Bateman Seidel

MEMORANDUM

TO: Honorable Mayor and Oregon City Commission

FROM: Carrie A. Richter, Deputy City Attorney

DATE: December 9, 2019

RE: Update on Stormwater Master Plan and Stormwater and Grading Design Standard Amendments

INTRODUCTION

At Mayor's direction, on December 3, 2019, City staff met with several individuals who have expressed concerns about the proposed Stormwater Master Plan (SMP) and the amendments to the Stormwater and Grading Design Standards (Standards). The identified concerns focused primarily on the desire to provide greater protection for Oregon City's streams and waterways by improving the quality of the stormwater entering these bodies. As a general proposition, all parties appeared to agree that the SMP and the amendments to the Standards would improve the quality of the storm water running into streams. However, the individuals challenged the City to include additional regulations within these documents because the individuals believe that additional regulations are either required to achieve compliance with the Statewide Planning Goals or just because including them makes good sense. In addition to addressing these concerns through additional findings within the longer 30-page staff report, a shorter summary is offered here for the Commission's consideration.

BACKGROUND INFORMATION

As the Commission is likely aware, the SMP and the Standards both play a role in land use planning through the City. At its heart, the SMP identifies a list of capital stormwater improvement projects. The projects generally address capacity or operational deficiencies resulting from existing development and those projects are prioritized based on which ones will have the greatest positive impact on stormwater quality acknowledging limited funding. (Stormwater impacts from new development should be addressed through development exactions and system development charges.) A prioritized list of projects allows the City to pursue grants or other funding incentives, as well as provides the City with the information necessary to set stormwater service rates, and is required in order to comply with the conditions of the municipal stormwater permit (MS4), the DEQ program that authorizes municipal stormwater discharges. In other words, the SMP serves as a long-term land use planning document only. The SMP does not have a direct effect on the regulations governing private development or the existing water quality protections throughout the City.

The Standards, by contrast, do set forth detailed, engineering requirements for managing stormwater that results from new development, from how a rain garden must be designed to the size of a catch-basin. These current Standards were first adopted in 2014. In applying the Standards over the past four years,

staff has identified areas where the Standards lack clarity and cause confusion for developers, consulting engineers, and property owners. The proposed amendments are limited to providing additional specificity to increase the predictability for applicants and efficiency in review for city staff. No change in policy is proposed.

DISCUSSION

The remainder of this memorandum will address how state law impacts the concerns identified by the individuals and whether the City is required to take any of the requested steps.

Statewide Planning Goal 2

The individuals first expressed concern that the City did not do enough to coordinate with other governmental agencies, such as Oregon Department of Fish and Wildlife (ODF&W), National Marine Fishery Service (NMFS) or the National Oceanic & Atmospheric Administration (NOAA) to ensure that those federal agencies were able to provide their concerns about the SMP and Standards. As the Commission knows, Goal 2 (Planning) requires the City to coordinate its Comprehensive Plan and regulations with other governmental agencies. "Each [comprehensive] plan and related implementation measure shall be coordinated with the plans of affected governmental units." An "affected governmental unit" includes "those local governments, state and federal agencies and special districts which have programs, land ownerships, or responsibilities within the area included in the plan."

Although it is not clear to what extent these agencies qualify as "affected governmental units," on November 8, the City did provide notice of these amendments to ODF&W and did not receive any response, but no notice was provided to NMFS or NOAA. On multiple occasions, LUBA has held that claims that an agency might have objected is insufficient to sustain a violation of the Goal 2 coordination rule. *Martin v. City of Dunes City*, 57 Or LUBA 92 (2008); *Bernard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998). For these reasons, Goal 2 coordination requirement is satisfied.

