

City

AP 14-02 Graser-Lindsey Appeal of Planning File SP 14-01
Beavercreek Rd. Live/Work Apartments
Jan. 21, 2015

PROBLEM (Or STAFF ERROR) #1:

Consideration or approval of application SP 14-01 does not comply with law. According to OC law, LUBA's interpretation of OC law, and OC commitments made during an appeal of the annexation of this land, the Beavercreek Road Concept Plan must precede any urbanization and development of this property.

MAP 1. This map shows that this property (the subject of SP 14-01) is part of the land annexed to Oregon City by annexation AN 07-02¹ which was appealed to the Oregon's Land Use Board of Appeal (or LUBA) (which was appealed and affirmed).

This land is also a central part of the Beavercreek Rd. Concept Plan area that the City adopted in 2008, but LUBA remanded in Aug. 2009; i.e., LUBA rejected the concept plan as it was and sent it back to Oregon City to be revised.

Like me (the appellant), the City's own Planning Commission felt that annexing the land (in blue), which includes this property (red), before the concept plan was completed put the "cart before the horse".

Consequently, I appealed this annexation to LUBA.

LUBA affirmed the annexation and allowed it to proceed the adoption of the concept plan,

but LUBA found "the question is a reasonably close one" and it found that the annexation required very specific interpretations of OC law which it provided. (LUBA 2007-171 Final Opinion and Order, p. 19 line 13).

LAW #1

LUBA looked at Oregon City Comprehensive Plan (OCCP) Goal 14.4 and provided its interpretation based on the City's interpretation and argument:

¹ Appeal Memorandum from City Staff of Jan. 15, 2015, p. 2, cites Ord. # 1021.

ENTERED INTO THE RECORD

DATE RECEIVED: 1/21/15

SUBMITTED BY: Elizabeth

SUBJECT: Graser-Lindsey

Item 10a

Oregon City Comprehensive Plan (OCCP) Goal 14.4 “Annex lands to the city through a process that considers the effects on public services and the benefits to the city as a whole and ensures that development within the annexed area is consistent with the Oregon City Comprehensive Plan, City ordinances, and the City Charter.”

“Policy 14.4.2 Include an assessment of the fiscal impacts of providing public services to unincorporated areas upon annexation, including the costs and benefits to the city as a whole as a requirement for concept plans.” LUBA, p. 17

LUBA’S INTERPRETATION of OCCP Goal 14.4 and similar law:

“The underlying purpose of OCCP Goal 14.4 and related city and Metro provisions appears to be to ensure that

- (1) a concept plan will precede actual urbanization of the annexed areas,
- (2) concept plans will provide the basis for planning and zoning of annexed areas for urban development, and
- (3) adequate and sufficient public facilities are extended to annexed areas as they urbanize in a way that does not financially burden or adversely affect public facilities and services in other parts of the city.

As we have explained elsewhere in this opinion, the city took steps to ensure that urbanization cannot occur until the Beavercreek Road Concept Plan has been completed.” (LUBA 2007-171 Final Opinion and Order, p. 20)

LAW #2

LUBA also looked at the Oregon City Municipal Code (OCMC)

OCMC 14.04.060(A) "14.04.060 - Annexation factors.

A. When reviewing a proposed annexation, the commission shall consider the following factors, as relevant:

1. Adequacy of access to the site;
2. Conformity of the proposal with the city's comprehensive plan;
3. Adequacy and availability of public facilities and services to service potential development;
4. Compliance with applicable sections of ORS Ch. 222, and Metro Code Section 3.09;
5. Natural hazards identified by the city, such as wetlands, floodplains and steep slopes;
6. Any significant adverse effects on specially designated open space, scenic, historic or natural resource areas by urbanization of the subject property at time of annexation;
7. Lack of any significant adverse effects on the economic, social and physical environment of the community by the overall impact of the annexation.

