

BEFORE THE CITY COMMISSION  
FOR THE CITY OF OREGON CITY, OREGON

In the Matter of an Application by	)	FINDINGS OF FACT AND
Historic Properties, LLC for a Type IV	)	CONCLUSIONS OF LAW
Concurrent Comprehensive Plan Map and	)	APPROVING THE APPLICATION;
Zoning Map Amendment	)	CITY OF OREGON CITY FILE
(the “Application”) for Approximately	)	NUMBERS PZ 15-01 AND
15.69 Acres Generally Northeast of the	)	PZ 15-03
Intersection of Oregon Highway 213 and	)	
Beavercreek Road	)	

**1. Introduction.**

The Application requests approval of a concurrent comprehensive plan map and a zoning map amendment on eleven tax lots containing approximately 15.69 acres (the “Property”). The only inventoried Goal 5 Resource (the “Goal 5 Resource”) affected by this proposal is Newell Creek. The record includes a map showing the location of the Newell Creek riparian corridor on the Property subject to the post-acknowledgement amendment.

This Application requests approval of a comprehensive plan amendment and zoning map amendment to change the comprehensive plan map designation from “Low Density Residential” and “Medium Density Residential” to “Mixed-Use Corridor” (“MUC”) and a zoning map amendment from “R-3.5”, “R-6”, and “R-10” to Mixed-Use Corridor 2 (“MUC-2”).

The MUC-2 zone allows a variety of uses such as: multi-family residential, office, retail, restaurant, services, child care, health and fitness clubs, banquet and conference center, medical and dental clinics and other permitted uses under OCMC Chapter 17.29.020.

The City’s previous decision, incorporated herein, prohibits the development from including museums, libraries, postal services, repair shops, restaurants, retail trade, ancillary drive-in, or drive-thrus, or gasoline service stations.

The Property is currently used for a variety of uses including six residences, a church and a school district bus facility.

This Application is on remand to the City from the Oregon Land Use Board of Appeals (“LUBA”) in *Nicita v. City of Oregon City*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2016-045, January 25, 2017).

LUBA’s opinion is seventy pages and it addresses eleven assignments of error advanced by Petitioners and Intervenors-Petitioner. LUBA found a single mistake in the City’s decision. As explained in more detail below, LUBA agreed with Petitioner’s third assignment of error concerning Statewide Planning Goal (“Goal”) 5, “Natural Resources, Scenic and Historic Areas, and Open Spaces”. In this assignment of error, the Petitioner argued that the City erred by

failing to explain why the more intensive uses allowed by the PAPA would not be consistent uses with the protected Goal 5 resources on the site, Newell Creek because the City failed to adopt the findings responding to this assertion. LUBA held that the City must do the following to respond to this assignment of error:

**“\* \* \* 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 the 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 inventoried resources from the lower density residential development allowed under the prior map designation is also adequate to ensure that new more intensive uses would 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 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 can be met.”**  
**(Footnote omitted.) *Id.*, slip op 17 and 18.**

The Applicant and the Petitioner appealed LUBA’s decision to the Oregon Court of Appeals. The Court of Appeals affirmed LUBA’s decision. *Nicita v. City of Oregon City*, CA164237 (April 11, 2017). Petitioner asked the Oregon Supreme Court to review the Court of Appeals’ decision, however the Supreme Court declined review. The Court of Appeals entered an appellate judgment on February 6, 2018.

The Oregon City City Commission considered the Application on remand at its duly noticed public meeting on April 4, 2018. As recommended by staff, the City Commission did not conduct a public hearing on the matter and directed that the Planning Commission consider the Application on remand in a limited *de novo* hearing. No person objected to the City Commission’s procedure, determination, or scope of review in remanding the Application to the Planning Commission. The Applicant did not amend the Application since the original decision was made.

The City Commission directed the Planning Commission hearing be limited to the single Goal 5 issue described above and limited argument and evidence to that single issue. As explained below, issues that could have been raised but were not, or were raised and finally rejected in the appellate process, may not be raised in this remand proceeding.

The proceeding before the City on remand is subject to the “Law of the Case” doctrine. The Law of the Case doctrine holds that an issue may not be raised if, in a prior stage of a single proceeding, that issue was decided adversely to the party, or that issue could have been raised but was not. As applied to this proceeding, the Law of the Case doctrine means that issues other

than those related to the single assignment of error that was the basis for LUBA's remand cannot be considered.

