



### MEMORANDUM

**To:** The Honorable Mayor and City Commission  
**From:** Carrie Richter, Deputy City Attorney  
Tony Konkol, Community Development Director  
Pete Walter, AICP, Associate Planner  
**Re:** **AP 14-01 and 14-02:** Appeals of Community Development Director's approval on November 14, 2014 of file number **SP 14-01**, a Site Plan and Design Review application for 120 Apartments Units and 59 Live-Work Units on 9.7 acres (Zoned MUC-1).  
**Date:** January 15, 2015

#### **STAFF RECOMMENDATION:**

Staff recommends the City Commission deny the two appeals, one filed by the applicant, Beaver Creek Road LLC, AP 14-01, and one filed by Elizabeth Graser-Lindsey, AP 14-02, and uphold the Community Development Director's decision to conditionally approve the applicant's request to construct 120 Apartments Units and 59 Live-Work Units on 9.7 acres on the east side of Beaver Creek Road including conditions as set out in the staff decision.

#### **NOTICE OF APPEAL HEARING:**

As stated in OCMC 17.50.190(E)

*Notice of the Appeal Hearing. The planning division shall issue notice of the appeal hearing to all parties who participated either orally or in writing before the close of the public record in accordance with Section 17.50.090B. Notice of the appeal hearing shall contain the following information:*

- 1. The file number and date of the decision being appealed;*
- 2. The time, date and location of the public hearing;*
- 3. The name of the applicant, owner and appellant (if different);*
- 4. The street address or other easily understood location of the subject property;*
- 5. A description of the permit requested and the applicant's development proposal;*
- 6. A brief summary of the decision being appealed and the grounds for appeal listed in the notice of appeal;*
- 7. A statement that the appeal hearing is confined to the issues raised in the notice of appeal;*
- 8. A general explanation of the requirements for participation and the city's hearing procedures.*

This appeal hearing has been noticed in accordance with this requirement.

#### **STANDING TO APPEAL:**

As stated in OCMC 17.50.190.D(1),

*For Type II decisions, only those persons or recognized neighborhood associations who have standing pursuant to ORS 197.175(10)(a)(C) may appeal a planning manager decision. The city commission shall hold a de novo hearing on the appeal. New evidence and new issues be raised at the hearing before the city commission.*

Both the applicant and Elizabeth Graser-Lindsey commented in writing during the public comment periods and therefore have standing to appeal. These comments are part of the record.

### **BASIC FACTS:**

The Site Plan and Design Review application SP 14-01 was submitted by the applicant, Beavercreek Road LLC, for review by the Community Development Director on January 22, 2014. The application was deemed incomplete on February 20, 2014, and upon submittal of additional materials, was deemed complete for review on July 11, 2014.

The application was subject to two public comment periods due to new information submitted into the record by the applicant to support their sewer and water system proposal for the development.

Following the two public comment periods and review by staff, the Community Development Director conditionally approved the application on November 14, 2014.

The current extended 120-day decision deadline for this SP 14-01 is February 4, 2015.

### **BACKGROUND & PROPOSAL**

(See Project Overview on Page 8 of SP 14-01 Staff Report)

The subject property was annexed to the Oregon City in 2007. City File #AN 07-02 and Ord. #1021. Appellant Graser-Lindsey and others appealed the annexation decision to LUBA arguing that the Beavercreek Road Concept Plan must be adopted before the annexation can be approved. LUBA No. 2007-171. LUBA rejected the appeal finding nothing in Metro Code Title 11 or the Oregon City Comprehensive Plan that required adoption of the Beavercreek Concept Plan before annexation.

The Beavercreek Concept Plan was adopted in 2008 and included the subject property within its boundaries. The plan designated the subject property Mixed Employment Village, including commercial and residential uses. The appellant and others appealed the concept plan adoption to LUBA. LUBA No. 2008-170. LUBA remanded the City's decision finding that the City failed to adequately explain why the concept plan identified only 120 acres for industrial uses when Metro's Title 4 Significant Industrial and Employment Lands map designated 308 acres for industrial use. The subject property is not located within the area previously mapped as a Title 4 significant industrial area. The City has not taken any further action to adopt the Beavercreek Concept Plan.

In 2010, the City approved a comprehensive plan and zone change application for the subject property from FU-10 to MUC-1 – Mixed Use Corridor District. Conditions of the plan amendment / zone change required compliance with the Beavercreek Road Concept Plan to all subsequent

development, once it is adopted and if the plan is not yet adopted, it establishes development standards including a minimum floor area FAR, building height, pedestrian friendly amenities, green development practices and an urban design consistent with the plan. This decision was not appealed.