LUBA'S INTERPRETATION of OCMC 14.04.060(A)

In the absence of the City's express interpretation of this law, LUBA supplied the City's interpretation:

"...**the city interprets OCMC 14.04.060(A)** to require that the city 'consider' the ultimate comprehensive planning for the annexed area and to 'consider' the adequacy and availability of public services and facilities to serve that urban development as 'relevant factors.' We understand the city to argue that since (1) annexation, in and of itself, authorizes no additional urban development of the annexed property, (2) no urban development of the 122 annexed acres is allowed or will be allowed under the existing FU-10 zoning, (3) **no urban development will be possible before the Beavercreek Road Concept Plan is adopted** and necessary comprehensive plan and zoning amendments are adopted to allow urbanization of the annexed area, and (4) **the Beavercreek Road Concept**

Plan will be required to address the public facilities and services that will be needed for the urbanization of the plan area, the city's findings that recognize and point out **these facts are sufficient to 'consider' the 'relevant factors' set out in OCMC 14.04.060(A).**" (LUBA 2007-171 Final Opinion and Order, p. 24).

LUBA'S REITERATION

LUBA reiterated this opinion in several further statements:

"We ultimately conclude in rejecting subassignments of error B and C under the first assignment of error that **the city** did not violate its obligations under those OCCP and OCMC requirements because it **has ensured that the 122 acres will not urbanize until the required land use and public facilities planning is completed under the Beavercreek Road Concept Plan.**" LUBA 2007-171 Final Opinion and Order, p. 2 line 13-17).

On OCMC 14.04.050(E), the annexation application and its references to "anticipated development" and "proposed development", LUBA notes: "**The city concedes that the Metro Code and the OCCP require that the Beavercreek Road Concept Plan must be adopted before the annexed territory can be planned and zoned in a manner that would allow the annexed property to be developed with urban uses.**" (LUBA 2007-171 Final Opinion and Order, p. 13-14).

OTHER LAWS REQUIRING THE CONCEPT PLAN PRIOR TO DEVELOPMENT

And regardless of the Annexation requirements outstanding for the city, other city laws require the concept plan before development:

OCCP Policy 14.1.2

Concept plans that provide more detail than the city's Comprehensive Plan will be required prior to development of lands within the Urban Growth

Boundary.

Goal 14.3 Orderly Provision of Services to Growth Areas

Plan for public services to lands within the Urban Growth Boundary through adoption of a concept plan and related Capital Improvement Program, as amendments to the Comprehensive Plan.

STAFF CLAIM NOT RELEVANT: REZONING IS INADEQUATE

(City specifically promised to have a concept plan before urbanization and development and LUBA's opinion specifically requires a concept plan before urbanization – LUBA found this necessary to approve the annexation in a close decision. (LUBA 2007-171 Final Opinion and Order, p. 19 line 13.)

The City's staff suggests that the 2010 re-zoning of this land with conditions² was sufficient to allow urbanization and development of this land.

(Appeal Memorandum from City Staff of Jan. 15, 2015, p. 3-4)

- The City gave one argument before LUBA for the annexation. The City did not divide the annexation into subzones that could receive reduced planning.
- A rezone with conditions is not the concept plan that the City's law requires -- neither as written or as interpreted by LUBA or mentioned in LUBA's Final Opinion and Order. (It did not need to be appealed; it was irrelevant to LUBA's requirements and the City's law).
- At no point did LUBA say rezoning could substitute for a concept plan and the City's law does not state that either.
- The staff report acknowledges, that without a concept plan, "compliance with the concept plan cannot be require" (p. 4 ¶2)³.
- In addition, the conditions that the City applied with the rezone do not constitute an entire concept plan nor do they serve to coordinate the property with the whole concept plan area.

² Staff says, "The conditions attached to the plan amendment/zone change explain that development of the property may precede adoption of the Beavercreek Road Concept Plan..." (p. 4 ¶4). Conditions do not supercede pre-existing law or create law.

