that the application be subject to later enacted ordinances and made the required demonstrations, or that the planning official reviewed and approved such a request in this case.

e. The fact that the City attorney’s office cited to the prior version of the ordinance in Exhibit 27 is not determinative of the vesting date. This is after the fact argument by the City’s attorney, not by the planning official empowered to determine vesting.

5. The examiner finds that the proposed development is consistent with VMC 20.740.110.A(1)(e). This section provides:

Riparian Management Areas and Riparian Buffers. The regulated areas include the land from the ordinary high water mark to a specified distance as measured horizontally in each direction. The Riparian Management Area is adjacent to the lake, stream or river, and the Riparian Buffer is adjacent to the Riparian Management Area.

(A) When impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the waterbody, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. If the waterbody is not completely physically isolated, but is completely functionally isolated, the Planning Official may adjust the regulated riparian area to reflect site conditions and sound science.

a. The examiner finds that the majority of the watercourse on the site is completely functionally isolated from the adjacent Riparian Management Area and Riparian Buffer areas by existing impervious surfaces; pavement, culverts, gravel, plastic lining of the watercourse, etc. See Exhibits 4 and 38. As noted at p 1 of Exhibit 4, of the approximately 256 feet of watercourse on the site, 178 feet is “confined by culverts... [or] otherwise impounded by an impervious layer...” These impervious areas extend to, and in the case of culverts and the plastic lined channel, beyond, the banks of the watercourse. These impervious areas separate the watercourse from the abutting riparian areas. There is no land area between the ordinary high water mark of the watercourse and these impervious surfaces. Therefore these portions of the on-site watercourse comply with the first section of this provision and a Riparian Management Area is not required.

i. The appellants argue that this provision requires more than a mere culvert, driveway or paved area, noting the example of “an existing industrial paved area and warehouses” in the prior version of the ordinance. However the City Council chose to delete this example from the current version of the Code. In addition, this is only an example of one type of impervious surface. An industrial paved area is likely to have greater impact on an adjacent watercourse due to issues with contaminated runoff. However this section of the Code is not concerned with this type of impact. The issue is whether an impervious area isolates the watercourse from the adjacent Riparian Management Area or Riparian Buffer. Whether the impervious area is used as industrial storage or residential parking is irrelevant, because the use does not impact the physical separation of the watercourse from the Riparian Management Area and Riparian Buffer. In this case the culverts, plastic stream liner, driveways, parking areas and other extensive impervious areas on this site clearly separate the watercourse from the Riparian Management Area and Riparian Buffer.

(A) This provision is consistent with the definition of “riparian area” in VMC 20.150.040.B. This section defines “riparian area” as:

The area adjacent to aquatic systems with flowing water (e.g., rivers, perennial or intermittent streams, seeps, springs) that contains elements of both aquatic and terrestrial ecosystems which mutually influence each other. Riparian areas are defined differently in and for the purposes of the Vancouver Shoreline Management Master Program.

Impervious areas adjacent to an aquatic system significantly limit, if not eliminate, the opportunity for mutual influence between the aquatic system and the adjacent upland area.

ii. The appellants and WDFW note that the watercourse itself retains some functions; conveyance and attenuation of floodwaters, filtering of pollutants by aquatic vegetation, infiltration and nutrient transfer where the watercourse contacts the natural substrate, presence of macro-invertebrates within the watercourse, providing a source of cool clean water, etc, See Attachment 7 of Exhibit 21 and Exhibit 17. However all of these functions occur within the aquatic system/watercourse, below the ordinary high water mark of the watercourse and outside of the Riparian Management Area and Riparian Buffer. The cited functions are largely unaffected by the existence of impervious surfaces abutting the watercourse. There is no substantial evidence that the portions of the Riparian Management Area that are covered or otherwise separated from the watercourse by impervious surfaces retain any riparian functions.

b. As noted in Exhibit 4, the remaining 78 feet of “open” watercourse on the site occurs in three discrete sections; between the north boundary of the site and the northernmost culvert, between the south end of the culvert and the parking area abutting the shop and house, and in the portion of the area between the southern driveway and Lieser Point Road where the watercourse is not lined with culverts, plastic, concrete or other “armoring.” See Exhibit 38. The examiner finds that these portions of the watercourse are not physically isolated from the adjacent Riparian Management Area and Riparian Buffer by existing impervious areas. Therefore these sections of the watercourse do not comply with the first part of VMC 20.740.110.A(1)(e).

i. The examiner finds that the lawn area on the site is not an “impervious surface” as defined by the Code. VMC 20.150.040.B defines “impervious surface” as:

A hard surface area which either prevents or retards the entry of water into the soil. Examples include, but are not limited to, structures, walkways, patios, driveways, carports, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, haul roads and soil surface areas compacted by construction operations, and oiled or macadam surfaces.

(A) The applicants’ geotechnical engineer tested the soils on the site and determined that “[t]he soils surrounding the drainage ditch in the northeast portion of the site were compacted to greater than ninety five (95) percent of the theoretical maximum density.” Attachment 4 of Exhibit 28. They observed a tested infiltration rate of less than one inch per hour. *Id.* However, although the stated purpose of the analysis was to determine whether the soils on the site are sufficiently compacted to constitute an “impervious surface” as defined by the Code, the report does not include such a conclusion. It merely sets out the results of the testing, without providing any analysis or comparison of the results to the types of materials listed as examples of “impervious surfaces” in the Code.

(B) The applicants testified that they repeatedly drove heavy construction vehicles and equipment over this area, ran cattle and operated a riding lawnmower in this area for the past 36 years. Attachment 5 of Exhibit 28. Presumably this activity compacted the soils in this area as discussed in Attachment 4 of Exhibit 28. However the applicants have maintained a lawn in this area for the past 17 years. The photographs of the site in the record demonstrate that the lawn appears to be thriving. Therefore some water must be infiltrating into the soils in this area. Soils that are so compacted as to “prevent or retard[s] the entry of water into the soil” would be unlikely to support this lush growth of vegetation. Therefore the examiner finds that the lawn areas on the site are not sufficiently compacted to qualify as an impervious surface as defined by the Code.

c. The examiner finds that the riparian area abutting the section of the watercourse between the northernmost culvert and the north boundary of the site is not “completely functionally isolated.” Based on the photographs in the record, this segment of the watercourse and associated riparian area extend onto the adjacent property to the north for quite some distance. See Exhibit 38 and the photos attached to Exhibits 18 and Attachment 1 of Exhibit 29. This contiguous riparian area appears large enough to allow the interaction and mutual influence between the watercourse and the riparian area that the Riparian Management Area and Riparian Buffer are intended to protect. There is evidence of “rock armoring” along a portion of the on-site section of this watercourse segment. See Attachment 3 of Exhibit 28. However there is no substantial evidence that these piles of rock constitute an “impervious surface” sufficient to isolate the watercourse from the abutting riparian area. Therefore the applicants should be required to modify the preliminary plat to provide a 100-foot Riparian Management Area and a 50-foot buffer adjacent to the segment of the watercourse between the northern end of the northern culvert and the north boundary of the site. Given the location of this segment of the watercourse, it appears feasible to retain the current layout of the development. The applicants need only reduce the size of the building footprints on Lots 1 and 2 to accommodate the Riparian Management Area and Riparian Buffer areas.

i. The examiner finds that preservation of a Riparian Management Area and Riparian Buffer in this area of the site does not constitute an unconstitutional taking under the U.S. Supreme Court’s *Nollan* and *Dolan* decisions.

(A) There is an essential nexus between the public need to protect habitat and the required buffer on this site. The contiguous habitat area created by the segment of the watercourse and associated riparian area in the northern portion of the site and continuing onto the adjacent property is large enough to provide the habitat functions that the CAO is intended to protect. Development in the northern portion of the site will impact those habitat functions. Therefore there is a nexus between the impacts of the proposed development and the required Riparian Management Area and Riparian Buffer, which will protect the identified functions.

(B) The protected area is roughly proportional to the impacts of the proposed development. The Riparian Management Area and Riparian Buffer impact a relatively small portion of the site and will not reduce the number of lots the applicants can develop on this site.

d. The examiner further finds that the remaining two sections of the watercourse on the site that are not physically isolated by impervious surfaces from the adjacent Riparian Management Area and Riparian Buffer, are completely functionally isolated. These areas may serve some limited riparian function, because the lack of abutting impervious surfaces allows contact, interaction and mutual influence between the watercourse and the adjacent riparian area. However these riparian areas are relatively small. The northern section, between the northern culvert and the driveway abutting the shop, is roughly 30 feet long. The southern section is much shorter. These small riparian areas are physically isolated from upstream and downstream riparian areas by existing culverts and other impervious surfaces. See Exhibit 38. In addition, “the entire length of the watercourse traversing the Monroe property has structurally altered banks which impede the area’s ability to form and maintain proper fish and wildlife habitat.” P 2 of Ex 4. See also Attachment 3 of Exhibit 28, which illustrates the constraints on the site. Given the small size and physical isolation of these riparian areas and based on the multiple environmental analyses in the record, the examiner finds that the applicants demonstrated that these areas are completely functionally isolated and a Riparian Management Area and Riparian Buffer should not be required consistent with sound science. The appellants failed to sustain their burden of proof to the contrary.

e. The applicants should be required to install signs along the outer perimeter of the fish and wildlife habitat conservation areas on the site, the watercourse channel, the area of mitigation planting in the north of the site and the Riparian Management Area and Riparian Buffer areas required near the north boundary of the site, consistent with VMC 20.740.110.C(1)(d).

