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CITY OF MERCER ISLAND  
HEARING EXAMINER

|   |            |  |
|---|------------|--|
| The Carol Ann Cook Revocable Living Trust |            | No. APL21-004<br>(Ref. No. CAO 20-004) |
|   | Appellant  | Appellant’s Pre-Hearing Memorandum     |
| v.<br>City of Mercer Island               |            |  |
|   | Respondent | HEARING EXAMINER JOHN E. GALT          |

**COMES NOW** the Appellant, the Carol Ann Cook Revocable Living Trust, by and through their attorney of record, Kristen C. Reid of Belcher Swanson Law Firm, PLLC and provides this pre-hearing memorandum.

**I. BACKGROUND FACTS**

In 2013 Carol Anne Cook (sometimes known as Carol Anne Cosacchi) conveyed her ownership interest in property located at 7025 N. Mercer Way, Mercer Island, Washington (the “Property”), to Carol Anne Cook and Maureen Mayo, as Trustees of the Carol Anne Cook Revocable Living Trust. In 2020, Carol Anne Cosacchi resided in a memory care facility and did not have adequate resources to pay the monthly fees for the memory care facility. The trustee, Maureen Mayo (“Mayo”) attempted to sell the Property in order to generate enough income to

1 continue to enable Carol Anne Cosacchi to remain in the memory care facility.<sup>1</sup>

2 On February 13, 2020, Mayo signed an agreement with D. K. Legacy  
3 Development, LLC (“DK”) to purchase the Property for One Million Six Hundred  
4 Thousand Dollars (\$1,600,000). The agreement included a contingency to confirm  
5 that the Property was suitable for the buyer’s intended redevelopment of the Property.  
6 As part of their due diligence, DK learned from the City of Mercer Island (“City”) that  
7 the ravine to the west of the Property (“Ravine”) contained water features that are  
8 designated by the City as a watercourse (“Water Feature”) as defined in the Mercer  
9 Island City Code (“MICC”) 19.16.010. The Water Feature was classified by the City  
10 as a “Type Ns” watercourse. *City Exhibit 1 - page 15*, is a printout from the City of  
11 Mercer Island GIS system showing the Property, the designated “Type Ns”  
12 watercourse, and associated buffer.<sup>2</sup> Also, there is a video taken from a drone of the  
13 Water Feature starting from the southern boundary and going north to N. Mercer Way.  
14 *Appellant Exhibit 1003.*

15 The buffer and buffer setback (“Buffer”) for a “Type Ns” watercourse negatively  
16 impacts the Property. A “Type Ns” watercourse requires a sixty (60) foot buffer and a  
17 ten (10) foot setback as set forth in MICC 19.07.180.<sup>3</sup> DK advised Mayo’s realtor that  
18 the watercourse Buffer, even with buffer averaging, significantly reduced the value of  
19 the Property. In response Mayo made an offer to reduce the purchase price by Three  
20 Hundred Thousand Dollars (\$300,000), but that was not adequate to induce DK to  
21

22  
23  
24  
25 <sup>1</sup> Carol Ann Cook passed away in October 2020. Maureen Mayo is the sole surviving trustee.

26 <sup>2</sup> <https://chgis1.mercergov.org/Html5Viewer/Index.html?viewer=PubMaps&viewer=PubMaps>

<sup>3</sup> MICC 19.07.180 allows for a setback of five (5) feet provided certain criteria are met.

1 complete the purchase. DK exercised its feasibility contingency and terminated the  
2 purchase agreement. Based on the City's current interpretation of MICC Chapter  
3 19.16, the Property is reduced in value by at least Three Hundred Thousand Dollars  
4 (\$300,000).

5  
6 The *City Exhibit 1 - page 15*, shows the Buffer associated with the "Type Ns"  
7 watercourse. Also included are photographs of the Ravine (*City Exhibit 1 - page 16*).  
8 The Ravine is located on adjacent properties and has been landscaped. The rock  
9 lined swale, ivy and shrubs within the Ravine are all artificial landscape features  
10 placed in the Ravine by the neighboring property owners (*City Exhibit 1 page 16 -*  
11 *Photo 2*).