³ "[t]he City's more recently adopted sewer, water, and stormwater master plans" themselves potentially would need revising to conform with the concept plan.

or pseudo conditions

- Finally, since a LUBA-affirmable concept plan has not yet been considered or adopted, there is no reason to think:
 - that the provisions of an old, remanded plan meet the City's current needs or
 - that an old plan adequately deals with public facilities and services.
 - LUBA anticipated that the creation of a new, legally-compliant concept plan could remedy potential additional errors in the old plan's handling of public facilities and services and citizen involvement⁴

The City itself is in error to consider this application (site plan design review) when the time is not right. The City is wrong to guide the applicant toward applying and approval criteria at a time when an application cannot yet be received due to the needed concept planning being incomplete and the concept plan, not adopted.

It is the concept plan which "identifies the effects of the full build-out ... on public services and any benefit to the city as a whole..." and which guides updating of appropriate Master Plans, such as the Transportation System Plan, Water and Sewer Master Plans. Without the concept plan being finalized these updates can't be properly planned⁵.

⁴ LUBA 2008-170 Final Opinion and Order for the Remand of the Beavercreek Rd. Concept Plan. "The petition for review also includes two more assignments of error that we have not addressed. The issues presented by those arguments may or may not arise if the city on remand adopts a new concept plan that complies with MC 3.07.1120 and 3.07.430... We therefore remand the decision without considering petitioner's remaining arguments." p. 26.

⁵ The city's findings addressing OCCP 14.4 are set out below:

'The city annexation process is set out in Chapter 14 of the [OCMC]. By requiring compliance with that code, the Metro Code, and the statewide Planning Rules, the city is **identifying the effects of the full build-out of these annexed properties will have on public services and any benefit to the city as a whole.** As part of the Beavercreek Road Concept Plan adoption, appropriate Master Plans, such as the **Transportation System Plan, Water and Sewer Master Plans for example, will be updated to address the anticipated impacts.**" Record 63. (LUBA 2007-171 Final Opinion and Order, p. 19 FN 11)] ____ see OC reports on this.

Without the concept plan, this area is not planned compatibly with the surrounding area and the city's purposes for the area and urban services and facilities are uncoordinated and not planned for adequacy, proper design, or , properly designed.

ERROR 2: Public services and facilities are not planned and designed properly and are not adequate.

The application indicates

- the plans and designs for providing of public facilities are not proper or adequate^{6, 7},
- are not without adverse impacts on existing residents of the city,
- are not coordinated, and
- are without plans for funding⁸ to accomplish the plans.

⁶ Goal 14.3 Orderly Provision of Services to Growth Areas

Plan for public services to lands within the Urban Growth Boundary through adoption of a concept plan and related Capital Improvement Program, as amendments to the Comprehensive Plan.

Policy 14.3.1

Maximize new public facilities and services by encouraging new development within the Urban Growth Boundary at maximum densities allowed by the Comprehensive Plan.

Policy 14.3.2

Ensure that the extension of new services does not diminish the delivery of those same services to existing areas and residents in the city.

Policy 14.3.3

Oppose the formation of new urban services districts and oppose the formation of new utility districts that may conflict with efficient delivery of city utilities within the Urban Growth Boundary.

Policy 14.3.4

Ensure the cost of providing new public services and improvements to existing public services resulting from new development are borne by the entity responsible for the new development to the maximum extent allowed under state law for Systems Development Charges.

⁷ An adopted concept plan is not providing this function. In addition, the remanded concept plan did an inadequate job of planning how the necessary public facilities will be provided and paid for, ensuring that delivery of those services would not diminish services to existing residents, and ensuring costs were borne by the developer.

⁸ LUBA 2007-171 Final Opinion and Order, p. 27 “the Beaver Creek Road concept Plan planning process... will establish the nature of that urbanization and how the necessary public facilities will be provided and paid for is complete.” p.28 line 13 adequate and available

This puts the application out of compliance with OCMC 12.04 (streets), 17.62.050 (sewer and water), and 13.12 stormwater.

TRANSPORTATION

Beavercreek Rd., despite being crowded already, isn't getting a new lane to handle the new traffic volumes.