6. There is a dispute about the extent of the Riparian Management Area and Riparian Buffer required for the section of the on-site watercourse that is subject to the CAO.

a. The appellants argue that the City previously concluded that the watercourse requires a 100-foot Riparian Management Area and a 50-foot Riparian Buffer, citing p 11 of Exhibit 1. The applicants did not appeal the decision. Therefore the City’s determination is final. However the appellants misread the planning official’s decision. The bulleted paragraphs on p 11 under the heading “Designation” merely summarize the Code requirements for a particular type of stream, stating that “There are established *in the city* the following Fish and Wildlife Areas...”(Emphasis added). The decision goes on to state that “The watercourse traversing the Monroe Property can be best described as a conduit for stormwater and ground water originating from upstream sources” The City never makes an affirmative finding that the watercourse on the site is subject to the 150-foot buffer requirement.

b. The applicants argues that, if the watercourse on the site is a stream, it should be classified as an Np stream with a 25-foot Riparian Management Area and no Riparian Buffer, because “[t]he ‘watercourse’ does not ‘connect via surface water to another stream or river.’ Rather, it dumps out of a culvert and falls several feet before it hits the Columbia River.” Attachment 1 of Exhibit 28.

c. The examiner finds that the watercourse is subject to the 100-foot Riparian Management Area and 50-foot Riparian Buffer required by the 4th section of VMC Table 20.740.110-1.

i. There is no dispute that the watercourse is not a shoreline-of-the-state, does not contain fish habitat and is perennial.⁷

ii. The appellants argue that the watercourse is more than five feet wide, based on the width of the on-site pond. p 33 of Exhibit 31. However this ponded area is created by a manmade impoundment, a weir. See the photographs attached to Exhibit 18. This ponded area would be eliminated if the applicants opened the weir and allowed the watercourse to flow unimpeded. Therefore the examiner finds that the watercourse on the site is not more than five feet wide.

iii. The applicants argue that the on-site watercourse does not “connect via surface water to another stream or river...” They argue that the watercourse “dumps out of a culvert and falls several feet before it hits the Columbia River.” P 2 of Attachment 2 of Exhibit 28. However the Code provides that a “surface water connection” exists “even if the connection traverses a culvert, wetland, or other feature...” In addition, the applicants’ own photographs show that the culvert discharges onto the shore of the Columbia River where it flows across the surface to the river. There is no “fall.” See photo 12 attached to Exhibit 18. Therefore the examiner finds that the watercourse on the site does “[c]onnect via surface water to another stream or river...”

7. The examiner finds that the proposed development complies with the approval criteria of the CAO, VMC 20.740.060. The examiner finds that the approval criteria only apply to those portions of the site that require protection under VMC 20.740.110, the channel of the on-site watercourse and the required Riparian Management Area and Riparian Buffer areas in the northern portion of the site. These portions of the Riparian Management Area and Riparian Buffer are completely functionally isolated from the watercourse and are not subject to VMC 20.740.060.

⁷ The applicants note that “late in the growing season, the watercourse becomes mostly dry” and the watercourse can run completely dry every two or three years or so. P 3 of Exhibit 4 and p 2 of Attachment 2 of Exhibit 28. That is not sufficient to qualify as an “intermittent” seasonal watercourse as defined by the Code.

a. The examiner finds that the proposed development will avoid impacts that degrade the functions and values of the critical areas to the extent feasible. VMC 20.740.060.A. The development will only impact the watercourse at the proposed watercourse crossing for the driveway serving Lot 2. The driveway serving Lots 3 and 4 will utilize an existing watercourse crossing and therefore will not have any additional impacts on the functions and values of the watercourse. The examiner finds that the watercourse crossing impact is unavoidable. The applicants must build a driveway across the watercourse in order to access the northeast corner of the site.

b. The examiner finds that the applicants can minimize the impact of this watercourse crossing to the extent feasible. VMC 20.740.060.B. The applicants should be required to construct the crossing with the minimum width necessary to provide access to the home on Lot 2, consistent with the requirements of the Code.

c. The examiner finds that the applicants will mitigate for the unavoidable impacts of the proposed watercourse crossing. VMC 20.740.060.C. The applicants will remove some of the existing riprap and bank armoring within the channel of the watercourse and install landscape plantings along a portion of the watercourse to provide a buffer between the developed site and the watercourse. See the proposed landscape plan, Sheet 7 of 7. In addition, the applicants will remove several existing culverts and paved areas where the watercourse is currently piped underground. The applicants will “daylight” these sections of the watercourse, creating additional areas of open drainage channel and reducing fragmentation of the watercourse resource on the site. See p 5 of Exhibit 1.2. These measures will mitigate impacts to the drainage course and improve the habitat functions of the watercourse.

d. The examiner finds that the proposed development will result in no net loss of critical area functions and values. VMC 20.740.060.D. There is no dispute that this site currently has very limited critical area functions and values and the vast majority of those functions and values are limited to the watercourse channel. See, e.g., Exhibits 4, 5, 17, 18 and 28. The proposed mitigation, removing existing culverts, bank armoring and rip-rap and impervious surfaces, daylighting sections of the watercourse that are currently underground and planting riparian vegetation, will replace any lost functions and ensure that the development results in no net loss, and a potential enhancement, of critical area functions and values.

i. The appellants argue that the proposed development will have an adverse impact on the stormwater/hydraulic functions of the watercourse, because the development will increase the amount of impervious surface area on the site (roofs and roads) and the project will not provide water quality measures to treat the runoff. Pp 30-31 of Exhibit 31.

ii. The examiner finds that the development will not significantly increase the amount of pollution generating surface areas (roads, driveways and parking areas) on the site. The proposed short plat will actually reduce the amount of such pollution generating surface areas. Compare the preliminary plat, Sheet 1 of 4, to the existing conditions plan, Sheet 2 of 4. Future development on the proposed lots will create additional pollution generating surface areas, driveways and parking areas. However the majority of the buildable area of the lots is likely to be consumed by structures, rather than driveways. There is no substantial evidence to the contrary. Stormwater runoff from roofs does not collect contaminants and therefore does not require treatment under the City's stormwater ordinance.

iii. The proposed development and the future construction of homes and driveways on the individual lots will increase the amount of impervious surface area on the site. However, as discussed below, the applicants are required to infiltrate stormwater runoff from roof areas of the homes. Therefore the homes will not impact the volume of runoff entering the watercourse on the site. The applicants proposed to more than double the flow capacity of the on-site watercourse, from 43.14 cubic feet per second ("cfs") to 94.80 cfs. See Exhibit 32, the applicants' stormwater report. The applicants' stormwater report demonstrates that this additional capacity is more than adequate to accommodate the additional runoff volume generated by the proposed development. There is no substantial evidence to the contrary. This additional capacity could cause additional downstream flooding and erosion problems. However the applicants can be required to address those potential impacts during the final stormwater engineering process as discussed below.

Tree Preservation

8. The examiner finds that the proposed development complies with the tree preservation requirements of VMC 20.770.

a. VMC 20.770.070.B(1) provides:

When there are feasible and prudent location alternatives on site *for proposed building structures* or other site improvements, wooded areas and trees are to be preserved. This may require site redesign including, but not limited to: redesign of streets, sidewalks, stormwater facilities, utilities; changing the shape and size of the parking lot; reducing or limiting proposed site grading; and *changing the locations of buildings or building lots*. Provided, where necessary, density transfer areas may be used to ensure protection and retention of trees.

(Emphasis added).