12  
13 There is also a large structure that is shown in the photograph and described in  
14 the letter (*City Exhibit 1 - pages 18-19*) from Martin Weiss that is apparently located  
15 within the property at 1824 or 1818 70<sup>th</sup> Avenue S.E. ("Structure"). Any drainage from  
16 the land south of the Structure would need to be conveyed in underground culverts.

17  
18 At N. Mercer Way, stormwater from the Ravine, adjacent properties, and  
19 stormwater drainage from Mercer Way, enter a culvert under N. Mercer Way that  
20 takes the stormwater approximately 400', in underground pipes, to Lake Washington.  
21 (*City Exhibit 1 - page 16 - Photo 1; City Exhibit 2 – page 8*).

22  
23 The Property drainage has minimal impact on the Ravine. Water from the  
24 house on the Property and other impervious improvements go into the N. Mercer Way  
25 drainage system or sheet flow to the northeast corner of the Ravine, in the same area  
26 where the N. Mercer Way stormwater is discharged into the Ravine. In fact, there are

1 several catch basins leading into the pipe that discharges into Lake Washington. See  
2 *City Exhibit 2 – page 8* which is taken from the City’s GIS mapping.<sup>4</sup>

3 Prior to human modification, the drainage system that includes the Ravine  
4 would have been approximately 800’ long. Of that total length 200 feet are in the  
5 Ravine and only a small portion of the Ravine receives stormwater from improvements  
6 located in the “Building Area” shown on the map (*City Exhibit 1 – page 20*).

7  
8 The Property also has four exceptional trees as defined in MICC 19.16.010  
9 Exception Trees (“Exceptional Trees”). The MICC requires retention of these  
10 Exceptional Trees. Other factors influence residential development on the Property:

- 11 1. The Roanoke Inn is located immediately south of the Property. The  
12 Roanoke Inn during the summer months, has outdoor dining and  
13 outdoor music that would make it undesirable to have a residence near  
14 the south boundary line of the Property.
- 15 2. Locating a house on the south half of the Property would also be difficult  
16 because of the location of an Exceptional Tree that would limit the area  
17 in which to locate a house.
- 18 3. The Property has vehicle access to N. Mercer Way. The Property  
19 driveway is at a curve in N. Mercer Way that limits sight distance. A  
20 house on the Property must be set back from N. Mercer Way a distance  
21 adequate to allow vehicles to turn around to avoid having to back onto  
22 N. Mercer Way.

23  
24  
25 <sup>4</sup><https://chgis1.mercergov.org/Geocortex/Essentials/REST/TempFiles/8.5x11%20Portrait.pdf?guid=8cad67fe-c116-4b31-bf8e-abad30a27847&contentType=application%2Fpdf>  
26

1 Included is a map showing the Property, the Exceptional Trees with dripline for each  
2 tree, the Structure, the existing house and related structures, a portion of the Water  
3 Feature, the most valuable Building Area, the buffer and buffer setback, based on the  
4 City's interpretation of the MICC and potential buffer averaging line (*City Exhibit 1 –*  
5 *page 20*).  
6

7 Constructing a residence within the Buffer will have no impact on the Ravine or  
8 any watercourse that is in the Ravine. A fence separates the Property from the  
9 Ravine, stormwater from the Building Area will either sheet flow to the northwest  
10 corner of the Property or is directed to the N. Mercer Way stormwater system, all of  
11 which go into a pipe to Lake Washington. In the event of new construction, current  
12 stormwater rules will mitigate any stormwater impacts to the Ravine. Residential use  
13 of the Property will have no adverse impact on whatever minimal environmental  
14 functions and values the Ravine and Water Feature still retains.  
15

16 Variance is not an option. One important note in considering the issues as a  
17 whole in this case is the fact that a variance is not an option. MICC 19.06.110 states  
18 “An applicant or property owner may request a variance from any numeric standard,  
19 except for the standards contained within Chapter 19.07 MICC.”  
20