The proposed project is a combination of 121 rental apartments and 59 live-work units that form a village concept. The proposed community's mix of live-work ground floor commercial and regular apartments provides opportunities for meeting the Mixed Use Corridor base zoning of the site while also meeting the intent of the soon-to-be-adopted Beaver Creek Road Concept Plan – Mixed Employment Village.

## **ISSUES RAISED BY THE APPLICANT**

The Applicant Beaver Creek Road LLC argues that City staff erred in imposing a fee in lieu of \$545,000 to modify and upsize portions of the off-site sewer system necessary to serve this development. The Public Works Department provides further explanation for its decision in the attached Exhibit 4.

## **ISSUES RAISED BY THE APPELLANT GRASER-LINDSEY**

Ms. Graser-Lindsey's concerns with this project as outlined in Exhibit 2 relate to the following issues:

### **Compliance with Comprehensive Plan**

#### **Appellant statement**

- ***This appeal results from application SP 14-01 being approved despite its violation of Oregon City Comprehensive Plan (OCCP), Oregon City Municipal Code (OCMC), Metro Code (MC), and State law.***

#### **Staff Response**

The applicant did not provide a great deal of specificity as to how the application violates the plans and codes cited above. Staff will attempt to respond to those few specific points the applicant does cite as discussed below.

#### **Appellant statement**

- ***Urbanization of the property cannot proceed* [sic – staff takes appellant to mean “precede”] *adoption of a valid concept plan according to applicable law inclusive of OCCP* (sic – staff takes appellant to mean the Oregon City Comprehensive Plan) **p. 118, Goal 14.3 Orderly Provision of Services to Growth Areas, Goal 14.4 Annexation of Lands to the City, OCMC 14, the city's own Findings to AN 07-02, LUBA's interpretation of these laws specifically with regarding to this property in LUBA 2007-171 (submitted to the record), and LUBA's remand of the Beaver Creek Road Concept Plan in LUBA 2008-170.****

#### **Staff Response**

“Urbanization” of the subject property may proceed since the property, unlike the other properties within the BRCP area, was annexed, rezoned and conditionally approved for Site Plan and Design Review in compliance with the Oregon City Comprehensive Plan and the Oregon City Municipal

Code. The planning and zoning of the annexed property as MUC-1, suitable for urbanization, was established as part of the 2010 plan and zoning decision and that decision was not appealed. That decision is now final and is beyond further challenge.

Further, although compliance with the concept plan cannot be required, the City has taken numerous steps to ensure that the policies identified in the concept plan are furthered by this development including (1) compliance with the conditions attached to the comprehensive plan and zone change decision requiring massing and design obligations as identified in the concept plan, and (2) the City's more recently adopted sewer, water, and storm water master plans relied on development demand assumptions contained within the concept plan.

With regard to the appellant's claims that this proposal violates certain comprehensive plan policies, the subject decision is a limited land use decision and as such, comprehensive plan policies that are not specifically incorporated as part of the approval criteria do not apply. ORS 197.195(1). Incorporation of plan policies requires that the local government must make it clear what specific policies or other provisions of the comprehensive plan apply to a limited land use decision as approval criteria. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005). Appellant identifies no City Comprehensive Plan policies have been incorporated into the applicable site design and design review criteria. Therefore, the plan policies do not apply.

Further, compliance with the Oregon City Comprehensive Plan was already decided, when the property was rezoned to MUC-1 in 2010. The conditions attached to the plan amendment / zone change decision explain that development of the property may precede adoption of the Beaver Creek Road Concept Plan when it was rezoned in 2010 with approval of the Comprehensive Plan Amendment (Planning File PZ 10-01) and concurrent rezoning (Planning File ZC 10-01). The rezoning was properly acknowledged by DLCD, was not appealed and is now final. It is for this reason that the statewide planning goals do not apply to this decision.

The appellant states that the development of the subject site violates the City's own findings regarding AN 07-02 (Exhibit 7 of the decision SP 14-01) presumably based on a discussion by LUBA that urbanization will not occur until the concept plan was adopted. The property owner has the right to develop the property, so long as it is consistent with the applicable provisions of the municipal code and the previously imposed conditions. The density and nature of the proposed residential and commercial mixed use proposal is a use permitted outright in the MUC-1 zone. The only issues germane for review in the site plan design review relates to criteria in OCMC Chapter 17.62, which includes topics such as public utility infrastructure adequacy and development design issues.