The examiner finds that the applicants are not required to reduce the size of the proposed building envelopes or the density of the development in order to preserve additional trees on the site. The Code provides a limited list of things an applicant is required to do to preserve trees, all of which relate to relocating the proposed improvements. None of the options listed in this section require that the applicants reduce the size of the proposed buildings or the number of lots. Reducing the development density or the size of proposed structures clearly exceeds the limited scope of options required by the Code. The appellants failed to provide any evidence that it is feasible to redesign the development to retain additional trees.

b. VMC 20.770.070.B(3) requires that the applicants give priority to certain trees in designing a development project. “Trees located within or adjacent to sensitive areas” are listed third highest priority. VMC 20.770.070.B(3)(c).

i. This section does not require that such trees be preserved, only that they be given higher priority for preservation. In this case the appellants failed to bear the burden of proof that it is feasible to redesign the proposed development to retain these trees.

ii. In addition, the examiner finds that these trees are not located in a “sensitive area.” VMC 20.150.040 defines “Sensitive Areas” as:

For the purposes of Chapter 20.770 VMC Tree Conservation, this includes streams, geologically hazardous areas, fish and wildlife habitat areas, wetlands, and their associated buffers.

The trees noted by the appellants are located in the southern portion of the site. As discussed above, this portion of the site outside of the channel of the watercourse is not a fish and wildlife habitat area or buffer because the on-site watercourse is functionally isolated from the riparian management area in this portion of the site. Although the trees may provide some shading and cooling functions, the existing impervious areas on the site physically isolate this segment of the watercourse from the adjacent riparian area where the trees are located. Because the trees are not located in the Riparian Management Area or Riparian Buffer they are not located in a “sensitive area” subject to VMC 20.770.070.B(3).

c. The examiner finds that the Code does not require a tree plan prepared by a qualified professional in this case.

i. VMC 20.770.050.B(1) provides that the Level I tree plan required for this short plat application “[c]an be developed by the applicant, but *may* require a qualified professional for significant wooded areas or trees on parcel.” (Emphasis added). There is no substantial evidence that this site contains “significant wooded areas or trees ...”

ii. VMC 20.770.070.B(3), cited by the appellants, does not supersede VMC 20.770.050.B(1) and require that a qualified professional prepare the tree plan. This section only applies to trees to be preserved. In addition, the City Forester, who is a “qualified professional” can make the determination of whether trees proposed for preservation are “[h]ealthy, wind-firm, and appropriate to the site at their mature size... during review of a proposed tree plan.

Stormwater

9. The examiner finds that the proposed short plat will create less than 2,500 square feet of impervious surface area. Based on the applicants’ calculations, development will create roughly 2,064 square feet of new impervious area (shared driveways) on the site. See Exhibit 32. Therefore the short plat is not subject to the stormwater ordinance pursuant to VMC 14.25.100(a)(1).

a. No homes or other structures are proposed as part of this short plat application. The applicants are not required to estimate the additional impervious areas created by future homes on the individual lots in the stormwater analysis for this short plat development. Construction of single-family homes and accessory structures on the individual lots is subject to separate review for compliance with VMC 14.25.340.

b. The appellants argued that backfilling and compaction of utility trenches will create additional impervious surfaces that were not included in the applicants’ stormwater analysis. P 12 of Attachment 1 of Exhibit 29. The examiner finds that those portions of the backfilled and compacted utility trenches located outside of proposed paved areas will not constitute “impervious surfaces” as defined by the Code. The applicants are required to replant such disturbed areas with grass or other vegetation to control erosion. As discussed above, soils that are so compacted as to “prevent or retards the entry of water into the soil” would be unlikely to support the growth of vegetation. However utility trenches are routinely planted and continue to support the normal growth of vegetation.

10. The examiner finds that it is feasible to modify the design of the proposed short plat so it does not qualify as a “drainage project” as defined by VMC 14.25.110. Therefore the short plat is not subject to the stormwater ordinance pursuant to VMC 14.25.100(b).

a. VMC 14.25.110 defines “drainage project” as “[t]he excavation or construction of pipes, culverts, channels, embankments or other flow-altering structures in any stream, stormwater facility or wetland in the city of Vancouver.” The examiner finds that the watercourse on the site is a “[s]tream [or] stormwater facility...in the city of Vancouver.”

b. The applicants initially proposed to construct individual stormwater laterals and riprap outfalls in the watercourse on the site to accommodate runoff from the future homes on the individual lots. See the “Street, Storm & Lighting Plan,” Sheet 3 of 7. The examiner finds that the proposed stormwater laterals and riprap outfalls are “pipes, culverts, channels, embankments or other flow-altering structures...” Therefore, to the extent these features are located “in” the watercourse, they qualify as a “drainage project” subject to the stormwater ordinance pursuant to VMC 14.25.100(b). However the applicants now proposes to utilize roof downspout systems for residential structures on the individual lots and “[o]ne of the standard BMPs listed in Section 14.25.210(b) for treating runoff other than the runoff from roofs” as allowed by VMC 14.25.350(b)(1), eliminating the need for the private stormwater laterals and outfalls.⁸ Therefore the proposed short plat, as modified at the hearing, does not qualify as a “drainage project” because it does not include “[t]he excavation or construction of pipes, culverts, channels, embankments or other flow-altering structures in any stream, stormwater facility or wetland in the city of Vancouver.”

c. The applicants argue that VMC 14.25.100(b) only applies to projects that consist of nothing but drainage work. “Under appellants’ interpretation, every project that involves a discharge pipe or a connection to a storm drain would be a drainage project subject to the full application of chapter 14.25. The limitations in the first through third categories would become meaningless and superfluous.” P 13 of Exhibit 30. The examiner disagrees, because the plain language of the Code does not support the applicants’ interpretation and the alleged conflict does not exist. VMC 14.25.100(a) provides an exemption for certain types of projects that create relatively small amounts of new or replacement impervious surfaces. However not all such projects require construction or similar impacts “[i]n any stream, stormwater facility or wetland in the City of Vancouver.” Such small projects may discharge runoff via surface flow to adjacent pervious areas or existing stormwater facilities, on-site infiltration or other methods of disposal that do not require construction in stream, stormwater facilities or wetlands. Therefore examiner’s, and the appellants’, interpretation that VMC 14.25.100(b) is not limited to stand alone drainage projects does not render the exceptions in VMC 14.25.100(a) superfluous.

d. The examiner finds that the proposed realignment of the on-site watercourse approved via the HPA permit is a “drainage project” as defined by VMC 14.25.110, which is therefore subject to the stormwater ordinance pursuant to VMC 14.25.100(b). However the examiner finds that the watercourse realignment is not part of the proposed short plat development. WDFW previously approved this watercourse realignment pursuant to an HPA permit and it may proceed separately from the short plat process. Therefore the watercourse realignment project is exempt from the water quality treatment provisions pursuant to VMC 14.25.360(1). In addition, the director may waive all or parts of the submittal requirements (VMC 14.24.200), maintenance and ownership requirements (VMC 14.25.230), and bonding and insurance requirements (VMC 14.25.240(d)) if the project meets the other appropriate parts of this chapter. VMC 14.25.360(2).

⁸ The examiner addresses the feasibility of roof downspout below.

11. The examiner finds that the applicants are not required provide a stormwater report for this short plat project, because, as discussed above, the development is exempt from the stormwater ordinance. However, even if the short plat is subject to the stormwater ordinance, it is a “single family residential short plat... of four lots or less” subject to the standards for “small residential projects” in VMC 14.25.350. Therefore the applicant is entitled to submit an abbreviated stormwater report consistent with VMC 14.25.350(c)(1) and VMC 14.25.420.

a. The applicants are not required to demonstrate that on-site infiltration is feasible in order to qualify as a small residential project under VMC 14.25.350. Infiltration is only necessary to utilize roof downspout systems and exempt the project from the criteria specified in VMC 14.25.350(b)(1) and (2). This is an application for a four lot short plat. Therefore it is a “qualifying project” under VMC 14.25.350(a) and the applicants are entitled to utilize the abbreviated stormwater plan process of VMC 14.25.420 and a hydrology report (Section 14.25.200(a)(3)(B)) is not required. VMC 14.25.350(c). The applicants are required to provide “sufficient information and data ... with the stormwater plan to allow the director to determine conformance with the applicable provisions of this chapter.” The examiner finds that the applicants stormwater plan was sufficient to comply with this requirement based on the expert testimony of City staff. There is no substantial evidence to the contrary.

i. Mr. Rodgers unsupported statement that “sufficient information and data has not been provided to determine if the Project conforms with the applicable provisions of this chapter” is not sufficient to overcome the expert testimony of City staff. See p 5 of Attachment 1 of Exhibit 21. Mr. Rodgers’ assertion that the project does not meet the standards for a small residential project because “more than 2,500 SF will be discharge to the creek” is also incorrect. *Id.* The project is only subject to the small residential project requirement if it creates more than 2,500 square feet of impervious surface area. If it creates less than 2,500 square feet of impervious surface area, and does not otherwise qualify as a drainage project, it is exempt from the stormwater ordinance altogether. The submittal requirements of VMC 14.25.200, cited at p 9 of Attachment 1 of Exhibit 29, are inapplicable. If this development is subject to the stormwater ordinance, it is subject to the submittal requirements for an abbreviated stormwater report set out in VMC 14.25.420.