In fact, the development is being planned so close to the road right-of-way that it effectively will prevent or make enormously expensive a future widening of BC Rd

Past traffic analyses from your consultant predicted that 10s of thousands of VTD vehicles trips per day would be generated by the concept plan area. The ODOT reviewer believed that the trip load was underestimated (numbers lower than usual were used for unit trip generation) due to the an assumption that the residents would largely work on site.

There was no evidence for that assumption before. And now, with residential being prioritized over family-wage job creation and proceeding family-wage job creation, there won't be family wage jobs on the site.

This increased congestion is devastating for the Beavercreek community and Oregon City neighborhoods

and frightening to the Holly Lane community as well that gets the overflow traffic and, if BC Rd. can't accommodate all the traffic, potentially becomes a thoroughfare.

During the next 20 years the state and county predict that Hwy 213 through Newell Creek canyon and I205 past Oregon City will reach terrible levels of congestion which required a drop in the traffic standards.

SEWER

OCMC 17.62.050⁹ provides for the city to require over sizing of facilities to meet standards in the master plan or needed to be orderly and efficient in

⁹ OCMC 17.62.050 ...A development may be required to modify or replace existing offsite systems if necessary to provide adequate public facilities. **The city may require**

provision of services. "Per the [City's] 2014 SSMP [Sanitary Sewer Master Plan], the BRCP [Beavercreek Road Concept Plan] area, including the Beavercreek Rd. Apts, is planned to be served by the Beavercreek Rd. basin from a future 15" sanitary sewer main extension in Beavercreek Rd...." (City Engineer Aleta Froman-Goodrich Memorandum, Nov. 5, 2014). The applicant instead selected the Glen Oaks basin sewer system. To make it work they indicate that manhole covers will needed to be welded shut due to sewage being 2 feet down. ____ "Bolting down the manholes does not resolve the capacity deficieiencies of the sewer pipes." (p. 4) "The SSMP has committed the existing remaining capacity of the Glen Oak collection system fo the planned developments that must flow to the Gen Oaks basin and Hwy 213 sewers." (p. 4) "The results predict there are additional impacts to the existing collection system that cause excessive surcharging of gravity sewers that **could lead to basement backups.**" (Memorandum from City Engineer Aleta Froman-Goodrich, January 5, 2015, p. 3 paragraph 3). The applicant would be charged 25% of the cost (shared with other BRCP development) for increasing the capacity of the Hwy 213 sewers to prevent the back up. However, what if the other 75% of the 213/Glen Oak solution does not manifest nor pay (so there is insufficient funds to do the fix) before the sewage system begins backing in basements and streets? Timing is a problem: "...very little flow" from the BRCP area is expected "within the next 10 years" (p. 5 vii 5) which implies that "very little flow" of dollars from the BRCP area can be expected to supplement the applicant's fee in lieu which will leave the Glen Oaks sewage line with bolted down manhole covers and sewage backing up in basements for 10 years (or possibly more). The City requires the development sewage line "shall incorporate the design of the future 15-inch sanitary sewer so in the future the Beavercreek Apts can be transferred to

over sizing of facilities if necessary to meet standards in the city's facility master plan or to allow for the orderly and efficient provision of public facilities and services. Where over sizing is required, the developer may request reimbursement from the city for over sizing based on the city's reimbursement policy and fund availability, or provide for recovery of costs from intervening properties as they develop.

the Beavercreek basin...” (p. 5 vii 2) If the developer pays for the Hwy 213 capacity increase now, it is not clear they are paying for the BC line in the future.

[Previously, at one of your hearings, one of the adjacent BRCP land owners proposed putting treated sewage into the creek.]

The City should require the normal approach, that is, that the developer put in the needed Beavercreek Rd. line with cost reimbursements, because this protects the public from sewage backups and overflows and it prepares the concept plan area for future development with the proper necessary infrastructure.

WATER

The City needs more water and more water pressure to serve this area. It needs to build a reservoir to the south to achieve this according to the experts. It needs to address this short- and long-term need to serve this development with city water and to be able to serve the BRCP area. If the City allows the water to be bought from a rural water district, which has the priority function of meeting rural needs, it could come up short under various scenarios such as

- build out in the Beavercreek area,
- drought,
- increase irrigation demand for more local food production,
- others

leaving this development without water, or other city residents with reduced water to serve this development.