21 Sustained and Continuing Impacts. There appears to be a substantial number  
22 of “piped” streams mapped on Mercer Island that discharge directly to Lake  
23 Washington (see the mapping referenced in footnote 4 on page 4 of this  
24 memorandum). All of these would be subject to the same analysis and issues  
25 presented in this case. Therefore, there is a sustained and continuing impact of the  
26

1 City's designation of a "Type Ns" and "piped" watercourses to numerous properties  
 2 within Mercer Island. The structure as it exists now on the Property would not have  
 3 been approved originally by the City given the City's interpretation.<sup>5</sup> This is true of  
 4 many structures that now sit within buffers or setbacks around the island.

## 5 II. PROCEDURAL HISTORY

6  
 7 In order to gain clarity on the procedural history of this case, an understanding  
 8 of the communication with the City is relevant. From the beginning, there has been  
 9 considerable delay on the part of the City. The relevant dates and events are as  
 10 follows:

11 The Appellant first submitted a letter on September 11, 2020 to the Interim  
 12 Planning and Community Development Director, Patrick Yamashita asking for a code  
 13 interpretation that the "aboveground channel" language found in the definition of "Type  
 14 Ns" did not apply to the Water Feature. On September 24, 2020, Mr. Yamashita  
 15 responded via email stating a code interpretation "requires a preapplication meeting."  
 16 *City Exhibit 1 – pages 24-27*. The Appellant responded via letter dated September 30,  
 17 2020 clarifying MICC 19.15.050.C allows a waiver of the preapplication meeting and  
 18 the Appellant requested said relief since a preapplication meeting was unnecessary  
 19 (*City Exhibit 1 – page 7-8*). Appellant asked for a status update via phone and email  
 20 on October 9, 2020 and Mr. Yamashita responded via email on October 12, 2020

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 22  
 23  
 24 <sup>5</sup> There is a "reasonable use exception" found at MICC 19.07.140 which requires, as a  
 25 prerequisite, that the applicant show "the application of this chapter will deny **all reasonable use** of the  
 26 owner's property..." "Reasonable use" is a defined term in MICC 19.16.010 and naturally allows a level  
 of subjectivity in balancing the public's interest and the owner's interest so it is impossible to know, from  
 one property to the next, what a "reasonable use" would be.

1 stating the request for a preapplication meeting had been waived and the application  
2 for a code interpretation would be processed (*Appellant Exhibit 1008*). On October 23,  
3 2020, Interim Director Jeff Thomas sent a letter to the Applicant denying the request  
4 for a code interpretation as “it would require a close examination of facts relating to  
5 your client’s property (including potential review of the watercourse by an expert),  
6 rather than an interpretation of the meaning or application of provisions of the  
7 development code.” The letter goes on to suggest a Critical Area Review 1 “may be  
8 suited to your client’s goals.” *Appellant Exhibit 1004*. Multiple attempts were made to  
9 discuss these issues over the phone but were unsuccessful and ultimately resulted in  
10 a letter to the City dated November 3, 2020 which is found in *City Exhibit 1 – pages 3-*  
11 *6*. A series of emails ensued as well as one phone call with Ms. Keiffer, the attorney  
12 for the City. Ultimately, it took well over a month for the City to state simply that they  
13 were unwilling to process a code interpretation. Therefore, at the request of the City,  
14 the Applicant submitted a Critical Area Review, 1 application on November 18, 2020.  
15 See *City Exhibit 1 – pages 1-2*.<sup>6</sup> The application was supplemented with a report from  
16 Pat Togher, PWS. See *City Exhibit 2*. Several emails were exchanged afterward about  
17 whether the City’s third-party reviewer would conduct a site visit but ultimately, the  
18 Appellant was told no site visit was necessary although it appears one was conducted  
19 from the public right-of way (see the Memo referenced below). *Appellant Exhibit 1005*.

20  
21  
22  
23 The notice of decision from the City was issued on March 3, 2021 and was  
24 included in the Appellant’s Notice of Appeal (*City Exhibit 12 – page 5-6*). The notice of

25  
26 <sup>6</sup> The application included previous correspondence with the City that, in the interest of efficiency and economy, have not been included here.