12. The examiner finds that it is feasible to infiltrate stormwater on this site. Therefore it is feasible to comply with 14.25.350(b)(1) by utilizing downspout systems for residential structures on the individual lots.

a. The applicants’ geotechnical report states that stormwater should be directed to the drainage ditch on the site “[b]ecause high wet-weather groundwater precludes the effectiveness of near-surface infiltration systems. The potential of a deep infiltration system was not explored.” P 2 of Exhibit 33. The infiltration analysis reported in attachment 4 of Exhibit 28 only measured the infiltration rate of surface soils.

This is consistent with Mr. Golemo's oral and written testimony that the "Type B" soils on the site "[t]ypically have a less permeable upper layer with a more permeable lower stratum." P 3 of Attachment 1 of Exhibit 28. Infiltration is allowed in Type B soils without infiltration testing. VMC 14.25.220(c)(2). Although construction of "deep infiltration systems" for individual downspout systems may be more expensive, but it is feasible, based on the evidence in the record. The applicants agreed to a condition of approval requiring on-site infiltration testing to confirm the feasibility of such infiltration systems.

b. The applicants agreed to a condition of approval requiring the use of downspout systems for residential structures and one of the standard BMPs listed in VMC 14.25.210(b) for treating runoff other than the runoff from roofs if the examiner determined that the development is subject to the stormwater ordinance. Therefore, even if the development is subject to the stormwater ordinance, it is exempt from the water quality treatment and quantity control requirements specified in VMC 14.25.210 and 14.25.220, the Hydrologic and Hydraulic Analysis of VMC 14.25.220(b), and the Design Methodology for Quantity Control Facilities of VMC 14.25.220(c)(2), (3) and (4).

c. Infiltration of roof runoff through the use of downspout systems will also eliminate the erosion and stability concerns noted at p 6 of Attachment 1 of Exhibit 21.

13. The applicants argue that development on this site is exempt from quantity control requirements because the applicants can discharge stormwater runoff directly to the Columbia River. p 2 of Attachment 1 of Exhibit 28, however there is no support for this conclusion in the record. As Mr. Rodgers notes, the Clark County stormwater ordinance includes such an exemption. The City stormwater ordinance applicable to this development does not.

14. Mr. Rodgers expressed concerns that the additional runoff generated by this development may cause or exacerbate downstream flooding and erosion problems. As Mr. Corn and Mr. Sheasgreen noted, the watercourse on the site overflows Lieser Point Road during large storm events under existing conditions. The examiner shares those concerns.

a. These concerns could be addressed with a downstream analysis, which is required by VMC 14.25.220(b)(3). However, as discussed above, this development is exempt from the stormwater ordinance because it will create less than 2,500 square feet of impervious area. Even if it is subject to the stormwater ordinance, it is exempt from the quantity control requirements of VMC 14.25.220, provided the applicant utilizes roof downspout systems and the standard BMPs listed in Section 14.25.210(b) on the individual lots. Therefore the examiner has no authority to require a downstream analysis pursuant to VMC 14.25.220(b)(3).

b. However, given the existing capacity problems in the area and the applicants' proposal to increase the conveyance capacity of the watercourse, the examiner finds that it is in the public interest to require a downstream analysis in this case pursuant to VMC 20.320.040. Mr. Golemo testified at the hearing that the applicants are willing to increase the size of the culverts if necessary to ensure that adequate conveyance capacity is available.

i. The examiner finds that the proposed development is unlikely to cause significant downstream impacts. The applicants will remove a significant amount of existing impervious surface area on the site that currently drains to the on-site watercourse, including the roof areas of the existing house and shop. The applicants will infiltrate roof runoff from the new homes. In addition, the applicants proposed to more than double the capacity of the on-site watercourse to accommodate any additional runoff. See p 2 of Exhibit 32. As Mr. Golemo testified, the applicant can detain stormwater on the site, in a pipe beneath the on-site roadways, if necessary to avoid downstream impacts. Therefore, the examiner finds that it is feasible to revise the development if necessary to alleviate problems discovered through the downstream analysis.

15. The examiner finds that applicants are not required to provide a 15-foot easement on one side of the on-site watercourse pursuant to VMC 14.25.220(d)(7)(D), because the short plat is exempt from compliance with the stormwater ordinance. Even if the development were subject to the stormwater ordinance, the short plat is exempt from the quantity control requirements of VMC 14.25.220. However the planning official imposed a condition of approval requiring such an easement, condition of approval 23, and the applicants did not appeal that requirement.

a. In addition, VMC 20.320.070.A(2) requires an easement for the width of the watercourse plus 15 feet on both sides of the on-site watercourse. The planning official granted an adjustment to this standard pursuant to VMC 20.255-040 to waive the easement requirement on one side of the watercourse. See p 9 of Exhibit 1. There is no substantial evidence in the record that the planning official exceeded the authority provided by VMC 20.255-040 in granting this minor adjustment.

i. Condition of approval 23 only requires a 15-foot easement on one side of the watercourse. It does not require an easement for the width of the watercourse. This condition should be modified to require the additional easement consistent with VMC 20.320.070.A(2) as modified by the planning official's decision.

16. Mr. Rodgers noted a number of concerns raised in the applicants' geotechnical report. See pp 6 through 8 of Attachment 1 of Exhibit 21.

a. Mr. Rodgers argues that the fact that a site plan was not available at the time of the geotechnical report makes the report incomplete. However he fails to cite any authority for this assertion.

b. The examiner finds that it is feasible to ensure “proper management” of stormwater on this site as necessary to protect the steep sloped area south of the site. The applicants should be required to grade the site and design the driveways, roof downspouts and other facilities to direct stormwater runoff away from these steep areas. As Mr. Swanson testified at the hearing, the City does not allow discharge of stormwater to the streets in this area. The City can review the grading, stormwater and other final engineering plans to ensure that stormwater is “properly managed” in this area. Although the development is exempt from the stormwater ordinance, the City has authority to require such review to protect the public interest, VMC 20320.040.A.

c. The steep slopes noted in the geotechnical report are located off-site. Compliance with the ten-foot rear yard setback requirements of VMC Table 20.410- 3 will ensure that buildings on this site will not impact this steep sloped area.

d. The geotechnical report states that “surface flooding from storm water runoff during prolonged periods of heavy rainfall may be the greatest hazard at the site. Mr. Rodgers argues that “These conclusions are inconsistent with the usage of an ‘abbreviated’ Stormwater Plan.” P 7 of Attachment 1 of Exhibit 21. However the plain language of the Code does not support this assertion.

e. The geotechnical report expresses concerns that future upstream development that discharges stormwater to the on-site watercourse may warrant additional setbacks and elevation of structures on this site. However the Code does not impose such requirements on this site, which is not located in a floodplain. In addition, the examiner finds that such impacts are unlikely to occur, since future developments subject to the stormwater ordinance are required to detain runoff and release it at less than predevelopment rates, which will maintain the existing rate of runoff flowing through the on-site watercourse.

f. The geotechnical report recommends that foundation drains be installed around the homes on this site. p 5 of Exhibit 33. However this is only a recommendation. It is not required by the Code. The examiner finds that the applicants are not required to address the additional runoff generated by the foundation drains in a stormwater plan, because foundation drains are not proposed as part of this short plat application. The City can address this issue in the building permit review stage if foundation drains are proposed on the individual lots.

g. The geotechnical report notes that “additional deeper explorations (i.e. drilled borings) would complement site-specific seismic design considerations for the proposed structures.” p 6 of Exhibit 33. The applicants or future owners may choose to conduct such additional seismic analysis when designing homes on the proposed lots. However this analysis is not required by the Code or necessary to protect the public interest. Additional seismic analysis may be required to comply with the requirements of the building code. However the City can ensure compliance with the building code through the building permit review process.

Traffic

17. The appellants allege that:

The project's roads and parking area inadequate, including, but not limited to, the corner at the site that appears to reduce the size of the Lieser Point Road at a critical curve, and inadequate driveway separation. This is unsafe, a potential fire hazard, and violates City Code, and the State Platting Statute. It also may exceed the scope of the easement ...

P 3 of Exhibit 3.