This “solution” lacks a contract (a firm commitment) with the Clackamas River Water District. In the recent response from Clackamas River Water (1-14-2015), the district gave “no comment” regarding most aspects of supplying water; it would not serve BRCP needs.

Avoiding making a long-term plan leaves the concept plan area without a workable water solution for the whole area and it leaves this development not contributing financially to the solution..

[Earlier in the process one of the adjacent BRCP land owners indicated they would build a well to get water.]

It appears the City could be left not providing necessary urban services.

POLICE AND FIRE. There was no word from the police or fire until after the application was approved by Planning. The constrained traffic flow on Beaver Creek Rd. constitutes a hazard to life and safety in Beaver Creek which receives fire services from Oregon City (and vice versa).

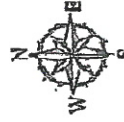
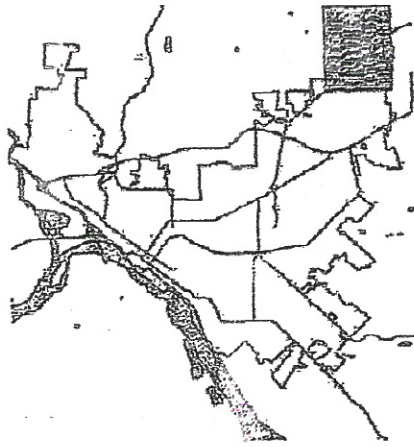
ERROR #3 This development would hamper, block and preempt needed concept planning. This could prevent meeting Oregon City's needs and compliance with the law.

This land is part of the flat and un-bisected part of the site where much of the northern and eastern part of the site is unbuildable due to severe slopes of ravines and canyons and/or due to multiple regional power-line corridors. Its specific use greatly constrains the development of the concept plan.

ERROR #4: Oregon City did not get notice of the appeal to the Caufield Neighborhood Association although they submitted testimony in the file.

AN 07-02

SP 14-01



CITY of Oregon City
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Oregon City, OR 97045
(503) 637-0391
www.orcity.org

This map is not suitable for survey, engineering, legal, or navigation purposes. Errors and omissions may exist.

