



### 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:** February 11, 2015 (for City Commission Hearing February 18, 2015)

**This item was continued from February 4, 2015. This memorandum addresses additional comments submitted up through February 10, 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.

#### **LIMITING PARTICIPATION IN THE APPEAL**

The appeal before the Commission is a "limited land use" decision, a special category of expedited land use review that applies in cases of site plan and design review and some types of land divisions. Limited land use decisions are subject to special statutorily mandated procedures and pursuant to those procedures, holding a local appeal hearing is permissive and the local government may decide whether to limit its review to the record or to take new evidence. ORS 197.195(5). The Oregon City Municipal Code (OCMC) processes these special limited land use decisions through a Type II process, including an appeal hearing of the planning director's decision to the City Commission. OCMC 17.50.110(B). OCMC 17.50.190(D)(1) provides that only those persons or recognized neighborhood associations who have standing may appeal the decision. In order to have standing, a party must have submitted written comments before the Planning Director issued a decision. This code section goes on to require that the Commission hold a de novo hearing on appeal. This means that new evidence and new issues can be raised. Therefore, although initiating an appeal is limited to parties who have standing, this section does not specify whether participation below is a prerequisite for participation in the appeal proceeding.

However, OCMC 17.50.120(E)(6) provides that the disclosures at the beginning of an appeal hearing should include the following:

For appeal hearings, only those persons who participated either orally or in writing in the decision or review or who have standing pursuant to ORS 197.175(10)(a)(C) will be allowed to participate either orally or in writing on the appeal.

The disclosures given at the initial hearing did not include a statement that participation at the hearing would be limited to those that have standing. The mailed notices inviting comment on the application did not specify that participation in an appeal would be limited. However, both the posted and mailed notices of the appeal hearing contained this language. To make matters more confusing, the statutory reference to ORS 197.175(10)(a)(C) in the code as well as in the notices is incorrect and would have no application to this limited land use decision. The City does have a practice of restricting participation during appeal hearings to those with standing.

This was not an issue before and during the hearing held on January 21st because all participants up to that time had standing. On January 25, 2015, Mr. Paul Edgar submitted a series of written comments to the record for this appeal and Mr. Edgar did not submit comments during the proceedings below. Since that time, the City has received written comments from the Caufield Neighborhood Association, Mike Fernandez, Brian Todd, the Caufield Neighborhood Association and oral comments from ex-Mayor Doug Neeley as well as by Mr. Edgar. Mr. Edgar has subsequently submitted written testimony objecting to any restrictions in those who may testify claiming that it is inconsistent with the Commission's initial invitation to collect testimony from all citizens in Oregon City.

Therefore, as part of making this decision, the Commission needs to interpret and apply OCMC 17.50.190 and 17.50.120(E) together to determine whether to restrict participation in this appeal hearing to only those individuals and neighborhood associations who commented when the application was pending review by staff. This would require rejecting all of the testimony and evidence submitted by the above-listed individuals from the record and not considering it when making a decision.

Staff recommends that the City Commission accept all of the testimony and evidence submitted into the hearing. This recommendation is based on the requirement for a "de novo" hearing in state law and the somewhat inconsistent messages contained in the code and presented by staff about the controlling appeal procedures. Although the state law requirement for a "de novo" hearing does not specify the participants in an appeal hearing, it suggests that the hearing should not be limited. Finally, to the extent the City prohibits the participation of a person who should have been allowed to take part in the hearing, the result would be a remand, even if the City made the correct decision.

#### **RESPONSE TO ADDITIONAL ISSUES RAISED**

##### **Appellant Elizabeth Graser-Lindsey**

Appellant Elizabeth Graser-Lindsey submitted an additional letter and PowerPoint presentation into the record on January 21, 2015. Staff has reviewed these items to determine whether the Appellant raises any additional issues that were not addressed in Staff's January 21 memorandum.

The Appellant Graser-Lindsey raised no new issues on January 21, however, the following points are restated for clarification:

- The appellant Graser-Lindsey states that urbanization of the subject site may not precede adoption of a concept plan, based on LUBA's interpretation of the appeal of the Annexation 07-02 with respect to the entire Beaver Creek Area.

Staff respectfully disagrees. As stated previously:

- Inclusion in the 1979 UGB, before Title 11, removes the property from the concept planning requirements, which are only applicable to urban reserve areas and the 2002 and 2004 UGB expansions.
  - As discussed previously, when the property applied for a comprehensive plan amendment and zone change in 2010, the approval of the application was based on findings that public facilities and services were adequate to serve the property, that the property was part of the original UGB and not subject to concept planning requirements (unlike the properties in the UGB expansion area), and with specific conditions of approval to meet the intent of the un-adopted BRCP in the event that urbanization of the subject property did in fact precede adoption of the plan, which is the case here. This decision was provided to the State and acknowledged by DLCD and there was no appeal to LUBA at that time.
  - The appellant has not identified how a Site Plan and Design Review application would violate Metro Code.
  - The attorney for the appellant/applicant, Steven P. Hultberg, provided a very clear response to this concern in his letter to the City Commission submitted into the record at the January 21, 2015 public hearing (See paragraph 6, Pp. 3-4, with heading "Beaver Creek Road Concept Plan). Staff concurs with this response.
- The appellant Graser-Lindsey argues that this development would hamper, block and pre-empt needed concept planning.