The City provided for on-site posting of the hearing notice and mailed notice of the Planning Commission's May 14, 2018 public hearing to surrounding property owners and the parties to the LUBA appeal. The Applicant posted notice of the hearing on the Property. The City mailed notice of the Planning Commission hearing to surrounding property owners as required by ORS 197.763(2) and Oregon City Municipal Code ("OCMC") 17.50.090.B and 17.50.100 as required.

The Planning Commission found that the Application was properly before it after the required notice of hearing. No additional post-acknowledgement amendment notice to the Metro Chief Operating Officer (the "Metro COO") or the Oregon Department of Land Conservation and Development ("DLCD") is required for a post-acknowledgement amendment application on remand; only pre-initial evidentiary hearing notice is required to the Metro COO and the DLCD.

The record before the Planning Commission includes the entire City record, including the local government record submitted to LUBA in LUBA No. 16-045.

## **2. Planning Commission Review.**

The Planning Commission opened the public hearing on May 14, 2018 and continued the public hearing to the date certain of June 11, 2018.

The Planning Commission opened the continued public hearing on June 11, 2018 with a quorum present. Chair McGriff read the announcements required by ORS 197.763(5), asked that testimony be directed to the specific issue on remand and asked for *ex parte* contacts, bias or conflicts of interest from the Planning Commission. No Planning Commission member disclosed an *ex parte* contact, bias or conflict of interest. No one in the audience challenged the lack of disclosures by any Planning Commission member or the jurisdiction of the Planning Commission to hear the matter, or the scope of the remand.

Deputy City Attorney Carrie Richter explained the scope of remand and told the Planning Commission that the single issue on remand was addressing the impacts resulting from the new uses allowed under the plan amendment may have on Newell Creek, the only Goal 5 resource at issue in the remand. Ms. Richter noted that the Goal 5 inventory is not at issue, nor is the existing quality of Newell Creek an issue. She told the Planning Commission that the scope of remand presented a "very limited question" to the Planning Commission.

The Planning Commission heard the oral Staff Report accompanied by slides. The Staff Report noted that the record included excerpts of the 1999 Goal 5 inventory from Shapiro & Associates. The Staff Report found that the existing Goal 5 program is sufficient to protect Newell Creek based on this finding and the Staff recommended approval of the Application on remand. The Planning Commission then heard testimony in opposition to the Application in the form of oral and written testimony from Mr. James Nicita, oral testimony from Mr. William Spady and written testimony from Ms. Sha Spady.

The Applicant provided rebuttal to the opposition testimony.

No party raised any procedural objections to the Planning Commission hearing process.

The Planning Commission closed the public hearing and record and voted 6-0 to approve the Application on a motion by Commissioner Espe, seconded by Commissioner Henkin. The motion included a recommendation to accept the following items of testimony from Mr. Nicita:

- Article on ESA and Goal 5
- Oregon City NPDES 2016-2017 Annual Report
- The cover page and pages 29-30 of the Cascade Environmental Group Clackamette Cove Water Quality and Habitat Improvement Feasibility Study
- Oregon City TMDL Implementation Plan
- Metro Newell Creek Conservation Plan

The Planning Commission rejected and did not include the following documents in the record:

- Oregon City MS4 Permit is already in the record
- ODEQ State Agency Coordination Program
- Remainder pages of Clackamette Cover Water Quality and Habitat Improvement Feasibility Study

\Mr. Nicita did not object to the exclusions of documents from the record.

### **3. Incorporation.**

The City Commission incorporates in its decision the Staff Report to the Planning Commission for the May 7, 2018 and June 11, 2018 public hearings and the Staff Report to the City Commission for the July 18, 2018 public hearing. If there is a conflict between these findings and the incorporated documents, these findings shall control.

### **4. The Application Satisfies the Goal 5 Issue on Remand.**

The City Commission finds for the reasons explained below that the new uses allowed by the post-acknowledgement amendment will not conflict with the only inventoried Goal 5 Resource on the Property, Newell Creek.

#### **A. April 16, 2018 Letter from Tom Sisul, P.E.**

Mr. Sisul's April 16, 2018 letter explains that, when comparing the less intensive uses allowed under the existing zones with the more intensive uses allowed in the MUC-2 zone, the City's existing regulatory scheme, including the MS-4 permit, will preclude the new, more intensive uses from conflicting with the inventoried Goal 5 Resource. Mr. Sisul reached this conclusion because the MS-4 permit requires a stormwater control system for the Property that will maintain the water quality, quantity and velocity in a way that accounts for the increased intense uses. In other words, according to Mr. Sisul's substantial evidence, by complying with the MS-4 permit, OCMC Chapter 17.47, "Erosion and Sediment Control", and Chapter 17.49, "Natural Resource Overlay District", the City's existing regulatory program will protect the inventoried Goal 5 Resource from the impacts of more intensive uses allowed in the MUC-2 zone.