The appellants expanded on these concerns with the report from traffic engineer Bruce Schaefer. Attachment 5 of Exhibit 21. Mr. Schaefer opined that "Given the existing poor physical conditions to access the proposed plat expansion of lots and the increase in traffic the approval of this proposed Plat will jeopardize the health and safety of those that would live in the newly created lots." *Id.* at p 1.

a. The examiner finds that it is feasible to comply with the parking requirements of the Code. VMC 20.945.070-1 requires a minimum of one parking space per single-family detached dwelling unit. The City can verify compliance with this requirement during the building permit review process for homes on the individual lots.

b. The examiner finds that it is feasible to comply with the driveway separation requirements of VMC 11.90.016, based on the expert testimony of City transportation staff and the applicants' revised civil plans dated April 24, 2008. Conditions of approval 1 and 2 of the planning official's decision require compliance with this standard.

c. The examiner finds that proposed development will not reduce the curve radius of Lieser Point Road, based on the expert testimony of City Engineer Mahsa Eshghi at p 6 of the Appeal Staff Report. There is no substantial evidence to the contrary.

d. Mr. Schaefer expressed concern that the 90-degree curve may limit larger emergency vehicles ability to access the site. p 1 of Attachment 5 of Exhibit 21. However he failed to submit turning radius diagrams for such vehicles or other evidence to support this concern. Traffic engineers for the City and the applicants and the City Fire Marshall reviewed the proposed development and did not raise any concerns with this 90-degree curve.

e. The examiner finds that National Fire Code, cited by Mr. Schaefer, is inapplicable. The City of Vancouver adopted the International Fire Code, which requires a minimum 20-foot emergency access width, rather than the 26-foot width cited by Mr. Schaefer. See VMC 16.04.010 and IFC 503.2.1. Lieser Point Road is currently developed with a 24-foot-paved width, which is more than adequate to comply with the emergency access requirements of the IFC. See p 1 of Exhibit 1.7.

The shared driveway serving proposed Lots 2 and 3 lots is less than 20 feet wide. Therefore the Fire Marshall required that the applicants install automatic fire sprinklers in the homes on these lots. See Condition 19 of the planning official's decision and Exhibit 26.

f. Mr. Schaefer noted that the proposed development will increase the net amount of traffic generated from this site by 300 percent. That statement is correct, as far as it goes. However he failed to discuss the impact of that increase. This development will create three new homes on the site, which will generate an additional 29 Average Daily Trips ("ADT"), based on the traffic generation estimates of the ITE manual. See p 2 of Exhibit 1.7. The 26 existing homes on this street currently generate 249 ADT. There is no substantial evidence that this road is incapable of accommodating less than 300 ADT.

g. The examiner finds that there is no support for Mr. Schaefer's conclusion that "[a]pproval of this proposed Plat will jeopardize the health and safety of those that would live in the newly created lots," given the complete lack of support for the concerns Mr. Schaefer expressed.

18. The examiner finds the private street standards of VMC 11.80.200 are inapplicable to the existing off-site private street serving this development. This Code section is expressly limited "[t]o all private streets *within a development.*" VMC 11.80.200 (Emphasis added). Therefore the fact that Lieser Point Road currently exceeds the maximum cul-de-sac length standards and total number of dwelling units served requirements of VMC 11.80.200 is irrelevant.

19. The examiner finds that the gate on Lieser Point Road south of the site does not create a barrier to emergency vehicle access. The Fire Department can open the gate in order to access the emergency vehicle turnaround at the end of the road, based on the expert testimony of Mr. Qayoumi and Mr. Golemo. There is no substantial evidence to the contrary. In addition, there is another existing turnaround to the north of the site, between the site and Evergreen Highway.

Preliminary Plat Approval Criteria

20. The examiner finds that the proposed short plat complies with the preliminary plat approval criteria of VMC 20.320.040.

a. VMC 20.320.040.A requires that the examiner find:

Appropriate provisions to the extent necessary to mitigate an impact of the development have been made for transportation, water, storm drainage, erosion control and sanitary sewage disposal methods that are consistent with the City's current ordinances, standards and plans

i. The planning official determined that the proposed development makes adequate provisions for water and sanitary sewage disposal. That determination was not disputed on appeal. The applicants are required to pay System Development Charges (SDC) that the City will use to construct additional water and sewer improvements in the area, which will further mitigate the transportation impacts of the development on these facilities.

ii. As discussed above, the proposed development will not exceed the capacity of the existing transportation system or otherwise create a hazard. There is no substantial evidence to the contrary. In addition, the applicants will pay Traffic Impact Fees ("TIFs") that the City will use to construct additional transportation improvements in the area, which will further mitigate the transportation impacts of the development.

iii. The examiner finds that the proposed short plat makes appropriate provisions for storm drainage and erosion control, based on the above findings. Although the proposed development is exempt from the City's stormwater ordinance, the City required that the applicants submit an abbreviated stormwater report. Based on review of that report, the existing conditions on the site and the proposed development, the City concluded that the development makes adequate provisions for storm drainage and erosion control. Although the appellants disputed this finding, they failed to sustain their burden of proof. The applicants will increase the capacity of the existing watercourse to accommodate stormwater runoff. The applicants are required to conduct a downstream analysis to ensure that the proposed development does not cause or exacerbate downstream flooding and erosion problems. The applicants will implement required BMPs during construction to limit erosion.

b. The examiner finds that, as conditioned, the proposed streets, alleys and public ways, utilities and other improvements comply with all applicable criteria or permitted modifications, based on findings in the planning official's decision, the Appeal Staff Report and the above findings. There is no substantial evidence to the contrary. Therefore the application complies with VMC 20.320.040.B.

c. VMC 20.320.040.C requires that the examiner find:

Appropriate provisions to the extent necessary to mitigate an impact of the development have been made for open space, parks, schools, dedications, easements and reservations;

i. Given the small size of this site, the applicants are not required to set aside land for parks or open space on this site. However the applicants will pay park and school impact fees, which are conclusively adequate to mitigate the impacts of the development on these facilities. See VMC 20.915.010.

ii. As noted at p 7 of the Appeal Staff Report, “access, stormwater, water, and utility easements have been shown on the preliminary plat. Where easements are not adequate or do not meet minimum regulations, conditions to provide these easements are required prior to final plat approval (Staff report conditions 23, 24, and 26).” There is no substantial evidence to the contrary.

d. The examiner finds that the short plat has taken into consideration the physical features of the site, including but not limited, to: topography, soil conditions, susceptibility to flooding, inundation ... steep slopes or unique natural features such as wildlife habitat...” based on the planning official's decision, the Appeal Staff Report and the above findings. There is no substantial evidence to the contrary. Therefore the application complies with VMC 20.320.040.D.

RCW 58.17.110

21. The examiner finds that the proposed short plat, as conditioned, makes appropriate provisions for the public health, safety and general welfare, based on the extensive discussions throughout this decision and the record. There is no substantial evidence to the contrary.

a. The development is in the public interest because it provides new housing available to the general public and complies with desired densities identified in the comprehensive plan and the Code, promotes infill development and helps in limiting urban sprawl.

b. The applicants are providing the necessary infrastructure to serve the new lots (water, sanitary sewer and a stormwater plan) in compliance with regulations in place. The applicants have opted not to provide sidewalks or frontage improvements to keep the site consistent with existing and surrounding properties. This is permitted with adherence to the infill ordinance, VMC 20.920 and VMC 11.96.050(2).

c. The Vancouver School district has advised that school bus service will provide a means for potential students to travel safely to school.

Comprehensive Plan

22. The examiner finds that the applicants are not required to demonstrate that the application is consistent with the comprehensive plan. Compliance with the comprehensive plan is only required where the zoning code itself expressly requires such compliance. *Cingular Wireless v. Thurston County*, 131 Wn.App. 756, 770, 129 P.3d 300(2006). The examiner finds that the VMC does not require such compliance. VMC 20.320.040.A and B require that land divisions make appropriate provisions for “transportation, water, storm drainage...” and several other facilities “that are consistent with the City’s current ordinances, standards and plans.” The examiner finds that the term “plans” in this section is not intended to refer to the comprehensive plan. The Code consistently uses the term “comprehensive plan” when referring to the comprehensive plan. The examiner was unable to find any other Code section that utilized the shorthand term “plan” to refer to the comprehensive plan. In addition, VMC 20.320.040.A and B use the plural term “plans.” However the comprehensive plan is a single document, which would be referenced by use of the singular term “plan.” The Code always uses the singular form of the word “plan” when referring to the City’s comprehensive plan. The examiner finds that the term “plans” in VMC 20.320.040.A and B is intended to refer to the various “plan districts” listed in VMC 20.610 through 20.660.

23. Ms. Dillon expressed concerns with the proposed lot sizes. The examiner understands residents' displeasure with the growth around them, but this growth was foreseeable and is in the broader public's interest. As large lots are sold, they will presumably be developed to the maximum extent allowed. The examiner finds that objections to the proposed lot sizes and density are not relevant, because the density and dimensions of proposed lots comply with the comprehensive plan map designation and zoning of the property, as modified by the Tier I infill standards.

a. Even if he wanted to, the applicant could not develop substantially larger lots under the current zoning. The Code imposes minimum density and maximum lot sizes to maximize the density in the urban growth boundary, consistent with the comprehensive plan and zoning maps, to make the most efficient use of urban services.