1 decision affirmed the “Type Ns” designation of the Water Feature and relied upon the  
 2 Memorandum of Scott Olmstead and Rachelle Tews from ESA Engineering (“Memo”).

3 In the Memo, regarding the definition of “aboveground channel system,” it states:

4       ESA understands this section of code to mean that Type Ns  
 5 watercourses do not drain naturally into subsurface soils. This  
 6 understanding has been further supported by a separate communication  
 7 with Larry Fisher, WDFW Area Habitat Biologist (personal  
 8 communication February 4, 2021). Mr. Fisher confirmed that WDFW  
 9 would still regulate the watercourse as a stream because the pipe is an  
 10 approved conveyance system and the stream flow does not naturally  
 11 infiltrate subsurface. Therefore, a piped segment of watercourse would  
 12 still be considered an aboveground channel system and the open  
 13 channel segment of [the Water Feature] would be regulated as a Type  
 14 Ns watercourse.<sup>7</sup>

15       Filing Fee. The application for a Critical Area Review, 1 required a fee of  
 16 \$1,452. The fee schedule states “deposits for land use applications are based on an  
 17 hourly staff rate... See below for specific hours applied to each land Use application  
 18 deposit.” Under the applicable Critical Area Review Type 1, it states “10-hour deposit  
 19 + hourly time as required + actual cost of peer review.” *Appellant Exhibit 1006*. After  
 20 the Notice of Decision was issued, emails from the City were received requesting an  
 21 additional \$3,156 from the Appellant for “peer review fees.” *Appellant Exhibit 1007* is  
 22 the invoice from the City to the Appellant showing the City’s third-party reviewer fees  
 23 of \$3,156. Of note is the fact that 25.5 hours were spent on this case despite the fact  
 24 there was no site visit conducted.<sup>8</sup> No credit for the \$1,452 was shown on the invoice.  
 25 Assuming the Appellant is successful on appeal, the Appellant respectfully requests a  
 26

<sup>7</sup> *City Exhibit 12 – page 7-9.*

<sup>8</sup> To be clear, it appears ESA observed the Water Feature from the public right-of-way but did not actually go onto the Property.



1 refund of the filing fee and relief from payment of the City's "peer review fees."

2 **III. ISSUES**

- 3 1. Is the Water Feature a "Type Ns" water as defined in 19.16.010 of the MICC?  
4 2. Is the MICC as applied by the City in this case, a violation of RCW 82.02?  
5 3. Is the application of the MICC in this case a constitutional taking?

6 **IV. LEGAL ANALYSIS**

7 1. Water Feature does not meet definition of a "Type Ns" water. If the Water Feature  
8 is a watercourse as defined in the MICC, it should not be classified as "Type Ns."

9 Watercourse is defined as:

10 Watercourses: A course or route, formed by nature and generally  
11 consisting of a channel with a bed, banks, or sides throughout  
12 substantially all its length, along which surface waters, **with some**  
13 **regularity (annually in the rainy season)**, naturally and normally flow  
14 in draining from higher to lower lands. **This definition does not include**  
15 **irrigation and drainage ditches, grass-lined swales, canals, storm**  
16 **water runoff devices, or other courses** unless they are used by fish or  
17 to convey waters that were naturally occurring prior to construction.  
18 (emphasis added)

19 "Type Ns" is defined as:

20 Type Ns, which include all segments of natural waters within the bankfull  
21 width of the defined channels that are not Type S, F, or Np waters.  
22 These are seasonal, nonfish habitat streams in which surface flow is not  
23 present for at least some portion of a year of normal rainfall and are not  
24 located downstream from any stream reach that is a Type Np water. **Ns**  
25 **waters must be physically connected by an aboveground channel**  
26 **system to Type S, F, or Np waters.** (emphasis added)

To be classified as a "Type Ns," a watercourse must be physically connected above  
ground to a higher classification water.