Staff respectfully disagrees. As stated previously:

- This development would provide critical public infrastructure connections to adjacent redevelopment areas within the BRCP area, including streets, allowing for coordination of public infrastructure improvements once the concept plan is adopted. In particular, the applicant will be constructing a portion of the fourth leg of Meyer's road into the area on their property, a transportation improvement long-envisioned in the City's Transportation System Plan.
- The City's review is limited to this project only and not Beaver Creek as a whole. Adoption of the Beaver Creek Road Concept Plan, when it comes back on remand, will have to take this development into account to ensure coordinated development.
- Now that the land is designated MUC-1, the City is required to review the development as a Type II Limited Land Use decision, and may not return to the broadly construed "positive balance of factors" discussed in 14.04.060 - Annexation factors which formed the basis for annexation approval by the Planning Commission and City Commission in 2007. The proposed use and development application is presumed to be allowable in the

underlying MUC-1 zone district and the review at this point is limited to the criteria and findings set forth in the Staff Report and Decision.

#### **Notice to Caufield Neighborhood Association**

- The appellant Elizabeth Graser-Lindsey claims that notice to the Caufield Neighborhood Association was not provided. This is incorrect.
- Public Notices for SP 14-01 were provided by email to the Caufield Neighborhood Association, first with the original transmittal for SP 14-01, on July 24, 2014 and with the second public notice for the revised application materials for SP 14-01 on October 17, 2014.
- Notice of the Appeals AP 14-01 and AP 14-02 was provided by regular mail to the Land Use Chair of the Caufield Neighborhood Association, Mike Mermelstein, at 20114 Kimberly Rose Dr, Oregon City, OR 97045, on December 30, 2014.
- Copies of the above mentioned notice are in the record.

#### **Traffic**

The appellant claims that the application underestimates the traffic generated by the development.

- City Transportation Consultant, John Replinger, provided initial comments on the applicant's Transportation Impact Analysis, which are part of the record for SP 14-01.
- Mr. Replinger has provided a supplemental memorandum in Exhibit 2 that further responds to Appellant Graser-Lindsey's and Hamlet of Beavercreek concerns regarding capacity, trip generation, intersection performance, future development, and Access, Site Circulation and Intersection Spacing.
- Beavercreek Road will function adequately as a three-lane section with access control provided by the fourth leg of the Meyers Road signalized intersection.
- The capacity of Beavercreek Road abutting the subject site was not determined to be a concern.
- The operation of the Beavercreek / OR 213 intersection has been studied extensively by ODOT, Oregon City and Clackamas County. This occurred when the property was annexed in 2007, rezoned in 2010, with the Oregon City and Clackamas County TSP updates in 2013-2013, and most recently with the subject application.
- As indicated in the November 12, 2014 comment letter, Mr. Replinger finds the TIA meets city requirements. The TIA indicates that development will cause modest increases in traffic. With the exception of Highway 213/Beavercreek Road, mobility standards will be met at all locations with the development in year 2016. This intersection is, however, allowed under the special provisions of OCMC 12.04.205 D to exceed v/c 0.99. Mr. Replinger found nothing in the appellant's materials that leads him to alter his conclusion that the transportation system is adequate to accommodate the development or that it will be made adequate with the conditions of approval that were associated with ZC 10-01 and SP 14-01.

#### **Coordination of Transportation Planning with off-site developments**

- The Hamlet of Beavercreek as well as the Caufield Neighborhood Association expressed concern for coordinated traffic analysis between the apartment proposal and the soon-to-be submitted application for the Oregon City School District bus transportation facility, which would relocate from the existing Maplelane Road facility near the intersection of Beavercreek Road / OR 213 to a new location north of Glen Oak Road west of OCHS, which

will have impacts on the Meyer's Road intersection. Only a pre-application has been completed at this point by the school district.

- The traffic impacts of the re-routed bus traffic for the Transportation Facility by Oregon City School District will be documented in a Traffic Impact Analysis submitted at the time of formal Land Use Application by the school district pursuant to the adopted Guidelines for Transportation Impact Analysis, allowing for appropriate analysis at that time.
- There is no requirement to delay a decision on the apartment proposal pending a traffic analysis for an off-site project over which the applicant has no control.

### **Parallel Parking on Beaver Creek Road**

Concerns have been expressed by several people regarding the proposal for on-street parallel parking on Beaver Creek Road. This parking was proposed by the applicant with planning staff support in order to support the Live-Work commercial units that would eventually become occupied in the ground floor units that front on Beaver Creek Road.

- There will be no parking on Beaver Creek Road constructed with the development and all parking requirements will be met on-site. The interim condition of approval is for this area to be an "interim landscaping area" or to be striped so as to prohibit parking, in accordance with Clackamas County's recommendation and the School District's preference.
- The timing of the on-street parking will depend on several factors. Parallel Parking on Beaver Creek Road would only occur when the Beaver Creek Road corridor becomes urbanized and is fully built out, the posted speed limit is reduced, and the road is transferred from Clackamas County to Oregon City jurisdiction, in order to preserve the capacity of the road and allow it to continue to function safely and adequately with parallel parking.

