

May 14, 2018

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VIA E-MAIL

Ms. Denyse McGriff, Chair
Oregon City Planning Commission
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RE: City of Oregon City File Nos. PZ 15-01 and ZC 15-03

Dear Chair McGriff and Members of the Planning Commission:

1. Introduction.

This Application is on remand to the Oregon City Planning Commission (the “Planning Commission”) 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).

Although LUBA’s opinion is seventy pages and it addresses eleven assignments of error advanced by Petitioners and Intervenor-Petitioner, LUBA found only one 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”. This assignment of error 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 Goal 5 resource 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 allow 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*, A164237 (April 11, 2017). Petitioner then asked the Oregon Supreme Court to review the Court of Appeals' decision. 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 Planning Commission hearing is limited to the single Goal 5 issue described above and allows any person to submit argument and evidence limited 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 before the Planning Commission.

The City has required on-site posting and mailed notice of the Planning Commission's May 14, 2018 public hearing. The Applicant posted notice of hearing on the property on as required. 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 can find that the Applications are properly before it after required notice of hearing. No additional PAPA notice to the Metro Chief Operating Officer (the "Metro COO") or the Department of Land Conservation and Development ("DLCD") is required for an application on remand. Only pre-initial evidentiary hearing notice is required to the Metro COO and the DLCD.

ORS 227.181 is inapplicable to this Application because the 120-day provision in ORS 227.178(1) does not apply to a PAPA pursuant to ORS 227.178(7). Because the Planning Commission's hearing is not the initial evidentiary hearing, ORS 197.763(6) does not apply. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

Finally, 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 Scope of Review.

The Planning Commission may accept argument and evidence only related to the single issue on remand as described in the notice of public hearing.

When the local government limits its remand proceedings to issues that were the basis for LUBA's remand order, issues that were not raised in the first appeal or not within the scope of the issues that were the basis for LUBA's remand order, cannot be raised in a subsequent appeal to LUBA. *O'Rourke v. Union County*, 31 Or LUBA 174 (1996). The City Commission may limit its proceedings following the remand from LUBA to addressing the issues that led to the remand and may select the procedures it believes are most appropriate, provided, as is the case here, those procedures do not improperly exclude any persons who are entitled to participate in the remand proceedings. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

The Applicant has not amended the Application since remand.

The proceeding before the Planning Commission is subject to the "Law of the Case" doctrine. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). 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 error cannot be considered by the Planning Commission. The Applicant respectfully request that the Planning Commission decline to consider or accept argument and evidence unrelated to the single issue before the Planning Commission.

3. The Application Satisfies the Goal 5 Issue on Remand.

The Planning Commission can find for either reason articulated by LUBA that the new uses allowed under the PAPA will not conflict with the only identified Goal 5 resource, Newell Creek.

A. Tom Sisul, P.E. Letter.

Mr. Sisul's April 16, 2018 letter explains that, when comparing the existing less intensive uses to the more intensive uses allowed in MUC-2 zoning district, the City's existing regulatory scheme,

including the MS-4 permit, will preclude the new more intensive uses from conflicting with the Goal 5 resource. Mr. Sisul reached this conclusion because the MS-4 permit requires a stormwater control system 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 Goal 5 resource from the impacts of more intensive uses allowed by the PAPA.

As LUBA directed, the Planning Commission can find in this case that the City's existing program to protect the inventoried Goal 5 resources from the lower density residential development allowed under the current zoning designation also be adequate to assure that new, more intensive uses, the proposed PAPA, will not conflict with the protected resources. Therefore, no further inquiry is needed.

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 cause of 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.

Based on OCMC Chapter 17.47 and Mr. Sisul's letter, the Planning Commission can find that the new intensive uses allowed under the PAPA will not conflict with the identified Goal 5 resource. Therefore, as explained by LUBA, the City may conclude that the Application is consistent with Goal 5.

C. John McConnaughey, M.S., PWS, Letter.

The Applicant also asked John McConnaughey to analyze the impact of the new and more intensive uses on the Goal 5 resource allowed by the PAPA. Mr. McConnaughey submitted a letter dated April 11, 2018.

Additionally, OAR 660-023-0040, "ESEE Decision Process", is part of the Goal 5 administrative rule. OAR 660-023-0040(1) requires the City to develop a program to achieve Goal 5 for significant resource sites based on an analysis of the economic, social, environmental and energy ("ESEE") consequences that result from a decision to allow or prohibit a conflicting use. OAR 660-023-0040(1)(a) requires the ESEE process to identify conflicting uses, subsection (b) requires a determination of an impact area, subsection (c) requires an analysis of the ESEE consequences and subsection (d) requires a program to achieve Goal 5.

OAR 660-023-0040(2) requires a local government to identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resources. To identify these conflicting uses, the City must examine all uses allowed outright or conditional within the zones applied to the resource site and its impact area.

The City is not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. No existing permanent uses occupy the site subject to the PAPA.

OAR 660-023-0040(2)(a) provides that if no uses conflict with the significant resource site, acknowledged policies and land use regulations may be sufficient to protect the resource site. The determination that there are no conflicting uses must be based on the applicable zoning rather than the ownership of the site.

Mr. McConnaughey's letter demonstrates, pursuant to OAR 660-023-0040(1) and (2), that the new more intensive uses allowed by the PAPA do not conflict with the Goal 5 resource. Based on his analysis and Mr. Sisul's analysis, the protections offered by OCMC Chapter 17.44 are sufficient to protect the Goal 5 resource. Therefore, the Applicant is not required to complete an ESEE process because substantial evidence shows that there will be no conflicting uses with Newell Creek, the Goal 5 resource. This is because, as explained above, the City's existing program is acknowledged to be consistent with Goal 5, and will protect Newell Creek from stormwater impacts caused by the more intensive uses allowed by the PAPA.

For all of these reasons, the Planning Commission can find that the Applicant has satisfactorily addressed the only issue on remand by LUBA by demonstrating that Newell Creek will not be impacted by the more intensive uses allowed by the PAPA.

D. 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.

The Planning Commission can find that OCMC Chapter 17.49 is one of the City's existing regulations that will ensure that the Goal 5 resource will be protected from the more intensive uses allowed by this Application.

4. Conclusion.

Based on the substantial evidence submitted by the Applicant, the Planning Commission can find that the remand issue has been satisfied and can conclude that Newell Creek will not be adversely affected by the more intensive uses allowed by the PAPA.

The Applicant respectfully requests that the Planning Commission approve the Application with additional findings addressing the remand issue.

Very truly yours,



Michael C. Robinson

MCR/jmh

Cc Mr. Dan Fowler (*via email*)
Mr. Mark Foley (*via email*)
Mr. Tom Sisul (*via email*)
Mr. John McConnaughey (*via email*)
Ms. Laura Terway (*via email*)
Mr. Garrett Stephenson (*via email*)
Ms. Carrie Richter (*via email*)

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