The water that runs into the Ravine flows into a culvert that is approximately ten  
feet below ground that goes under N. Mercer Way and continues underground in

1 pipes to Lake Washington. The Water Feature has no aboveground connection to  
 2 Lake Washington or any other water type. Therefore, the Water Feature cannot be a  
 3 “Type Ns” watercourse – there is no “aboveground channel system” that it is  
 4 physically connected to. *City Exhibit 2 – page 8* shows the pipe as part of the City’s  
 5 stormwater system.<sup>9</sup>

6  
 7 a. Statutory Construction. Words used in statutes and ordinances are to  
 8 be given their ordinary and plain meaning in the absence of the use of defined  
 9 terms.<sup>10</sup> If the language is clear, a court may not look beyond that language to other  
 10 sources.<sup>11</sup> Interpretation of a statute or ordinance should not render any term  
 11 meaningless or superfluous.<sup>12</sup> Additionally, an interpretation that results in unlikely or  
 12 strained consequences is to be avoided.<sup>13</sup> Here, “aboveground” is not a defined term  
 13 in the MICC. Therefore, its ordinary and plain meaning is to be used. The definition of  
 14 “aboveground” is obvious – Webster’s 3<sup>rd</sup> New International Dictionary defines it as  
 15 “located on or above the surface of the ground.” The pipe that the Water Feature is  
 16 connected to is below the ground, so it is not “aboveground.” The City’s interpretation  
 17 of “aboveground” leads to an absurd result. It is presumed the City Council intended  
 18 the words it used and the City staff’s interpretation ignores the clear language of the  
 19 ordinance legislated. If “aboveground” was meant to include “Piped” watercourse, or  
 20  
 21

22  
 23 <sup>9</sup> Given the fact it is part of the City’s stormwater system, it is conceivable the Water Feature is  
 not even a regulated “watercourse” but rather exempted out of that definition as part of the City’s “storm  
 water runoff device.”

24 <sup>10</sup> *City of Spokane v. Spokane County*, 158 Wash.2d 661, 673, 146 P.3d 893 (2006).

25 <sup>11</sup> *Lake v. Woodcreek Homeowners Ass’n*, 169 Wash.2d 516, 526, 243 P.3d 1283 (2010).

26 <sup>12</sup> *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 134 Wash.App. 329, 332, 139 P.3d 411  
 (2006) (quoting *Prison Legal News, Inc. v. Dep’t of Corr.*, 154 Wash.2d 628, 644, 115 P.3d 316 (2005)).

<sup>13</sup> *Broughton Lumber Co. v. BNSF Ry.*, 174 Wash.2d 619, 635, 278 P.3d 173 (2012).

1 any connection at all, the ordinance would have included it. Given the clear directive  
2 from the courts, this has to be where the analysis ends unless the Hearing Examiner  
3 finds the word “aboveground” ambiguous.

4           b.     Expert Analysis. Pat Togher, Senior Scientist for PBS engineering  
5 and Environmental, has over 26 years in environmental consulting and has been a  
6 professional wetland scientist since 2006 and he has come to the same conclusion. In  
7 his report dated December 28, 2020, he states the Water Feature is not a “Type Ns”  
8 watercourse as it “does not possess an aboveground channel system.” Additionally,  
9 he disagrees with the City’s analysis found in the Memo that “aboveground” means  
10 “Type Ns watercourses do not drain naturally into subsurface soils.” In his declaration  
11 filed concurrently herewith, he states that there is no definition of “aboveground  
12 channel system” – it is not in the code and not provided in guidance anywhere. He  
13 further states the comments from the Area Habitat Biologist for WDFW is a general  
14 statement, based on a single example outside of the City of Mercer Island, rather than  
15 specific to the Water Feature. The additional definition by the City of Mercer Island for  
16 a “piped” watercourse, which is not found in the DNR definitions, further confuses the  
17 WDFW’s comments.

18           c.     Purpose. Chapter 19.07 of the MICC, entitled “Environment” has  
19 a “purpose” section which states in relevant part:

20           These regulations are adopted for the following purposes:

21           ...