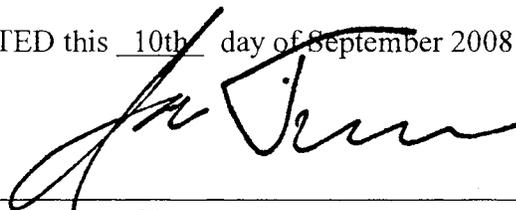
b. Although the proposed lots are smaller than adjacent lots, the uses are not incompatible. The applicant is proposing to provide single-family detached residences adjacent to existing single-family development. Even if the subdivision will have an adverse impact on property value --- and there is no substantial evidence to that effect in the record --- protection of property value and consistency with adjoining development are not relevant to the applicable State or City standards. The examiner must base the decision on the laws of the City of Vancouver and Washington State.

G. CONCLUSION

1. As discussed above, because the appellants failed to file a proper appeal, the examiner has no jurisdiction over the non-SEPA issues in this appeal. Therefore the discussion in Section F of this decision is entirely dicta and the examiner has no authority to impose any additional conditions of approval to implement these findings.

2. However in the event this appeal is held to be adequate upon further appeal, the examiner concludes, based on the above findings and discussion, that the City adequately considered the impacts of the proposed use. As conditioned the proposed use complies with all applicable approval criteria. Therefore the appeals should be denied and the planning official's decision affirmed, subject to additional conditions necessary to address issues raised on appeal.

DATED this 10th day of September 2008



Joe Turner, AICP
City of Vancouver Land Use Hearings
Examiner

NOTE: *Only the decision and the conditions of approval are binding on the applicants as a result of this order. Other parts of the final order are explanatory, illustrative and/or descriptive. They may be requirements of local, state, or federal law, or requirements which reflect the intent of the applicants, the city staff, or the Examiner, but they are not binding on the applicants as a result of the final order unless included as a condition.*

APPEAL: This decision of the Hearings Examiner is not subject to further administrative appeal to the City Council. This decision may be appealed to Superior Court within 21 calendar days after the date of decision, subject to compliance with appeal eligibility and notice provisions as specified by Chapter 36.70C RCW.

In the absence of a valid appeal within the timelines specified above, the Hearings Examiner's decision shall become final and conclusive.

AR

ONSITE PHOTOS-Wayne Monroe-Drainage Ditch

July 11, 2008



1. Looking upstream as drainage ditch enter property



2. Looking upstream as drainage ditch comes through first culvert on property



3. Looking upstream towards first culvert. Drainage Ditch is being backwatered by weir. Owners currently use the water that is backed up for watering the landscaping



7. Rip-rapped drainage ditch below the driveway area.



8. Looking downstream into excavated ditch, running through non-native English ivy.



9. Looking upstream at drainage ditch just below driveway area. Drainage ditch is flowing over plastic lining and a 4 ½ foot waterfall.

AR 1.10



P.O. Box 1995
Vancouver, WA 98668-1995

www.ci.vancouver.wa.us

June 18, 2007

Wayne and Dolores Monroe
1801 SE Lieser Point Rd.
Vancouver, WA 98664

SUBJECT: Official Determination Regarding Critical Areas Ordinance Applicability to Tax Lot Serial No. 166795-000

Dear Mr. and Mrs. Monroe:

I am pleased to inform you that, after many months of discussion and an extensive review of the facts of your property and your request for an exemption from the City's Critical Areas Ordinance, City planning staff have finally reached a determination that the riparian buffer is entirely functionally isolated due to previous development. As such, no critical areas permit would be required to develop the property, ~~provided such future development does not extend closer to the stream than the current impervious surfaces.~~

In making this determination, staff gave substantial weight to implied intent of VMC 20.740.110A1e(4) that a regulatory buffer may be functionally isolated from the waterbody by existing development, as follows:

If impervious surfaces from previous development completely functionally isolate the Riparian Management Area or the Riparian Buffer from the lake, stream or river, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. An example would be an existing industrial paved area and warehouses in the Riparian Management Area and Buffer.

The habitat assessment you submitted demonstrates that approximately 90 percent of the stream on your property meets the above description for being functionally-isolated due to impervious surfaces. The remaining 10 percent, while not physically isolated as part of this stream-riparian system, is still functionally isolated consistent with the intent of the code language.

Planning staff is currently developing proposed amendments to the above section to clarify the relationship between physical and functional isolation.

I hope this letter satisfactorily responds to your request. On behalf of the other planners you have worked with, we certainly appreciate the time you and your daughter Ramona have taken to review the proposed ordinance changes and advocate your positions, and would welcome any further comments you have on the proposed changes to the Critical Areas Ordinance.

EXHIBIT
tabbles
1.10.
(2 pgs)

Please do not hesitate to contact me at chad.eiken@ci.vancouver.wa.us or by phone at (360) 487-7882 if you should have any questions in regard to this letter of exemption.

Sincerely,



Chad Eiken, AICP

Planning Review Manager

Development Review Services

- c Laura Hudson, Community Planning Manager
- Marian Lahav, Senior Planner
- Lloyd Handlos, Environmental Planner
- Vicky Ridge-Cooney, Habitat Consultant
- Ramona Monroe, Stoel Rives LLP

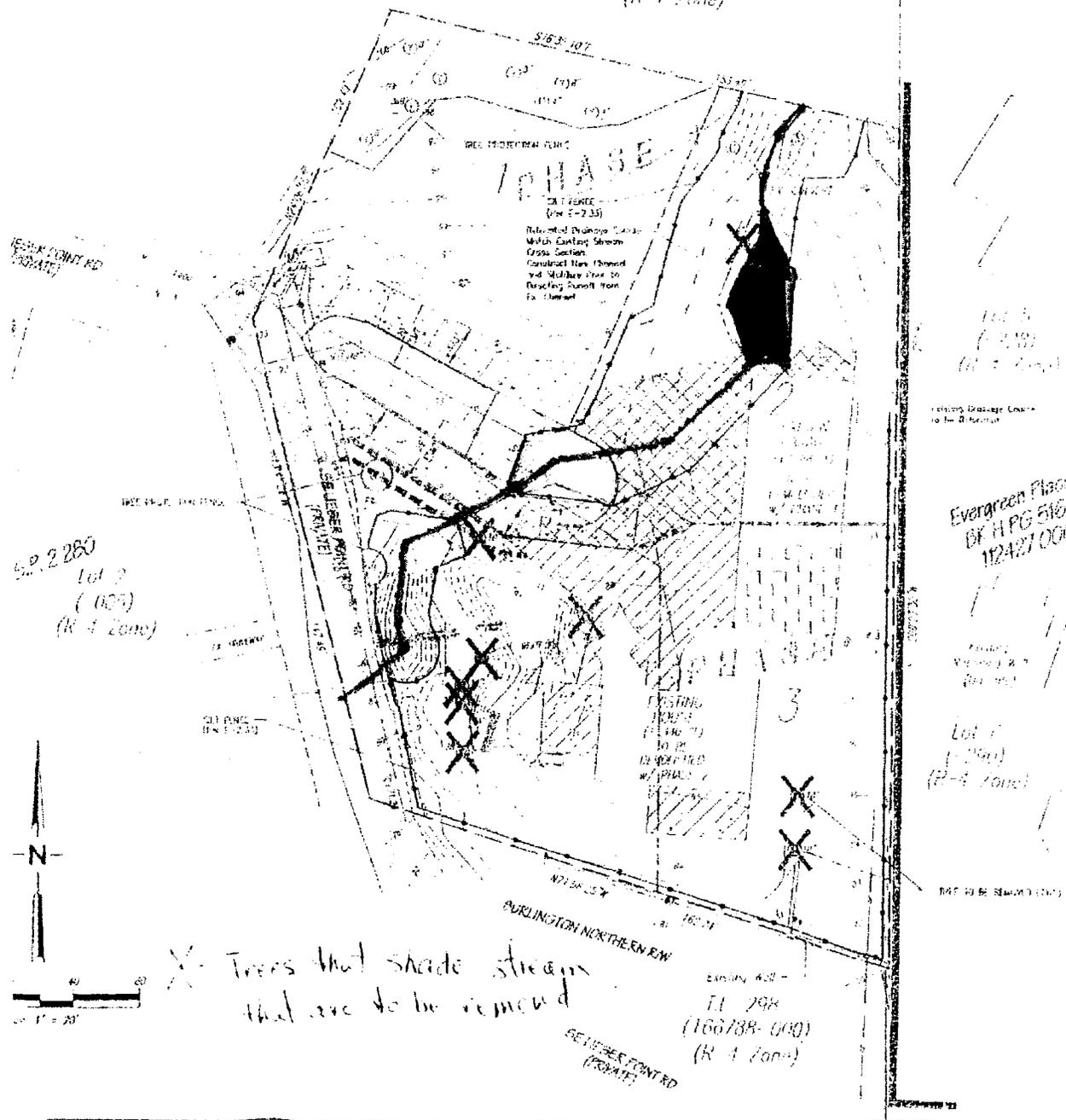
NO. 100
 NO. 100A
 NO. 100B
 NO. 100C
 NO. 100D
 NO. 100E
 NO. 100F
 NO. 100G
 NO. 100H
 NO. 100I
 NO. 100J
 NO. 100K
 NO. 100L
 NO. 100M
 NO. 100N
 NO. 100O
 NO. 100P
 NO. 100Q
 NO. 100R
 NO. 100S
 NO. 100T
 NO. 100U
 NO. 100V
 NO. 100W
 NO. 100X
 NO. 100Y
 NO. 100Z

ITEM	STRUCTURAL		NONSTRUCTURAL		TOTAL STRUCTURAL & NON-STRUCTURAL GRAVITY VOLUME
	CUT	FILL	CUT	FILL	
PRE GRADING	210	395	10	10	
PAVEMENT	210	---	---	---	
CONCRETE	---	60	---	0	
TOTAL	420	455	10	10	485

NOTE: Material site grading will take place for lot grading and to reduce the drainage volume.