## **B. OCMC Chapter 17.47, “Erosion and Sediment Control”.**

OCMC 17.47.010.A provides that the purpose of the Chapter is to provide construction and permanent erosion control prevention measures so that water, wind and other mechanical means will not transport soil particles from the site and sediment control measures are designed to capture particles after they have become dislodged by erosion. The objective of OCMC Chapter 17.47 is to control, at their source, waterborne and airborne erosion and air and water pollution that results from such erosion mechanisms in order to control water quality degradation from construction and development activities, in addition to other requirements of local, state or federal law. OCMC Chapter 17.47, an existing regulation, helps assure water quality during construction.

OCMC 17.47.030.A applies to any development that may cause visible or measurable erosion of any property within the city. OCMC 17.47.060 requires an Applicant to obtain an erosion and sediment control permit prior to approval of an Application for any building, land use or other city-issue permit that may cause any erosion. OCMC 17.47.070 requires erosion and sediment control plans. These plans must meet the standards from the City of Oregon City Public Works Department. OCMC 17.47.070.D.1. The erosion control plans must demonstrate that erosion control measures would be managed and maintained during the development. OCMC 17.47.070B.2. OCMC 17.47.080 requires erosion control plan implementation, while OCMC 17.47.090 requires that the erosion control plan be guaranteed.

Further, OCMC 17.47.100 provides for corrective of ineffective measures and enforcement where approved erosion control fails.

## **C. OCMC Chapter 17.49, “Natural Resources Overlay District”.**

OCMC Chapter 17.49 regulates the Natural Resources Overlay District (the “NROD”). The NROD on the property that is subject to this Application is coterminous with the Goal 5 resource boundaries.

OCMC Chapter 17.49.010 is the NROD purpose statement. Among the purposes of the NROD is to “protect and restore streams and riparian areas for their ecologic functions”. Additionally, the NROD is intended to “maintain and enhance water quality and control erosion and sedimentation \* \* \*”. OCMC Chapter 17.49.060 requires proposed development to comply with Federal and State requirements. OCMC Chapter 17.49.070 prohibits certain activities within the NROD. OCMC Chapter 17.49.080 allows certain activities within NROD. OCMC Chapter 17.49.090 allows certain activities within the NROD under prescribed conditions. OCMC Chapter 17.49.100 establishes general development standards for activities within the NROD. OCMC Chapter 17.49.110A establishes a vegetative corridor within the NROD. The remainder of the OCMC Chapter 17.49 establishes various standards for certain activities.

## **D. May 30, 2018 Memorandum from Stacey Reed, PWS, Senior Wetlands Scientist.**

Ms. Reed’s memorandum is an environmental, social, economic and energy (“ESEE”) analysis of the impacts of the post-acknowledgement amendment on Newell Creek. As explained below, because the Planning Commission found that the existing Goal 5 program is sufficient to prevent

the new uses allowed under the post-acknowledgement amendment from conflicting with the inventoried Goal 5 Resource that an ESEE analysis is not required. Nevertheless, and in the alternative, the City Commission incorporates by reference the entirety of Ms. Reed's May 30, 2018 memorandum demonstrating that the uses allowed under the post-acknowledgement amendment would not conflict with the inventoried Goal 5 Resource.

#### **E. Summary Findings and Conclusions.**

The City Commission finds that the City's existing program to protect the inventoried Goal 5 Resource from the lower density residential development allowed under the current zone designations will also be adequate to assure that new, more intensive uses allowed in the MUC-2 zone will not conflict with the inventoried Goal 5 Resources.

LUBA's decision on remand did not require that the City revisit its existing inventory of Goal 5 resources or analyze their quality or character to determine their significance. Newell Creek has already been designated as a Goal 5 resource. The City has no obligation to further inventory the wildlife in the stretch of Newell Creek that flows through the subject site.

The City Commission finds that the Applicant's evidence, including the Sisul and Reed memoranda, and the April 25, 2018 memorandum from Ms. Froman-Goodrich, P.E, the Oregon City Engineer, explain why the City's existing program is sufficient to protect the inventoried Goal 5 Resource from conflicts by new uses allowed by the amendment. Ms. Froman-Goodrich's memorandum explains that the Oregon City Stormwater Management Standards and National Pollutant Discharge Elimination System ("NPDES") MS-4 permit, combined with Oregon City Municipal Code Chapters 17.47 and 17.49, providing for control of erosion and sediment and the Natural Resource Overlay zoning district, and the City's 2015 Stormwater and Grading Design Standards, assure that water quality, water quantity, and water velocity will be maintained, notwithstanding any additional increases in the stormwater flows caused by uses allowed in the MUC-2 zone.

