

MEMORANDUM

TO: Oregon City Planning Commission
FROM: Carrie Richter, Deputy City Attorney
DATE: June 4, 2018
RE: Supplemental Staff Report for Historic Properties, LLC Plan Amendment and Zone Change
City File Nos. PZ 15-01 and ZC 15-03

Background Facts

In February 2016, the City Commission approved a plan amendment and zone change for property located at the corner of Beaver Creek Road and Highway 213. The approval changed the existing Low Density Residential and Medium Density Residential comprehensive plan map designations to Mixed Use Corridor (MUC). The existing R-3.5 Dwelling District, and R-6 and R-10 Single-Family Dwelling District zoning designations were changed to the MUC-2 Mixed Use Corridor District zoning designation. Commercial uses, including office and retail, are allowed in the MUC-2 zone. The approval imposed a number of conditions limiting the use including a trip cap and uses.

On appeal, the Land Use Board of Appeals (LUBA) remanded this approval back to the City finding that the City failed to adequately address Goal 5, the Statewide Planning Goal relating to the protection of natural areas, scenic and historic areas and open spaces. *Nicita v. Oregon City*, ___ Or LUBA ___ (LUBA No. 2016-045, January 25, 2017). LUBA found that the record did not contain adequate information as to the location of the riparian corridor protecting Newell Creek, nor did it make adequate findings explaining whether development of the new uses, allowed as a result of the decision, ‘could’ conflict with Goal 5 protected resources. LUBA determined that the City must do the following to respond to this issue:

In a nutshell, the city's error was in assuming that because no particular development plan has been submitted for approval at this time, and because the Geologic Hazards and Natural Resources Overlay districts have been applied to the property to protect inventoried Goal 5 resources, the city can assume that the Goal 5 resources those overlay districts presumably were applied to protect from the lower density residential uses allowed under the previously applied map designations will be adequately protected from the commercial, higher density development that is now possible by virtue of the PAPA. That may well turn out to be the case. But the city may not simply assume that is the case, because OAR 660-023-0250(3)(b) requires that the city conduct an initial inquiry to determine whether new uses allowed under the PAPA “could” conflict with Goal 5 resources. Only if the answer to that question is “no” may the city conclude that Goal 5 does not apply. As part of that initial inquiry, the city could consider whether the city's

existing program to protect the inventoried resources from the lower density residential development allowed under the prior map designations is also adequate to ensure that new more intensive uses will not conflict with protected resources. If a finding to that effect, supported by substantial evidence, can be made, then no further inquiry is needed. However, if the city's initial inquiry cannot eliminate the possibility of conflicts from the new uses allowed by the new map designations, the city must repeat any of the steps in the Goal 5 planning process that are necessary to ensure that the city's Goal 5 obligations with respect to protected resources continue to be met. (Emphasis added.)

The matter has been remanded back to the City. This decision was then appealed to the Oregon Court of Appeals, who affirmed LUBA's decision and the Oregon Supreme Court denied review. The matter is now ripe for further consideration by the City.

Applicable Procedures

The City Commission has asked that the Planning Commission conduct the initial review of this matter limited to the issues that led to the remand. In order to accomplish this, the Planning Commission should re-open the record for the limited purpose of (1) identifying the Goal 5 protected resources that could be affected by this proposal; (2) whether the new uses allowed by this plan amendment and zone change could conflict with the City's designated Goal 5 resources, particularly Newell Creek. Evidence or argument that is not related to these limited Goal 5 issues will not be placed in the record and will not be considered by the Planning Commission. After considering new evidence and argument, the Planning Commission will make a recommendation for adoption by the City Commission. The City Commission's review will be on the record and no new evidence will be considered.

Legal Analysis

What are the inventories Goal 5 resources potentially impacted by this proposal?

Having reviewed all of the City's adopted Goal 5-related inventories, including natural resources, historic resources, scenic and open spaces, the only Goal 5 designated resource potentially affected by the proposal is Newell Creek. See attached map of the riparian corridor running through the property.