Map created with QCMAP 2006

05/29/2007

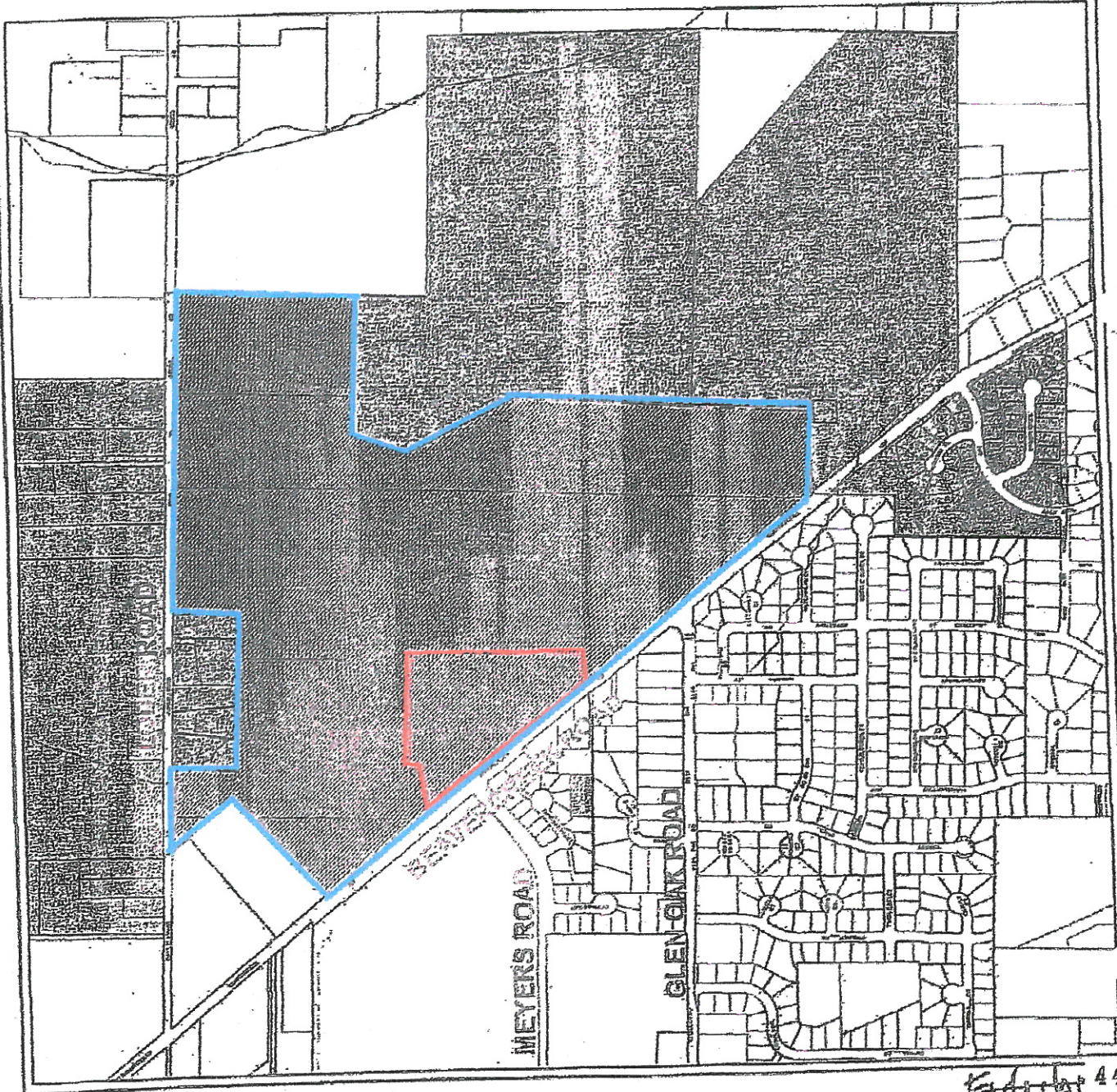


Exhibit 442

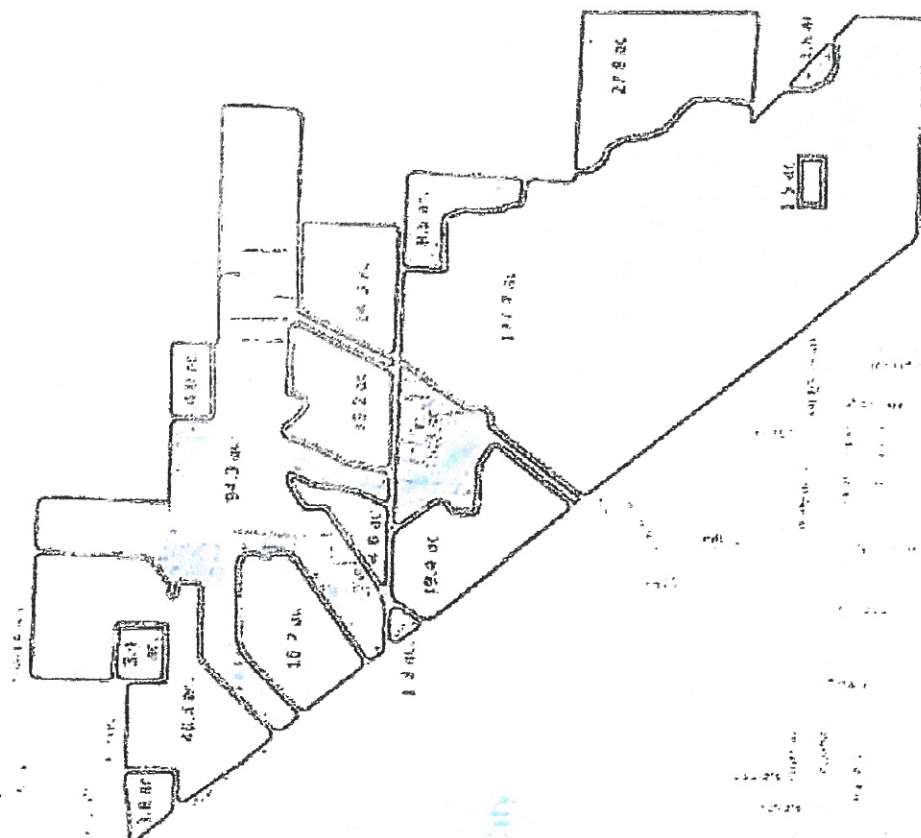
Figure 1



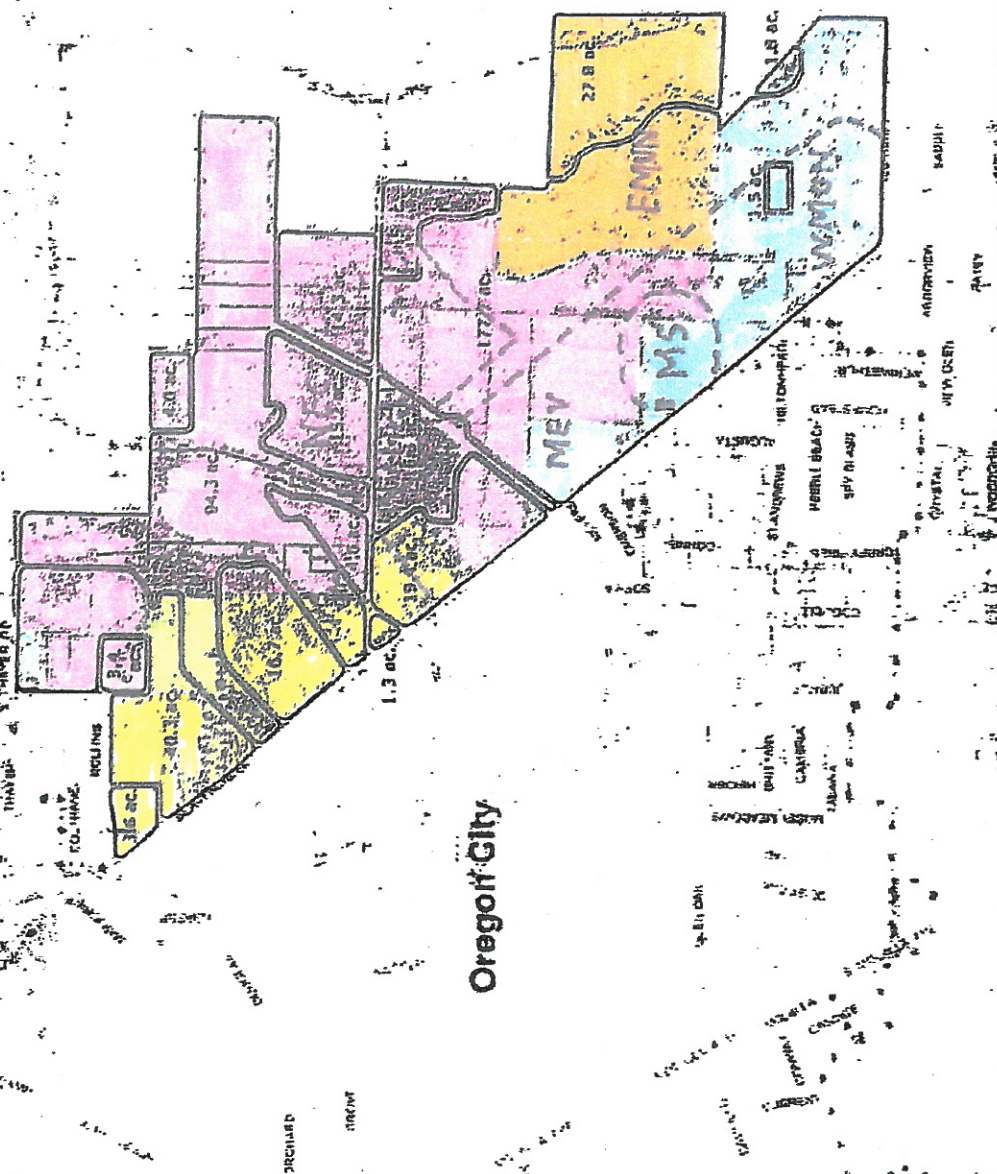
Figure 8 - Land Use Sub-districts

Note: Beaver Creek Road Concept Road

EVERETT R.O.D. CONCEPT PLAN



Note: Buildable Lands

[illegible]

BEAVERCREEK ROAD
CONCEPT PLAN

See map on previous page

Legend to APPENDIX C. Comparison of Maps in the Record Showing the 2002 and 2004 Metro Title-4 Industrial UGB Expansions and Other Lands in the Beavercreek Road Concept Plan Area.

Map Color	Metro 2040 Growth Concept Design Type	UGB Expansion	City Zoning or County	Acreage	Record page
Pink	Industrial	2002		245	42, 1524 & 725, Appendix B
Orange	Industrial	2004		63	42, 1524 & 725, Appendix B
Yellow	Employment	Pre-existing	Campus Industrial	~50	44, Appendix B, 1524
Green	Employment	Pre-existing	County	~14	Appendix B
Blue	Outer Neighborhood	Pre-existing	County	~74 ~2	1524 & 725, 42, 801, 1525, Appendix B
			Loder Rd.	5	Rec. 44

The Base Map is taken from Rec. 728 which is cleaner than other versions of the same thing.