Petitioner argued that the City's MS-4 permit and other existing regulations were not adopted in compliance with Goal 5 and, as a result, the City may not rely on compliance with those standards in order to demonstrate that the existing Goal 5 program adequately protects Newell Creek from impacts of the new allowed uses. The City Commission finds that the City adopted its water quality protections in OCMC Chapter 17.49 and that they comply with Metro Titles 3 and 13. Metro Title 13 standards require compliance with Goal 5, as does OCMC Chapter 17.49. Moreover, the City Commission can find that Goal 5 does not require that the regulations be acknowledged insuring that compliance with Goal 5 in order for the City Commission to determine, based on substantial evidence in the whole record, that the new uses allowed in the MUC-2 zone will not conflict with the Goal 5 resource. The City Commission finds that its existing programs are adequate to protect the Goal 5 resource and rejects any suggestion that it must revisit its existing programs to determine if they adequately comply with Goal 5. For example, Oregon City Comprehensive Plan at Page 35 describes the things that must be taken to protect the inventoried Goal 5 Resource, including protecting vegetation, reducing pulsed runoff and maintaining water quality and quantity. Additionally, Oregon City Comprehensive Plan Page 35 notes the City's 1999 Public Works Stormwater and Grading Design Standards, updated

in 2015. LUBA did not require that the City revisit any components of its existing program. The only question LUBA asked that the City resolve related to the impact from the new uses.

The City Commission notes that these Comprehensive Plan provisions are implemented by Oregon City Municipal Code Chapter 13.12, “Stormwater Management,” which has the effect of minimizing increased stormwater runoff, Chapter 17.47, “Erosion and Sediment Control”, which minimizes erosion and sediment discharge and Chapter 17.49, “Natural Resource Overlay District”, which protects the Goal 5 resource.

The City Commission’s decision is supported by the April 25, 2018 memorandum from the City Engineer, the April 16, 2018 from the Applicant’s Civil Engineer describing the City’s MS-4 permit, the May 14, 2018 letter from the Applicant’s Engineer providing examples of stormwater facilities that implement the City’s standards that will minimize impacts on the Goal 5 resource so that the more intensive uses do not impact the Goal 5 resource any more than uses allowed by the existing zones.

The City Commission finds that the record contains substantial evidence showing that its acknowledged program of land uses regulations and other regulations, including the MS-4 permit effectively protect the inventoried Goal 5 Resource from conflicts with the uses allowed by the MUC-2 zone.

## **5. Findings on Additional Issues.**

### **A. The Natural Resources Committee does not have jurisdiction over the Application.**

This is a remand of the Application required by the Oregon Land Use Board of Appeal’s decision in *Nicita v. City of Oregon City, Id.* LUBA remanded the Application to the City to explain why the more intensive uses allowed by the post-acknowledgment amendment would not conflict with the inventoried Goal 5 Resource on the Property.

The Planning Commission hearing was limited to the single Goal 5 issue described above and allowed any person to submit argument and evidence limited to that single issue. Issues that could have been raised but were not, or were raised and finally rejected in the appellate process, may not be raised.

As applied to this proceeding, the Law of the Case doctrine means that issues other than those related to the single assignment of error that was the basis for LUBA’s remand cannot be considered by the Planning Commission. The Goal 5 resource at issue in this case is Newell Creek, and no opponent argued during the prior hearings that a different Goal 5 resource could be impacted. At no point in the prior proceedings did any person argue that the matter should be decided by the City’s Natural Resources Committee.

For the above reasons, the request for the City to consider a different Goal 5 resource, or involve the Natural Resources Committee in the decision on remand, is beyond the scope of the matter on remand.

### **B. Contaminates from the Property.**

Petitioner argued that the stormwater runoff from the site could be a conflicting use because it will contain contaminants including dissolved copper, zinc, and lead. However, the City Commission finds that the City's existing program, including erosion and sediment control and other requirements, will assure that contaminants from the uses allowed by the post-acknowledgement amendment will not conflict with the inventoried Goal 5 Resource. A water quality study from Clackamette Cove noting that existence of contaminants that may affect anadromous fish is irrelevant as it has no bearing on water quality condition in Newell Creek near the subject property. Further, this study concludes that the low impact swales required by the City standards will adequately collect and treat stormwater runoff coupled with other factors relevant solely to site conditions of the Clackamette Cove.