Statewide Planning Goal 5 – Protections for Riparian Resources

Statewide Planning Goal 5 provides for the protection of natural resources, including waterways and riparian areas. Deciding which streams are worthy of protection and the appropriate level of protection begins with an inventory process, followed by a considered balancing of effects resulting from various levels of protection (often referred to as an evaluation of the economic, social, environmental, and energy (ESEE) consequences), resulting in a designation and regulatory restrictions, as appropriate. All known streams and waterways in Oregon City have been included within the City's existing Goal 5 inventory with water quality protections provided by requiring new development to comply with the Natural Resource Overlay District (NROD) regulations as well as the Standards.[1]

The first step in the general Goal 5 process is to compile an inventory of resources to determine which resources are significant. OAR 660-023-0030. The proposed amendment does not alter or amend the

[1] The SMP and Standards are just elements of the City's effort to protect water quality. In addition, the City has Erosion and Sediment Controls Standards, Geologic Hazard standards and a whole host of comprehensive plan standards aimed at protecting water quality.

City's existing riparian or wetland inventories. The quantity, quality, and significance determinations for riparian resources remains unchanged. Therefore, this inventory analysis step is not applicable to the City's adoption of the SMP or the Standards. That said, the SMP does include a comprehensive natural systems assessment that was completed to evaluate the inventoried stream and wetland conditions to identify impacts from stormwater runoff and to prioritize projects for inclusion. Field evaluations as to the health of each stream are set forth in Table 6-1 of the Plan which led the City to identify capital project locations for improving water quality. Therefore, to the extent that any sort of inventory was required, the analysis set forth in Section 6 of the SMP satisfied that requirement.

Some individuals have asked that the City update its Goal 5 inventory of riparian areas as part of this project to include additional resources such as the Canemah Water Works, the stream that runs through the upper yard of the Public Works Facility near Waterboard Park, and other streams or wetlands, refresh the conditions assessment conducted at that time, and alter other regulations to include in-stream water and habitat as part of riparian corridor protection. Although city staff acknowledges the value of engaging in such effort, amending the City's Goal 5 inventory to consider the existence of and characteristics of riparian areas is beyond the scope of a project limited to stormwater conveyance improvements and new development requirements. This inventory update effort could, and likely will, be addressed as part of the City's plan to adopt a new Comprehensive Plan scheduled to commence in 2020.

The second step in determining a program to achieve Goal 5 requires "an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use." OAR 660-023-0040. In this situation, a "conflicting use" is defined by OAR 660-023-0010 to include "a land use, or other activity reasonably and customarily subject to land use regulations, that could adversely affect a significant Goal 5 resource." Identification of capital stormwater improvement projects within the Stormwater Master Plan does not "allow, limit or prohibit a conflicting use" to a greater or lesser degree because these projects could have been constructed before the Master Plan was adopted. Development of the SMP-identified projects must comply with all of the plan and land use regulations applicable to such development. The only impact from including these projects within the SMP is to prioritize projects and procure grant funding. No additional uses are allowed or limited by the SMP. In other words, where capital improvements are proposed within Natural Resource Overlay District regulated riparian setback areas, including the addition of any new impervious surface, compliance with OCMC 17.49 standard will be required. Any stormwater facility development within historic districts or on landmarks are reviewed for compliance with OCMC 17.40 Historic Overlay District and the Design Guidelines for New Construction. Further, the projects identified in the SMP will improve stormwater capacity and containment of storm water than will improve rather than adversely affect any riparian areas. Therefore, adoption of the Stormwater Master Plan does not "allow, limit or prohibit" any uses to any greater degree than currently allowed. Improving water quality through capital stormwater improvements will not significantly affect Goal 5 resources. Therefore, no further analysis of ESEE consequences for adoption of the SMP is necessary.

As for the Standards, the proposed amendments add clarity to existing standards rather than impose any significant substantive changes. To the extent changes occur, the only effects will be to further limit conflicting development in favor of providing greater protection for Goal 5 inventoried resources. Given that the amendments will have a *de minimis* impact on water quality, compliance with Goal 5 can

be achieved through a very limited ESEE analysis. Below are examples of the clarifications that are included in the amendments to the Standards, along with a discussion of the identified ESEE consequences include:

- Replacing the Natural Resource notation from the abbreviation WQRA to the abbreviation NROD which is consistent with the references to natural resource areas in OCMC 17.49. This change in terminology will not change how development occurs, stormwater is treated or how riparian resources are protected. There are no ESEE consequences resulting from this change.

