County of Albemarle
COMMUNITY DEVELOPMENT DEPARTMENT

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February 22, 2023

Ms. Kelsey Schlein
Project Manager/ Land Planner
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RE: DECISION OF THE HEARING OFFICER
Following the Appeal Hearing of January 27, 2023
Appeal of the County Engineer's Determination of October 19, 2022 – Parcel 056E0-00-00-00200

BACKGROUND

An administrative hearing was held on January 27, 2023, from 9-11 am in the County of Albemarle conference room 241, 401 McIntire Road, Charlottesville, VA 22902. The purpose of this hearing was for the Appellant to present information regarding a disputed determination issued by County Engineer Frank Pohl of a stream (the "Subject Stream") located on Parcel 056E0-00-00-00200, sometimes referred to as "Montclair."

Present in the room on behalf of the Appellant were:
Henry R. "Speaker" Pollard, V, counsel, Williams Mullen
Robert Wright, senior associate regulatory specialist, Wetland Studies and Solutions, Inc.
Stephen Stone, hydrogeologist, Wetland Studies and Solutions, Inc.
Michaela Moss, environmental scientist, Wetland Studies and Solutions, Inc.
Vito Cetta, architect, Cetta, Vito AIA Architects & Associates
Samuel D Craig, Highlands West, LP
Justin Shimp, founder and principal engineer, Shimp Engineering, P.C.
Kelsey Schlein, project manager/land planner, Shimp Engineering, P.C.

Present from the County of Albemarle were:
Andy Herrick, deputy county attorney
Frank Pohl, county engineer
Jodie Filardo, community development director & hearing officer

While not a public meeting, the public was permitted to observe the administrative hearing.

The Order of Proceedings for the meeting was as follows:

ITEM	DECRIPTION	RESPONSIBLE PARTY
1	Administrative Hearing - Opening Statement	Ms. Jodie Filardo County of Albemarle Community Development Director & Hearing Officer
2	Applicable Law and Procedures for this Administrative Hearing	Mr. Andy Herrick County of Albemarle Deputy County Attorney
3	Presentation of Appellant's Information	Appellant and any representative(s)
4	Response (if any) to information presented	Mr. Frank Pohl County Engineer

5	Questions of the Presenters	Participants and the Hearing Officer
6	Next Steps • Hearing Officer's Decision due date o No later than March 13, 2023 • Judicial appeal due date o Within 30 days of Hearing Officer's decision	Ms. Jodie Filardo
7	Hearing Adjourned	Ms. Jodie Filardo

The hearing was conducted in keeping with the above Order of Proceedings and a video recording of the hearing was created.

Wetland Studies and Solutions, Inc. (WSSI), consultant for the Appellant, divided the waterway on the parcel into 6 different "reaches": Reaches 2A, 2B, 2C, 3A, 3B, and 3C. Based on their Best Professional Judgment and using the stream classification standards of the North Carolina Division of Water Quality and the Fairfax County Department of Public Works and Environmental Services, the WSSI representatives found Reach 2A to be "intermittent" and all other Reaches to be "ephemeral."

The County did not present additional information at this hearing.

I requested and was granted access by Mr. Samuel D. Craig (on behalf of the owner) to Parcel 056E0-00-00-00200 and indicated my intent to visit the parcel at least twice prior to issuing a decision on the appeal.

CODE OF ALBEMARLE COUNTY, VIRGINIA

Chapter 17 – WATER PROTECTION ORDINANCE contains the following standards upon which the review of the County Engineer's determination of October 19, 2022 is to be based:

Sec. 17-205 – Definitions. *Intermittent Stream.* The term "intermittent stream" means a natural stream or portion of a natural stream that has a defined bed and defined banks within which water flows in response to precipitation, through near surface groundwater flow, or from springs, and which is not a perennial stream.

Sec. 17-211.D.3 – *Evidence and law.* When reviewing the administrator's action or inaction, the hearing officer shall consider relevant and material laws and evidence presented by the owner, the administrator, and any other person as he deems to be necessary for a complete review of the matter.

RESEARCH SOURCES

As the Hearing Officer, I reviewed and considered the following in reaching my decision:

DOCUMENT	AUTHOR
Montclair – Perennial Flow Determination October 13, 2022	Mr. Jonathan R. Roller, AOSE, PSS, CNMP Manager and Principal, Environmental Scientist Ecosystem Services, LLC (ES) Retained by Albemarle County to assist with a stream determination on Parcel 056E0-00-00-00200
Stream Determination October 19, 2022	Mr. Frank Pohl, P.E., CFM County Engineer The County of Albemarle
Montclair Stream Flow Regime Determination November 18, 2022	Mr. Robert A. S. Wright, PWS, PWD, CNRP Senior Associate Regulatory Specialist and Mr. Stephen F. Stone, PG Hydrogeologist Wetland Studies and Solutions, Inc.

	Retained by Mr. Samuel D. Craig, Highlands West, LP to perform a stream determination on the subject parcel
ES Review Comment Response to Wetland Studies and Solutions Montclair Stream Regime Determination December 20, 2022	Mr. Jonathan R. Roller, AOSE, PSS, CNMP
Montclair Site, Crozet, VA Rebuttal of Ecosystems Services, LLC Review Comment Response of January 17, 2023	Mr. Robert A. S. Wright, PWS, PWD, CNRP Mr. Stephen F. Stone, PG
Highlands West Montclair Site, Crozet, VA Albemarle County Hearing on Stream Assessment WPO Determination January 27, 2023 presentation	Henry R. "Speaker" Pollard Williams Mullen
Highlands West Montclair Site, Crozet, VA Albemarle County Hearing on Stream Assessment WPO Determination January 27, 2023 presentation	Mr. Robert A. S. Wright, PWS, PWD, CNRP Mr. Stephen F. Stone, PG Ms. Michaela Moss, WIPT

FIELD VISITS

On February 3 and 8, 2023, I conducted field visits, walking the entire length of the Subject Stream. On both occasions, I observed water in all reaches of the Stream.