22           B. To maintain the functions and values of critical areas and enhance  
23 the quality of habitat to support the sustenance of native plants and  
24 animals;

25           C. To balance property owner interests with the public interest;  
26

1 ...

2 G. To protect the functions and values of fish and wildlife habitat  
3 conservation areas, including wetlands, watercourses and habitat for  
4 priority species and species of local importance, through the use of  
5 buffers;

6 ...

7 K. To avoid impact to the critical areas where possible, and, if  
8 avoidance is not reasonably possible, minimize impacts to critical areas  
9 and buffers to the greatest extent feasible, and mitigate any remaining  
10 impacts;

11 ...

12 M. To minimize negative impacts from the built environment on the  
13 functions and values of critical areas.

14 ....

15 The City has failed to meet the purposes set forth above. The City has not articulated  
16 how the proposed use of the Property would impact critical areas of habitats. The City  
17 has also failed to conduct any type of balancing of the property owner interests with  
18 the public interest.

19 d. DNR Determination. The definition of a “Type Ns” water comes  
20 directly from the Department of Natural Resources (“DNR”) and WAC 222-16-030.  
21 The DNR maintains a Water Type Map to document and track various watercourses  
22 within the state. The Water Type Maps can be used by local jurisdictions in deciding  
23 whether watercourses exist in a particular area.<sup>14</sup> In this case, the DNR does not show  
24 any watercourse within the area and does not consider the Water Feature to be any  
25 type of watercourse. This was verified via a phone call to Betty Burton of the DNR who  
26 can be reached at (360) 688-4197. She stated that no watercourse is documented in  
that area and the below-ground pipe would not satisfy the requirements to meet the

<sup>14</sup><https://fpamt.dnr.wa.gov/Default.aspx?maptheme=Water%20Type&extent=-13608364.514834803,6039610.538161642,-13607884.991915315,6039877.769178416>

1 definition of a “Type Ns” watercourse. She suggested that if anyone had any  
2 questions about this, they are welcome to contact her supervisor, Carla Fosberg,  
3 Forest Practices Coordinator at (425) 466-2102.

4 e. DNR and WDFW. In the Memo attached to the notice of decision  
5 from the City, the City’s third-party reviewer relies upon the statements from an Area  
6 Habitat Biologist from the Washington Department of Fish and Wildlife (“WDFW”). But  
7 WDFW is not charged with promulgating the water type definitions. That is solely a  
8 responsibility of DNR. WAC 222-16-030 explicitly states:  
9

10 the department [DNR] **in cooperation with** the departments of fish and  
11 wildlife, and ecology... will classify streams, lakes and ponds. The  
12 department will prepare water type maps showing the location of Type  
13 S, F, and N (Np and Ns) Waters within the forested areas of the  
14 state. (emphasis added)

15 WDFW’s role is one of cooperation. Not authority.<sup>15</sup>

16 f. Standard of Review. The standard of review in this context is limited.  
17 MICC 19.15.130 states:

18 The burden of proof is on the appellant to demonstrate that there has  
19 been substantial error, or the proceedings were materially affected by  
20 irregularities in procedure, or the decision was unsupported by evidence  
21 in the record, or that the decision is in conflict with the standards for  
22 review of the particular action.

23 There has been substantial error which has been explained in detail above.  
24 Irregularities in the procedure have been demonstrated via the long delays caused by

25 <sup>15</sup> It appears there are limited instances in which the DNR delegates authority to change water  
26 typing in non-forested lands: <https://www.dnr.wa.gov/forest-practices-water-typing>. However, this does  
not change the ultimate authority to promulgate water typing definitions – which is solely within the  
responsibilities of the DNR.