Attachment 4
 of Exh. 21

11,290,570
 (166789.000)
 (R-4 Zone)



X - Trees that shade stream that are to be removed

11,298
 (166788.000)
 (R-4 Zone)

Evergreen Place
 OF H PG 516
 112427000

Lot 1
 (1.500)
 (R-4 Zone)

LOT TO BE SHOWN (1.000)

To Hearing Examiner Turner:

I am a fisheries biologist who has been hired by John Karpinski to review this project. My resumé is attached.

Based on my review of the site, and the documentation from the Applicant, my professional opinion is that the site is not functionally isolated under Vancouver Code. I also conclude that, while this site is an altered waterway, it still clearly performs many important functions under Vancouver Code 20.740.020. These remaining functions include conveyance of stormwater, reducing water velocities, filtering potential pollutants, reducing erosion, and regulating water temperature through shading. In addition, while I did not perform a macro invertebrate survey, I note the Applicants' LDC Design Groups "Site Assessment" of June 6, 2006, page 2 found a variety of macro invertebrates on the site. So this site would also support a food chain function.

It is my opinion that the current proposal does not meet Vancouver Critical Areas Ordinance Code standards for protections, as it does not adequately avoid impacts to the stream and buffers, has no or inadequate buffers, and otherwise fails to comply with the Critical Areas Ordinance 20.740.080 and Habitat Code 20.740.110. I base my above conclusions on my review of documentation including:

- June 6, 2006 LDC "Site Assessment/Fish and Wildlife Conservation Area Guidelines"
- June 6, 2006 LDC "Riparian Habitat Field Rating" (with attachments and resumé)
- HPA 103690-2 January 2, 2006 and associated documents
- Vancouver Critical Areas Ordinance
- "Staff Report and Decision" packet, Garden Creek Short Plat (includes City of Vancouver 6/18/07 letter regarding applicability of the Critical Areas Ordinance)
- Julian Appeal

I also base my opinions on my site visit.

On 18 June, 2008 I visited the Monroe property at 1801 SE Lieser Point Rd, Vancouver WA. My purpose was to view the section of Garden Creek traversing the property and to provide my impression and opinion of the site and the function and value of the creek.

My impression of the site was that it was an altered waterway, but NOT functionally isolated due to the fact that impervious surfaces do not completely isolate the creek. There is a paved driveway and a couple of culverts the creek passes through. These areas are certainly confined but outside of those areas, the creek makes contact with the substrate and banks. This contact allows for some limited functionality of the creek. Thus, it is not "completely functionally isolate(d)" under VMC 20.740.110(A)(1)(e)(4), which says:

VMC 20.740.110Ae(4) test for "functionally isolated" is:

If impervious surfaces from previous development **completely functionally isolate** the Riparian Management Area or the Riparian Buffer from the lake, stream, or river, the regulated riparian area shall extend from the ordinary high water mark to the impervious surfaces. An example would be an existing industrial paved area and warehouses in the Riparian Management Area and buffer.

An example would be an existing industrial paved area and warehouses in the Riparian Management Area and Buffer.

The Vancouver Code defines functions as:

Section 20.740.020 General Provisions

A. No Net Loss of Functions

"Activity shall result in no net loss of functions and values in the critical areas. Since values are difficult to measure no net loss of functions and values means no net loss of functions. The beneficial functions provided by critical areas include, but are not limited to water quality protection and enhancement; fish and wildlife habitat; food chain support; flood storage; conveyance and attenuation of flood waters; ground water recharge and discharge; erosion control; and wave attenuation. These beneficial functions are not listed in order of priority. This chapter is also intended to protect residents from hazards and minimize risk of injury or property damage."

My assessment of the creek and the associated riparian area is that it serves to convey storm water, reduce water velocities, filter potential pollutants, and regulate water temperature through shading. While I did not do a macro-invertebrate survey, previous assessments have indicated that macro-invertebrates are present on the site. This would indicate some function as food chain support, maybe for salmonids but probably for water fowl or amphibians. There is some erosion control function as well. The aquatic vegetation helps filter sediment out of the water and the wider section of the creek would allow for some settling of sediment as the water slows and then moves through the culvert.

These functions all have the potential to improve water quality before the water reaches the Columbia River. In areas where the creek flows across natural substrate there may be some infiltration of water into the ground, and some nutrient transfer.

In reviewing the proposed development plan, it would seem appropriate to protect and increase the riparian area on both sides of the creek. This should be required under both the avoiding/minimizing/mitigating standards of 20.740.080, and the buffer requirements of 20.740.110. Daylighting sections of the creek currently running through culverts would also increase the functions and values associated with this waterway. While it may never not be a fish bearing stream without extensive restoration efforts, it has a strong potential to be a macroinvertebrate and amphibian bearing stream. That has value as part of a larger salmon ecosystem and care should be taken to maintain the functions that allow those aquatic organisms to thrive.

I apologize for being unavailable for the hearing on July 15, 2008 due to a work conflict. I could attend a later hearing if my live testimony would assist the Examiner in deciding to protect this site.



Respectfully submitted by Tammy Mackey on 14 July, 2008.

Tammy M. Mackey
PO Box 1134 Washougal, WA 98671
(360) 513-3725
tammymackey@yahoo.com

EXPERIENCE

President. Clark Count Trout Unlimited. 2001- present

- ❖ Coordinate volunteers for restoration projects.
- ❖ Coordinate volunteers for events at Columbia Springs Environmental Education Center.
- ❖ Keep chapter members informed of fish related issues at the local, state, and national level.
- ❖ Represent Trout Unlimited at public hearings.
- ❖ Write grants for projects.
- ❖ Work closely with other fish or habitat organizations in the area.

Freelance Fisheries Biologist. 2000- present.

- ❖ Evaluate projects and write Biological Assessment or Evaluations for clients.
- ❖ Sign off on habitat restoration or creation projects, making sure the projects are truly in the best interest of fish and wildlife.
- ❖ Provide salmon information to community groups such as Watershed Stewards, CPU Stream Stewards, and any other organization that asks.

Fisheries Biologist. US Army Corps of Engineers. Bonneville Dam 1999- present

- ❖ Inspect fishways, request maintenance or changes in operation in compliance with the Fish Passage Plan.
- ❖ Point of contact between state and federal researchers and Corps of Engineers personnel.
- ❖ Attend planning meetings regarding Bonneville Dam operations and maintenance.
- ❖ Work with federal, state, and local agencies in an effort to protect ESA listed species.

Conservation Vice President. Washington Council Trout Unlimited. 2006-2007

- ❖ Developed the WCTU Conservation Agenda.
- ❖ Coordinate conservation activities throughout the state.
- ❖ Assist the President with any special projects and meetings.
- ❖ Represent Trout Unlimited at public hearings.
- ❖ Work closely with other fish or habitat organizations in the state.

Biological Technician. USDA National Forest Service. Vancouver, WA 1998

- ❖ Coordinator for Gifford Pinchot National Forest "Teachers in the Woods" program.
- ❖ Field supervisor for middle and high school teachers performing stream transects, dispersed campsite inventory, noxious weed eradication, and timber sale riparian reserve monitoring.
- ❖ Created a GIS layer including the dispersed campsites inventoried in 1999 and in 1998.
- ❖ Authored a 138 page report detailing the summer's activities and results.

EDUCATION

Professional Watershed Management Certification classes- Portland State University
Wetland Delineation Certification classes- Portland State University
University of Washington-School of Fisheries. Bachelor of Science 1998
Wetland Ecology and Wetlands Development and Restoration. August 2001
Environmental Laws and Regulations. May 2001
Fish Passageways and Bypass Facilities. November 2000

AR17



State of Washington
Department of Fish and Wildlife
2108 SE Grand Blvd. Vancouver WA 98661 (360) 696-6211

July 10, 2008

Chad Eiken, Manager
Planning Review Team
City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995

RE: Garden Creek Short Subdivision, PRJ2005-01862/PLD2008-00002/APL2008-00001.