The appellant argues that approval of the development violates LUBA's remand of the Beaver Creek Road Concept Plan (BRCP) in LUBA 2008-170, but does not specify how or why. LUBA 2008-170 remanded the BRCP to Metro and the City in order to assure that the adopted BRCP was consistent with the Metro 2040 Plan with regard to Title 4 Significant Industrial lands. The subject property is not included within the area previously designated as a Title 4 Significant Industrial land. Metro has subsequently adopted an amendment to the 2040 Plan which is consistent with the BRCP, in any event.

It may be that the Appellant's objections are rooted in a belief that the infrastructure, public facilities and services demand from the BRCP development would adversely affect services for existing residents and therefore, the impacts from this development would have similar adverse effects. First, none of the LUBA decisions considered the public facility impacts from urbanization of the Beavercreek area. LUBA expressly did not decide these issues in LUBA No. 2008-170, the BRCP remand decision. Second, whether the question of infrastructure adequacy coupled with the proposed demand is independently determined by various OCMC provisions such as OCMC 12.04 Streets, Sidewalks and Public Places (Staff Report pp. 18-32), OCMC 17.62.050(A)(14), Public Sewer and Water Facilities (Staff Report pp. 40-43), OCMC 13.12, Stormwater Management (Staff Report pp. 70-73).

Again, based on the city's findings for the subsequent rezoning of the property in 2010 (Files PZ 10-01 / ZC 10-01) which was found to be consistent with the un-adopted BRCP – Mixed Employment Village concept, and which expressly allowed for development of the property prior to adoption of the BRCP, staff can find no reason why development of the property cannot precede adoption of the BRCP.

### **Appellant Statement**

- ***Because of the process being followed (including the absence of a adopted concept plan), public facilities and services are not being handled in a coordinated way respective of and conforming with the needed concept plan or with general good practice, are not adequate nor properly planned (including over-sizing and cost recovery plan, right of way planning and acquisition, response times, etc.), and are not without adverse impact on the city and residents of the area and are consequently in violation of applicable law including OCCP Section 11 Public Facilities, OCMC 17 Zoning (including 17.62 Site Plan and Design Review and 17.52, 17.29), those on infrastructure (including 12 Streets, Sidewalks and Pubic Places and 13 Public Services) and 14 City Boundary Changes and Extension of Services and those above.***

### **Staff Response**

As explained above, comprehensive plan policies are not applicable to this site plan and design review application and therefore OCCP Section 11 Public Facilities, 12 Streets, Sidewalks and Public Places, and 13 Public Services do not apply.

The appellant has not specified which public facilities have not been planned in a coordinated way. The site plan and design review application was reviewed for consistency with the city's adopted public facilities plans or "Ancillary Documents" as they are called in the OCCP. The application was also reviewed for adequacy of public facilities as required in the Oregon City Municipal Code for review of Site Plan and Design Review applications (OCMC 17.62.050.A.(14) and (15)). These include:

Transportation System Plan (adopted 2013) establishes the nature of the roadways necessary to support the proposed development and the City may do no more than require compliance with these standards as required by OCMC 12.04. The applicant has proposed the dedication of new public streets and street stubs to create a block system within the site and also connect to adjacent developable land in accordance with the City Transportation System Plan, OCMC 12.08, and including additional ROW dedication along Beavercreek Road on the applicant's property in

accordance with City Plans and county standards along Beavercreek Road. Conditions of Approval have been attached to the decision to assure compliance with the City's Transportation System Plan as well as coordination with Clackamas County standards for Beavercreek Road.

Sewer Master Plan (adopted 2013) – As explained in the supporting memoranda from Public Works, the Sewer Master Plan contemplates sewer connection of the subject property either along Beavercreek Road within the Beavercreek Sewer Sub Basin or along Highway 213 in the Glen Oak Road Sub Basin. Public Works has identified improvements along Highway 213 necessary to accommodate not only the subject property but also all of the flows that could reasonably be carried from the BRCP area to the Glen Oak Road Sub Basin. This is detailed in Exhibit 6b to the Staff Report for SP 14-01, "Public Works Engineering File Memorandum, dated November 5, 2014, for SP 14-01 Staff Report Findings and Conditions for Sanitary Sewer and Water Service".

#### Water Master Plan (adopted 2010)

The appellant asserts that the project conflicts with the city's adopted Water Master Plan, that the city should be the sole provider of water service to the property, and that a proposed Condition of Approval for an intergovernmental agreement (IGA) with Clackamas River Water (CRW) to provide water to the property and would compromise CRW's capacity to provide water service to its customers.

The City and CRW have numerous joint agreements throughout the city to provide water service to Oregon City and CRW customers within and outside of the City Limits. These arrangements are legal and not unusual.