**C. Inventory of Wildlife.**

Petitioner argued that the City should require an inventory of wildlife in the portion of Newell Creek located on the Property. The City Commission rejects this argument for two reasons. First, this issue was not raised in the initial proceeding before the City and thus was not presented in the subsequent appeals, so it is not preserved for argument on remand. Second, the City Commission finds that Petitioner has failed to link this issue to a relevant impact on the inventoried Goal 5 Resource where the City find that its existing program is sufficient to protect the inventoried Goal 5 Resource from conflicts with the new allowed uses.

**D. Best Management Practices.**

The City Commission rejects Petitioner's argument that the City's existing program to protect the inventoried Goal 5 Resource must address "best management practices". Substantial evidence before the City Commission demonstrates that the existing program is sufficient to protect the resource.

**E. Planting of Trees.**

The City Commission rejects Petitioner's argument that it should require the condition of approval of the planting of trees to shade Newell Creek. The City Commission finds that the existing program is sufficient to protect the inventoried Goal 5 Resource.

**F. Statewide Planning Goal ("Goal") 2 Coordination.**

Petitioner argued that the City must coordinate with affected governmental entities pursuant to Goal 2 during this stage of the proceeding. The City coordinated the original Application with affected government entities and none of those entities commented on the Application. The City is not required to further coordinate with affected government entities on remand where the only issue before the City Commission is whether the existing program is sufficient to avoid conflicts with the inventoried Goal 5 Resource, and the Application has not been amended.

**G. Goal 1.**



Petitioner argues that Goal 1, “Citizen Participation”, is relevant to this proceeding. The City Commission rejects this argument because Goal 1 was not included within the scope of the limited issues before the City on remand.

#### **H. Existing Conflicts.**

The City Commission finds that every issue raised by Petitioner is an issue that could affect the inventoried Goal 5 Resource under the Property’s existing zoning. The issue before the City Commission pursuant to remand is whether the more intense, commercial uses allowed by the amendment could conflict with the inventoried Goal 5 Resource. Petitioner has not explained how the more intensive uses will have any different conflicts on the inventoried Goal 5 Resource than would the existing allowed uses, including the school district bus facility.

#### **I. Sha Spady July 5, 2018 Letter.**

Ms. Spady’s arguments regarding referral of the application to the Oregon City Natural Resources Committee are outside of the scope of remand because they were not raised below and is not preserved on remand. The City Commission will not consider this issue further.

Ms. Spady argued that “technical issues” prevented the public from watching the Planning Commission hearing. To the extent Ms. Spady raises a procedural error that prejudices someone’s substantial rights to a full and fair hearing, the City Commission finds that that is not the case. Persons are able to attend the Planning Commission hearing, listen to an audio recording of the hearing which was available to the public, and there is no legal right to watch the Planning Commission proceeding on television. The City Commission rejects this procedural issue.

The third and fourth full paragraphs on Page 1 of Ms. Spady’s letter contain evidence outside of the Planning Commission record. The City Commission will not consider these paragraphs further and expressly excludes them from the record.

Ms. Spady argues that the City Commission should consider Oregon City Municipal Code (“OCMC”) 2.56.050. This provision was not raised before the Planning Commission and is not preserved for review in this remand proceeding. The City Commission will not consider these arguments further.

The second full paragraph on Page 2 of Ms. Spady’s letter contains evidence outside of the record. The City Commission will not consider it further and expressly excludes it from the record.

Ms. Spady argues in the third full paragraph on Page 2 of her letter that the City should have coordinated with various governmental entities. This issue is not preserved and will not be considered in this remand proceeding.

Ms. Spady argues that Newell Creek is a “regional” Goal 5 resource. The issue before the City Commission on remand is the City’s inventoried Goal 5 Resource, not a “regional” Goal 5

designation. The “regional” Goal 5 designation of Newell Creek is outside of the record and will not be considered further.

Ms. Spady’s fourth full paragraph on Page 2 of her letter contains evidence that was before the Planning Commission prior to the close of the record. The City Commission rejects this evidence because it is irrelevant to the issue on remand.

**6. Conclusion.**

For the reasons contained in this decision the City Commission hereby approves this Application with the recommended conditions of approval contained in **Exhibit A**.

Dated \_\_\_\_\_, 2018.