What are the new MUC-2 uses that could result from development?

Potential MUC-2 development that may occur on the site includes: single/detached residential, town center, parks, offices, services, child care, health and fitness clubs, banquet / conference center, medical or dental clinics, and other permitted uses listed under Chapter 17.29.020. The City's previous decision prohibited the development from including museums, libraries, postal services, repair shops, restaurants, retail trade, ancillary drive-in or drive through, and gas stations.

Is the City's existing program to protect Newell Creek from impacts resulting from additional storm water sufficient to protect the creek?

During the proceedings concerns were raised that the additional site coverage resulting from the increased density permitted in the MUC-2 zone would increase the impervious surfaces that would, in

turn, increase the storm water runoff that would impact Newell Creek. The identified impacts included increased flow velocity, increased contaminants and ground saturation that would increase the likelihood of landslides.

As the April 25, 2018 memo from Ms. Froman-Goodrich PE, the City Engineer, explains Oregon City's Stormwater Management Standards and National Pollutant Discharge Eliminations System (NPDES) MS4 Permit, coupled with the City's existing development regulations requiring erosion and sediment control, OCMC 17.47, and Natural Resource Overlay protections, OCMC 17.49, and its 2015 Stormwater and Grading Design Standards will ensure that water quality, quantity and velocity will be maintained, notwithstanding any additional increases in flows.

It may be helpful to the Planning Commission to note that these are the same grading and water quality standards that apply to all permitted MUC zoned development throughout the City. OCMC 17.49 was adopted to satisfy Title 13 of Metro's UGB Management Functional Plan.

These findings were further supported by testimony submitted by the applicant's engineer Mr. Sisul, PE. This analysis concludes that the City's has sufficient regulations in place to conclude that no conflict will result from the allowing new uses.

If the Planning Commission can determine that the new uses will not conflict with Goal 5 resources, no further analysis is necessary.

Does it matter that the City's MS4 Permit and other existing regulations were not adopted in compliance with Goal 5?

Mr. Nicita has submitted testimony indicating that the City's MS4 Permit and other existing regulations were not adopted in compliance with Goal 5 and as a result, that the City may not rely on compliance with those standards in order to achieve Goal 5. As pointed out above, the City adopted its water quality protections in OCMC 17.49 comply with Metro's Titles 3 and 13. Metro's Title 13 standards do comply with Goal 5 and as a result, OCMC 17.49 does as well. Moreover, Goal 5 does not require that the regulations ensuring compliance with Goal 5 be acknowledged in order for the local government to determine, based on expert testimony, that new uses will not conflict with designated Goal 5 resources.

If the City's existing water quality regulations are insufficient to determine no conflict with protected resources, what next?

As LUBA's remand explains, if the City cannot conclude that no conflict will result, it must repeat the steps of the Goal 5 planning process that are necessary to continue to protect the resource. Generally, the steps of the Goal 5 process are (1) to inventory and determine the significance of the resource site; and (2) evaluate the conflicts of allowing a new use by considering the economic, social, environmental and energy (ESEE) consequences that may result. OAR 660-023-0030 and -0040.

The applicant has provided written testimony from Ms. Reed, a senior wetland scientist, and Mr. McConnaughey, a professional wetland scientist, to evaluate the ESEE impacts resulting from the new uses. These findings conclude that any increase in stormwater from greater intensity development will be mitigated through compliance with the City's water quality standards that are stricter for non-

residential development and providing potential for a reduction in impact to Newell Creek. These findings also note that mixed use centers provide increased economic and social benefits in allowing residents to live near their work, reducing automobile uses, which minimizes air, water and energy impacts. Therefore, after analyzing the ESEE consequences the City may conclude that that the MUC uses should be allowed consistent with the use limiting conditions previously approved.

Conclusion

Based on the foregoing analysis, staff recommends that the Planning Commission recommend approval of this request.