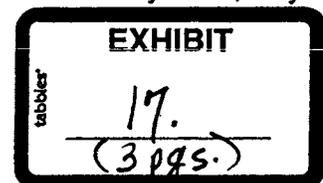
Dear Mr. Eiken:

Thank you for sending the additional materials related to this proposal in your email of June 25, 2008. I wanted to follow-up with some comments related to this information and our phone conversation of June 23, 2008.

The June 6, 2008 Staff Recommendation/Appeal of Staff Decision for this project states, "The City of Vancouver has determined the drainage course on the site is functionally isolated." It goes on to say, "Washington Department of Fish and Wildlife (WDFW) also agreed with this assessment after visiting and assessing the site and issuing an HPA permit to the applicant."

A search of our records in the Vancouver Office does indicate an HPA was issued to Wayne and Dolores Monroe. The project description reads, "Re-route ditch/straightened stream channel to wind through property in a different manner." There were no field notes, memos, letters or SEPA documents indicating WDFW thought this drainage course was "functionally isolated". Issuance of the HPA should not be interpreted as concurrence of that determination. We issue many HPA's every year for re-routing streams in which fish reside.

We agree that this particular stream has been severely impacted by development. But, it still possesses the basic characteristics of cool clean water, which is the basis for good fish habitat. Due to the many fish passage barriers there is most likely no use by any anadromous species. Additionally, due to manipulations of the creek by man, any suitable resident fish habitat is limited.



Mr. Eiken
July 11, 2008
Page Two

On the other hand, macro-invertebrates produced in or near the stream could and most likely are transported to downstream areas where fish are present. Also, the mouths of these tributaries to the Columbia River, of which there are several in the general vicinity, serve as important cold-water refuge for salmonids. Therefore, WDFW does not feel the stream is "functionally isolated."

It is stated in the above mentioned Staff Report that, "The Plat identifies a 10-foot drainage setback." In fact, the map received by WDFW shows the entire drainage way (creek and buffer), having a total width of 10 feet. Given the creek has some channel width that would leave a buffer of less than five feet on each bank. We think a buffer of that width is not adequate and would propose a minimum 25-foot drainage way. This would ensure a buffer on each bank of at least 10 feet.

The above referenced map shows a driveway crossing of this stream. The current HPA does not allow for installation of any crossing structures. Should the applicant wish to move forward with that portion of the project, they will need to seek a modification of the existing permit.

Thank you for the opportunity to provide these comments. Please let me know if you have any further questions.

Respectfully,



Tim R. Rymer
Habitat Program Manager
Region Five

Cc: Friesz
Karpinski
Olympia

AR 23



State of Washington
Department of Fish and Wildlife
2108 SE Grand Blvd. Vancouver WA 98661 (360) 696-6211

July 15, 2008

Joe Turner
Hearings Examiner
Development Review Services
4400 NE 77th Avenue, Third Floor
Vancouver, WA

RE: Garden Creek Short Subdivision, PRJ2005-01862/PLD2008-00002/APL2008-00001.

Dear Mr. Turner:

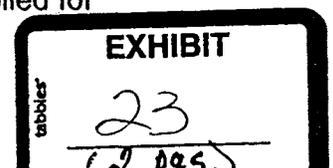
I'm writing to in response to comments submitted to you by Wayne & Dolores Monroe and a letter from Schwabe, Williamson and Wyatt, P.C. dated July 14, 2008.

I contacted our Olympia office today in reference to the existing Hydraulic Project Approval (HPA) that was issued for this project. The file is empty with no copy of the original HPA application, drawings, plans, etc. If the file was sent to Olympia there is no record of that action. Additionally, it would not have been placed in our archives until after a period of seven years.

Typically, if a crossing structure is part of a project it will be included in the HPA Project Description and there will be Provisions listed on the permit for that work. Neither of these occurs on this HPA and without any plans we would advise the Monroe's to seek a modification of the permit to accurately reflect the work to be accomplished.

The SEPA determination by the Washington Department of Fish and Wildlife (WDFW) for this project was made in error as per WAC 197-11-835, 3. and 197-11-840, 7. The WDFW SEPA Official confirmed this in a conversation with them today. But, it has been pointed out that the appeal period for the HPA has expired.

Regarding the stream in question and whether or not it is a "water of the state." I would point out that WDFW and not a consultant make such a determination. Obviously that determination was made when the original HPA was applied for and issued.



Mr. Turner
July 15, 2008
Page Two

As was pointed out in our July 11, 2008 letter to Chad Eiken, there are numerous spring fed tributaries to the Columbia River in this vicinity. While surface runoff may provide some flow during rainy periods, the majority originates in ground water springs that do provide cool, clean water. It is precisely this type of water quality that prompted the State to construct a fish hatchery in the general vicinity many years ago.

Thank you for the opportunity to provide these comments. Please let me know if you have any further questions.

Respectfully,

A handwritten signature in black ink that reads "Tim R. Rymer". The signature is written in a cursive style with a long, sweeping underline.

Tim R. Rymer
Habitat Program Manager
Region Five

Cc: Friesz
Karpinski
Olympia

1 **CERTIFICATION OF SERVICE**

2 I hereby certify that I served the foregoing Appellants' Opening Brief upon the following
3 listed attorneys on the date noted below:

4 Steve C. Morasch, WSBA #22651 Attorney for Respondents Monroe
700 Washington St Ste 701
Vancouver, WA 98660-3338
5 smorasch@schwabe.com

6 Linda A. Marousek, WSBA #12045 Attorney for Respondent City of Vancouver
7 VANCOUVER CITY ATTORNEY'S OFFICE
P.O. Box 1995
8 Vancouver, WA 98668
9 Linda.Marousek@ci.vancouver.wa.us

10 by the following indicated method or methods:

11 by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-prepaid
12 envelope, addressed to the Mayor and City Manager of the City of Vancouver, their attorney
13 Linda Marousek, the Applicants/Respondents Monroe, their attorney Steve C. Morasch, and
to "contact" for applicants Jamie Clark, as shown above the last-known office address of the
attorneys, and deposited with the United States Postal Service at Vancouver, Washington,
on the date set forth below.

14 by personal service on

15 by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid
16 envelope, addressed to the attorney as shown above, the last-known office address of the
attorney, on the date set forth below.

17 by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above,
18 which is the last-known fax number for the attorney's office, on the date set forth below. The
receiving fax machine was operating at the time of service and the transmission was properly
completed, according to the attached confirmation report.

19 by sending a full, true and correct copy thereof via **e-mail** to the attorneys at the attorneys'
20 last-known office e-mail address listed above on the date set forth below.

21 DATED this 4th day of April, 2010.

22
23 _____
24 DIANE M. KARPINSKI
25 Legal Assistant to
John S. Karpinski,
Attorney for Appellants

26 Julian Crt App Cert of Service Opening Brief.040410.wpd

27 Law Offices of John S. Karpinski
2612 E. 20th Street
Vancouver, WA 98661
360/690-4500
28 FAX 360/695-6016

CERTIFICATION OF SERVICE

I hereby certify that I served the foregoing Appellants' Opening Brief upon the following listed attorneys on the date noted below:

Steve C. Morasch, WSBA #22651
700 Washington St Ste 701
Vancouver, WA 98660-3338
smorasch@schwabe.com

Attorney for Respondents Monroe

Linda A. Marousek, WSBA #12045
VANCOUVER CITY ATTORNEY'S OFFICE
P.O. Box 1995
210 E. 13th Street
Vancouver, WA 98668
Linda.Marousek@ci.vancouver.wa.us

Attorney for Respondent City of Vancouver

FILED
COURT OF APPEALS
DIVISION I
10 APR - 7 AM 11:00
STATE OF WASHINGTON
BY DEPUTY

by the following indicated method or methods:

- by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to Linda Marousek, and Steve C. Morasch, as shown above the last-known office address of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.
- by hand delivery on Linda Marousek and Steve C. Morasch at the addresses above listed.
- by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, on the date set forth below.
- by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed, according to the attached confirmation report.
- by sending a full, true and correct copy thereof via **e-mail on April 4, 2010**, to the attorneys at the attorneys' last-known office e-mail address listed above on the date set forth below.

DATED this 5th day of April, 2010.

Diane M. Karpinski
DIANE M. KARPINSKI
Legal Assistant to
John S. Karpinski,
Attorney for Appellants

Julian Crt App Cert of Service Opening Brief.040410.wpd

Law Offices of John S. Karpinski
2612 E. 20th Street
Vancouver, WA 98661
360/690-4500
FAX 360/695-6016