Eventually, when the Beavercreek Road area is fully developed, the subject property and the surrounding area will be served exclusively by the Oregon City Water distribution system. In the interim period, the area will be served by a CRW master water meter and Oregon City pipes will be provided throughout the property. Far from being "piecemeal", as the applicant asserts, this will assure coordinated water service to the property and adjacent redevelopable land.

CRW provided a response to the appellant's comments (Exhibit 7). Nothing in those comments indicates that adequate water service and pressure cannot be provided to the development or CRW's customers with the approval of the development, through the Conditions of Approval for SP 14-01.

#### Emergency Services

##### *Clackamas Fire District #1*

CFD#1 is a review agency that works with the city throughout the development process. CCFD#1 submitted comments regarding the application (Exhibit 5b of the decision SP 14-01). The scope of the CCFD#1 review is typically limited to fire apparatus access and water supply, although the applicant must comply with all applicable OFC (Oregon Fire Code) requirements. CCFD's comments did not include any statements that fire call response time is or will be a concern.

CFD#1 Fire Marshall Doug Whiteley provided further comments by email (Exhibit 5) indicating that the CFD Urban Community Standard of Coverage for EMS response time for the project area, which

includes Oregon City High School on the other side of the road, is 7 minutes and 15 seconds. This is a baseline figure published in the District's 2013 Standard of Coverage reflects 90 percent of EMS responses, total response time of the first arriving apparatus. The first arriving unit is staffed with two, three, or four personnel and is capable of providing advanced life support and treatment for a one or two patient medical incident while providing for the safety of victims and responders in accordance with department policy and procedures.

Therefore, staff disagrees with the appellant that CFD#1's response times to serve the development will be substandard.

#### *Oregon City Police Department*

Oregon City Police Department was provided a copy of the application for comment and did not indicate any concern with emergency response times. OCPD already serves Oregon City High School on the other side of Beaver Creek Road. Additionally, the developer is required to pay a supplemental police service funding fee of \$3,500/ unit which was required as an Annexation Agreement that runs with the land as a condition of approval of the annexation AN 07-02.

Chief Police Band submitted a letter (Exhibit 6) stating that "while continued growth in Oregon City will require the police department to grow along with the population of our community, I do not believe the presence of this apartment complex will create any issues regarding police response to this location or in the surrounding area."

Therefore, staff disagrees with the appellant that OCPD's ability to serve the development will be compromised.

#### **Appellant Statement**

- ***The application is incomplete in that the city and service district responses do not document the availability of water and sewage capacity and the public cannot respond to a complete application in violation of applicable law including OCMC 17.62, OCMC 17.50.070 and 080 (completeness) and Statewide Planning Goals 1 and 2.***

#### **Staff Response**

Staff disagrees that there was any defect in the City's completeness review. Completeness review is an administrative review only and provides no declaration as to whether the applicable approval standards are met. In any event, the City did postpone and restart the public comment period after new evidence was submitted by both the applicant and the City allowing all parties sufficient time to respond. Further, the City Commission's review of this matter is *de novo*, meaning that all parties will have an opportunity to review and submit new evidence to supplement the record. The delayed comment period coupled with the *de novo* review allows the public adequate time to respond.

#### **CONCLUSION AND RECOMMENDATION**

Staff recommends the City Commission deny the two appeals, one filed by the applicant, Beaver Creek Road LLC, AP 14-01, and one filed by Elizabeth Graser-Lindsey, AP 14-02, and uphold the Community Development Director's decision to conditionally approve the applicant's request to construct 120 Apartments Units and 59 Live-Work Units on 9.7 acres on the east side of Beaver Creek Road including conditions as set out in the staff decision.

## EXHIBITS

1. Complete Record for SP 14-01
2. AP 14-01 Applicant (Beavercreek Road LLC) Appeal
3. AP 14-02 Graser-Lindsey Appeal
4. Public Works Memorandum from City Engineer, Aleta Froman-Goodrich, P.E., regarding AP 14-01, dated January 5<sup>th</sup>, 2015.
5. Email from CFD#1 Fire Marshall Dough Whiteley, dated January 12, 2014.
6. Letter from OCPD Chief James Band, dated January 12, 2015.
7. Draft Letter from Clackamas River Water responding to Elizabeth Graser-Lindsey remarks regarding CRW water service proposal, dated January 14, 2015.

The staff report and exhibits for SP 14-01 project are available for download at <http://www.orcity.org/planning/landusecase/sp-14-01-beavercreek-road-apartments-live-work-units>

The public notices for AP 14-01 and AP 14-02 and associated appeals are available for download at <http://www.orcity.org/planning/landusecase/ap-14-01-and-ap-14-02-appeals-sp-14-01-beavercreek-road-livework-and-apartment>