1 the City as set forth in section II above. The decision made by City staff is entirely  
2 unsupported by the evidence in the record – an underground pipe is not an  
3 “aboveground channel system.” Finally, the decision is in conflict with the standards  
4 for review because the City staff’s interpretation of “aboveground” is in conflict with the  
5 rules of statutory interpretation and the plain language of the words used in the  
6 ordinance.  
7

8 The Hearing Examiner is limited to interpretation and application of the MICC to  
9 the facts in this case. The rules of statutory construction prohibit construction of an  
10 ordinance that is in conflict with state law or the state or federal constitution. If the City  
11 staff’s interpretation is accepted, the MICC as applied to the facts would be a violation  
12 of both state law and the state and federal constitution.  
13

14 2. Violation of RCW 82.02. Imposing the Buffer on the Property is a  
15 violation of RCW 82.02.020 based on the facts in this case. RCW 82.02.020 prohibits  
16 the City from imposing “any tax, fee, or charge either direct or indirect” on land  
17 development, including construction of residential buildings. The Washington State  
18 Supreme Court in Isla Verde International Holdings, Inc. v. City of Camas, 146  
19 Wash.2d 740, 49 P.3d 867, interpreted RCW 82.02.020 in a similar situation. The City  
20 of Camas imposed a requirement that thirty percent of the land within a subdivision be  
21 open space. The Supreme Court ruled that such a requirement was an indirect tax,  
22 and, therefore, a violation of RCW 82.02.020, because the City of Camas failed to  
23 show that imposition of the open space condition was “reasonably necessary” as a  
24 result of the proposed development. In other words, imposing a condition that  
25  
26

1 restricts use of land is unlawful unless the City can show conditions imposed are  
2 reasonable when compared to the impacts from the development.

3 In this case the City cannot sustain its burden. Redevelopment of the Property  
4 will not in any way further degrade the Ravine or the Water Feature. The functions  
5 and values of the Ravine and the Water Feature would be unchanged by  
6 redevelopment of the Property within the Buffer, as there is currently a residence and  
7 other structures located within the Buffer as shown on the map. A new residence will  
8 not further impair any environmental function or value that the Water Feature may  
9 have.  
10

11 RCW 82.02.020 was adopted in response to Dolan vs. City of Tigard,  
12 discussed in section (b) below. In determining whether a condition is reasonably  
13 necessary to preserve a critical area, the benefit gained by the City must be compared  
14 to the damage caused by a development restriction. The financial damage done to  
15 the landowners far exceeds any nominal benefit that the City gains by protecting a  
16 critical area that is no longer in a natural state.  
17

18 3. Constitutional Taking.<sup>16</sup> The U.S. Supreme Court in Dolan vs. City of  
19 Tigard, 512 U.S. 374, 114 S. Ct. 2309, established the principle of “rough  
20 proportionality” in the context of a constitutional taking. The Court determined that  
21 requiring a store owner to dedicate a bike path on an adjacent flood plain was not  
22

23  
24  
25 <sup>16</sup> The Hearing Examiner does not have jurisdiction to rule on a taking claim, but the Hearing  
26 Examiner cannot interpret an ordinance contrary to state and federal law as explained in the section  
above. Therefore, caselaw regarding what does and does not constitute a taking is instructive.

1 roughly proportionate to the nature and extent of the impact of the proposed  
2 development and was therefore a constitutional taking.

3 In Dolan, supra, the court explained the concept of rough proportionality as follows:

4 No precise mathematical calculation is required, but the city must make  
5 some sort of individualized determination that the required dedication is  
6 related both in nature and extent to the proposed development's impact.

7 Any environmental protection that the Buffer provides to the Ravine and Water  
8 Feature is insignificant as compared to the diminished value of the Property.

9 **V. CONCLUSION**

10 Based upon the foregoing, the Appellant respectfully requests the Hearing  
11 Examiner reverse the decision of the City and find the Water Feature is not a "Type  
12 Ns" as defined in the code. Additionally, the Appellant respectfully requests a refund of  
13 the filing fee and relief from payment of the City's 'peer review fees.'

14 Respectfully submitted this 20<sup>th</sup> day of April, 2021.

15  
16 BELCHER SWANSON LAW FIRM, PLLC

17  
18 /s/ Kristen C. Reid  
19 KRISTEN C. REID, WSBA# 38723  
20 Attorney for Appellant  
21 The Carol Ann Cook Revocable Living Trust  
22  
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24  
25  
26