REVIEW FOR CONSISTENCY WITH THE DEFINITON OF INTERMITTENT STREAM

Because the County's ordinance definition of "intermittent stream" refers to "a defined bed and defined banks," I conducted a review of the above documents for references to the presence of a bed or banks, as critical to my determination (underlining below for emphasis is mine):

DOCUMENT	REFERENCES
Montclair – Perennial Flow Determination October 13, 2022	p.2 - **1. Continuous Bed and Bank – Strong (3 points)** - Field Observations: The entire stream reach exhibited strong and consistent bed and bank characteristics. Very minimal portions exhibited moderate bed and bank characteristics. p.3 - **17. Soil-based evidence of high-water table – Yes (3 points)** - Definition: YES - In the soil of the stream bank or base of a headcut within at least six inches above the average elevation of riffles or other shallow zones in the thalweg is found a soil layer at least two inches thick that has at least one indicator of a seasonal high water table. - Field Observations: More than 60% of the ped face is chroma ≤ 2 with or without concentrations p.4 - **1. Continuous Bed and Bank – Strong (3 points)** - Definition: Strong - The stream has a well-developed channel with continuous bed and bank present throughout the length of the reach. - Field Observations: The entire stream reach exhibited strong and consistent bed and bank characteristics. Only few interruptions were noted caused by man-made impacts (i.e. riprap) placed in streambed. p.6 - **12. Presence of baseflow – Weak (1 point)** - Definition: Water is standing in pools and the hyporheic zone is saturated, but there is not visible flow through the riffles or other shallow zones of the thalweg. Evidence of groundwater discharge is present but requires considerable time to locate. The groundwater table is at or slightly above the level of water in the pools.

	- Field Observations: Water is observed in pools and portions of stream channel with adjacent bankfull bench wetlands. Scored weak due to observations were inconsistent and localized throughout reach.
Stream Determination October 19, 2022	N/A
Montclair Stream Flow Regime Determination November 18, 2022	p.1 of WSSI Stream Evaluation Data Form - **I. Geomorphology** 1. Continuity of channel bed and bank (NC-A.1/F-II.9) Score of 3 indicating Strong (***NOTE**: If Bed & Bank Caused By Ditching And **WITHOUT** Sinuosity Then Score=0)* p.7 of Assessment - The stream level data (blue data series) from Nest 3B appears discontinuous as the stream bed was dry for extended periods of time. p.12 – Geomorphology for Segments 2 and 3 – Remarks: Strong #1, Moderate #8 (5 points), only 1 headcut and bed/back discontinuous)
ES Review Comment Response to Wetland Studies and Solutions Montclair Stream Regime Determination December 20, 2022	N/A
Montclair Site, Crozet, VA Rebuttal of Ecosystems Services, LLC Review Comment Response of January 17, 2023	p.3 - Indeed, the groundwater monitoring within the stream bed confirmed that shorter reach distances were appropriate.

DEFINITION DISCREPANCY

In its Rebuttal of Ecosystems Services, LLC Review (p.6), WSSI appears to follow a different definition of "intermittent stream":

"By definition, without groundwater contribution to the Stream, the Steam cannot be entirely intermittent (much less perennial), and it must be ephemeral instead where the groundwater interface is lost unless surface flow from surface water exists."

By contrast, the controlling definition of "intermittent stream" in County Code § 17-205 allows for "water flows in response to precipitation" and notes no requirement for groundwater flow. The County Code definition is controlling.

DIFFERENCES IN STREAM FLOW REGIME DETERMINATIONS

Even if the North Carolina Division of Water Quality standards are used, the results appear mixed. Per Table 2 (Stream Flow Regime Determinations at Montclair Site, Albemarle Co., VA) in the Rebuttal of Ecosystems Services, LLC Review Comment Response of January 17, 2023 (below), in site visits of August 8, 2022 and November 4, 2022, WSSI noted variations in their determinations as highlighted in the table. Five of six reaches in the WSSI analysis at one visit or the other received a determination of either Intermittent or Both/Either.

Table 2. Stream Flow Regime Determinations at Montclair Site, Albemarle Co., VA

Reach ID	Assessment Scores				NC Manual Determination	
	8/8/22 FX Method	8/8/22 NC Method	11/14/22 FX Method	11/14/22 NC Method	8/8/22	11/14/22
2A	13	23.5	N/A	N/A	Intermittent	N/A
2B	12.5	16.5	15.5	18.5/21.5*	Ephemeral	Both/Either
2C	9	12	13.5	19.5	Ephemeral	Intermittent
3A	11.5	19.5	12	16.5	Intermittent	Ephemeral
3B	9	17	13	21	Ephemeral	Intermittent
3C	8.5	15	9	16	Ephemeral	Ephemeral

DECISION

Following the controlling definition of "Intermittent Stream" from Albemarle County Code § 17-205, observations of water in all reaches from my site visits in February 2023, and a review of documents provided, all reaches of the Subject Stream have "a defined bed and defined banks within which water flows in response to precipitation, through near surface groundwater flow, or from springs."

Therefore, because all reaches of the Subject Stream meet the definition of "intermittent stream" in County Code § 17-205, I am affirming the October 19, 2022 determination of the County Engineer.

Respectfully Submitted,



Jodie S. Filardo, MBA
Director of Community Development, County of Albemarle
Hearing Officer

cc: Mr. Samuel D. Craig
Highlands West L.P.
PO Box 6156
Charlottesville, VA 22906