- More clearly define the exemptions from the stormwater requirements in 1.2.2 by providing further description and additional language. These amendments to not alter the stormwater obligations or opportunities currently provided within the existing standards. There are no ESEE consequences resulting from this change.

- Changing the Checklist obligation to set forth a preliminary design checklist rather than a planning checklist to be in line with how engineers talk about this section of the standards. Again, this a procedural submittal requirement that will have no impact on timing or cost of development.

- Clarify the stormwater management strategy hierarchy in Figure 2-2 that better explains how a designer should prioritize stormwater management options and alternatives. These amendments do not alter review procedures or submittal requirements, so in that way, development would not be affected any differently with this revision than it is handled now.

- Explain how to use the BMP sizing tool for underground stormwater management. This revision provides greater explanation and does not alter the substantive standards for prioritizing low impact stormwater solutions such as rain gardens over underground retention and/or treatment. The only impact may be to reduce project development costs resulting from the greater regulatory clarity.

- Increasing the minimum velocity requirements of storm sewers to be consistent with the Oregon Department of Transportation standards. The minimum velocity allowed for conveyance of storm water under existing standards is 2.5 feet per second rather than 3.0 feet per second, as proposed in this amendment. Moving water through pipes more quickly makes it less likely that standing water remains collecting pollutants along the way. Increasing stormwater velocity requirements will require negligible changes in construction methods that are unlikely to have any effect on development improvement costs.

With the minor amendments to the Standards, the City has chosen to amend its program to achieve Goal 5 with respect to inventoried riparian resources by adopting additional measures to protect those resources from an identified conflicting development uses. The overall regulatory approach will not

change by amending the Standards and it need not change in order to achieve Goal 5.[2] Rather, the proposed amendments will slightly adjust the balance the City initially struck in its initial ESEE analysis and its program to achieve the goal in ways that will improve water quality and, if it has any effect on development, that effect will be negligible.

One of the arguments raised is that the subject amendments suffer from the same defect that led a remand of the City's decision in *Nicita v. City of Oregon City (Historic Properties, LLC),* ___ Or LUBA ___ (LUBA No 2018-102). In that case, the approved zone change would permit development that could lead to greater levels of impervious surface, resulting in increased amount of runoff carrying pollutants. LUBA found that the increase volume of polluted runoff "could be" a conflict with Goal 5 and that the findings failed to address this issue. This proposal to amend the SMP and Standards is distinguishable for a number of reasons but most notably, the proposed decision will not authorize any greater levels of stormwater runoff including a greater level of pollutants. Rather, the proposed amendments clarify existing practice of requiring low-impact stormwater solutions before containment – a best management practice for removing contaminants. Further, the findings set forth above include the ESEE analysis that LUBA found was deficient in the previous case.

For these reasons, the Commission may find that Goal 5 is satisfied.

Statewide Planning Goal 6 – Maintain and Improve Water Quality

Statewide Planning Goal 6 (Air, Water and Land Resources) is "[t]o maintain and improve the quality of the air, water and land resources of the state." The goal calls on local governments to maintain and improve water quality by requiring that all "future development, when combined with such discharges from existing development, not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards." The concerned individuals urge that the City adopt additional comprehensive plan policies favoring greater water quality protection, including adopting the language of Goal 6 and/or the state water quality standards set forth in OAR 340, Div 41, and certain state laws limiting pollutant discharge into the Standards making those state laws part of the Standards and, therefore, approval criteria applicable to future development.