The City limits and property lines are evident at Record pages 1778, 1512, 1402, 1404, 727, 248.

The concept plan dotted lines come from Rec. 49.

Acreages

Blue ~74. This land in the south is part of the total annexation area of 114 acres litigated in *Graser-Lindsey v. City of Oregon City*. 2007-257. Final Order and Opinion page 2. Rec. 801. The 2004 UGB expansion was 63 acres. Rec. 42. The balance is 51 acres. Two additional wedge shaped properties along Beavercreek Road are estimated as 23 acres. In total that gives 74 acres. FN 6.

Green. This is estimated off the map. FN 6.

Blue. This is estimated off the map at the top left corner. FN 6.

Oregon City's zoning can be seen most clearly at http://www.ci.oregon-city.or.us/gis-mapping/pdf/atlas_zoning/Zoning Atlas Page 21.pdf and pages 22 and 28.

The Metro's adopted 2040 Growth Concept map can be seen most clearly at http://www.oregonmetro.gov/files/planning/2040_growth_concept.pdf



Elizabeth Graser-Lindsey <egraserlindsey@gmail.com>

Beavercreek Rd. Development Appeal

3 messages

Elizabeth Graser-Lindsey <egraserlindsey@gmail.com>

Thu, Jan 15, 2015 at 2:51 PM

To: Larry Hanlon <larryhanlon@hotmail.com>, Mike Mermelstein <mike1376@aol.com>

Dear Mike and Larry:

By now you have most likely received word of the appeal of the Beavercreek Rd. Development from Oregon City. Can the Caufield Neighborhood Association please bring its concerns to the attention of the Oregon City Commission which will newly be hearing the matter on January 21?

Elizabeth Graser-Lindsey

Mike Mermelstein <mike1376@aol.com>

Thu, Jan 15, 2015 at 7:15 PM

To: Elizabeth Graser-Lindsey <egraserlindsey@gmail.com>

Have not seen the appeal yet.

Mike

Sent from my iPhone

[Quoted text hidden]

Elizabeth Graser-Lindsey <egraserlindsey@gmail.com>

Fri, Jan 16, 2015 at 11:56 AM

To: Mike Mermelstein <mike1376@aol.com>

They were supposed to have send you notice a while back as they document in their appeal report. As of today the appeal is shown in the Jan. 21 agenda for the City Commission: <https://oregon-city.legistar.com/Calendar.aspx>

[Quoted text hidden]