### **Three Lane Section on Beaver Creek Road**

Please see previous comments and the memorandum from the City Transportation Consultant John Replinger. Additionally, Clackamas County requires compliance with the County Roadway 3-Lane Section standard except where the City's TSP standards exceed the County's. As stated by Clackamas County planner Kenneth Kent in the County's review of the SP 14-01 application:

*"3. The proposed development has approximately 1,015 feet of frontage on the easterly side of Beaver Creek Road. Clackamas County has designated Beaver Creek Road a major arterial roadway. Clackamas County has adopted roadway standards that pertain to the structural section, right-of-way width, construction characteristics, and access standards for arterial roadways. Developments adjacent to existing roadways are required to improve the roadway to current standards.*

*4. Clackamas County's Roadway Standards indicate that major arterial roadways shall have a right-of-way width that ranges from 60 to 134 feet, depending on the planned road section. **The standard urban major arterial roadway 3-lane section** calls for a 50-foot wide curb to curb width, typically requiring 80 feet of right-of-way. The applicant will be required to dedicate approximately 10 feet of additional right-of-way to provide a 40-foot one-half right-of-way width. Minimum improvements on the Beaver Creek Road frontage consistent with Clackamas County's Roadway Standards include, but are not limited to, up to a 25-foot wide half-street improvement, pavement widening, curb, 5-foot wide landscape strip and 7-foot wide sidewalk."*

This is consistent with the City's TSP standard for Beaver Creek Road, and condition of approval #24, which calls for the road to be a 3-land section major arterial with a 92-foot ROW (47-feet of ROW from centerline on the easterly side of the road).

### **Access Control on Beaver Creek Road**

Concerns were raised regarding whether a single access into the development was adequate. Access control on arterial roads in order to preserve capacity and safety, has long been an adopted standard by ODOT, Clackamas County and Oregon City transportation planning. Additional access on Beaver Creek Road and into the site are unnecessary and would fail to meet various standards for access management, intersection spacing and other adopted City, County and State requirements.

Example - BRCP Policy 7.3

- *Control access along the east side of Beaver Creek Road so that full access points are limited to the intersections shown on the Circulation Framework. Right in-Right-out access points may be considered as part of master plans or design review.*

### **Geologic Hazards**

The Hamlet of Beaver Creek as well as the Caufield Neighborhood Association expressed concern regarding geologic hazards. The site is very gently sloping and there are no geologic hazards (neither steep slopes nor landslides) indicated on or near the property, as shown on the attached map in Exhibit 8.

### **Construction Impacts on Beaver Creek, Meyers Road, Emerson Court, and Glen Oak Road**

Concerns have been raised regarding the temporary impact of construction of needed public improvements within the existing roads adjacent to the development. Such impacts are temporary, if inconvenient, and are not criteria for consideration when reviewing a land use application. Further, decisions about setting work hours, lane closures and the like are determined as part of the final engineering work is completed. Depending on which jurisdiction is issuing permits for roadway work, the Oregon City Public Works Streets Division and/or Clackamas County Department of Transportation and Development has existing policies and practices in place to minimize interruptions to traffic operations and flow, parking availability, and assure that pedestrian and bicycle safety is taken into account during the construction period.

### **PUBLIC WORKS ISSUES**

The City Engineer has prepared a separate memorandum responding to the following issues (Exhibit 1).

- Sewer capacity in Glen Oak Basin
- Applicant's request to modify Condition 34 regarding sewer connection
- Water pressure
- Response to Applicant's request regarding Condition 37 (SDCs/LID)

## **EXHIBITS**

### **January 21, 2015 Public Hearing (Previously Entered into Record)**

Item 6b. PC 15-147

<http://oregon-city.legistar.com/gateway.aspx?m=l&id=/matter.aspx?key=2928>

### **February 4, 2015 Public Hearing (Previously Entered into Record)**

Item 6a. PC 15-151

<http://oregon-city.legistar.com/gateway.aspx?m=l&id=/matter.aspx?key=2987>

### **New Exhibits for February 18, 2015 Public Hearing**

1. Memorandum, Aleta-Froman Goodrich, P.E., City Engineer, February 11, 2015.
2. Memorandum, John Replinger, P.E. Replinger and Associates Transportation Engineering, February 10, 2015.
3. Applicant's proposal for Sewer Options, 02.04.2015
4. Applicant's 120-day Extension.

### **Public Comments**

5. Public Comments Matrix
6. All Testimony Submitted since January 21, 2015 (Bundled File)
  - a. Christine Kosinski
  - b. Tammy Stevens
  - c. Mike Mermelstein
  - d. Mary Johnson
  - e. Mike Fernandez (w/ Staff Response)
  - f. Brian Todd
  - g. Paul Edgar
7. Copies of Public Notices (On File).
8. Topography Map from OC Map indicating absence of known Geologic Hazards on property.