There are a number of reasons why staff recommends rejecting the opponents' requests. First, the City's Comprehensive Plan currently contains policies that implement Goal 6, including adopting regulations that prevent erosion and the protection of open naturally vegetated drainageways. Those policies have been acknowledged as complying with Goal 6. The proposal before the Commission was not intended to be a full re-working of the City's Goal 6 program and such work is beyond the scope of the task at

[2] One opponent challenged staff to make more significant changes to the Standards to promote green infrastructure approaches such requiring a greater level of low impact treatment (knowns as the "treatment train"), such as requiring the use of porous pavement into public maintenance projects for roadway overlays and sidewalk construction, and the provision of greater water quality monitoring and protections from landslides. Section 1.3 of the Standards already authorizes City staff to require that development provide a combination of stormwater management facilities for removing specific pollutants in high-risk areas. According to Public Works staff, the provision of multiple treatment facilities is sometime unnecessary when the initial low-impact facility already removes contaminants and additional facilities would not measurably improve water quality. Adding water quality monitoring or greater study of landslide risk has cost implications but could be considered as part of the comprehensive plan.

hand. The Goal 6 implementing plan policies will be fully reviewed for amendment as part of the comprehensive plan amendment task to commence in 2020.

The request that the Standards include the language of Goal 6 and specifically require new development to comply with state standards should be rejected because the existing Standards already provide for compliance with all applicable state and federal standards.[3] There is no need for further amendment. All stormwater discharge in Oregon City must comply with the City's Municipal Separate Storm Sewer System (MS4) Permit that the Department of Environmental Quality (DEQ) has issued to the city as well as the Standards, which require compliance with all applicable state and federal regulations.[4]

Further, local law cannot pre-empt state law or authorize an activity that otherwise violates an applicable state or federal law or regulation.[5] In other words, if a state or federal standard, such as a prohibition

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[3] For example, the Standard 6.9.4 relating to Construction Dewatering requires:

> "All construction dewatering discharges resulting from groundwater or precipitation (rainfall) will be evaluated for contamination before disposal methods can be approved. Source controls, sampling points (if required), and the disposal point shall be identified on the erosion prevention and sediment control plan (see Chapter 7). Source control requirements will be identified as part of the review process of the laboratory analysis reports and the proposed stormwater management plan. Based on the intended method of disposal, the following requirements apply:
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> • If onsite infiltration is the proposed method for disposal, authorizations are required from the City and the Land Quality Division of ODEQ. Private infiltration systems for construction dewatering shall be located and maintained on private property, outside the public rights-of-way (ROWs).
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> • If a public sanitary system is the proposed method of disposal, authorizations are required from the appropriate authorities, and will be allowed only if extensive pretreatment is implemented and the discharge is approved by the appropriate authorities. All groundwater and surface water discharges to a sanitary sewer system shall meet local discharge limits and will be subject to discharge volume charges.
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> • If a public stormwater system is the proposed method of disposal, evaluations of discharge to the public storm system will be based on whether discharges meet, or can be pretreated to meet, requirements of the City, NPDES discharge permit, or other state and federal regulations for the receiving surface water.
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> • If a receiving stream is the proposed method for disposal, authorizations are required from the City and Land Quality and Water Quality Divisions of ODEQ."

[4] Although not necessary to resolution to the issues before the Commission, OAR 340, Div 41 does not control municipal stormwater discharge in Oregon City. Rather, municipal stormwater discharge is controlled by DEQ through its MS4 Permit program. The legal background is complex, but suffice it to say that OAR 340, Div 41 includes 58 pages of rules setting limits on types of pollution from dissolved oxygen to temperature to turbidity including basin-specific requirements. Rather than requiring that each development that contributes stormwater to the municipal system comply with these standards, the Department of Environmental Quality (DEQ) has promulgated OAR 340, Div 45, that allows discharges into the municipal system when they are authorized by a validly issued permit. In this case, the City has such a permit and it is the MS4 permit.

[5] The existing language of the Standards makes clear that applicable state and federal regulations continue to apply where they state:

against stormwater discharge with certain characteristics, those prohibitions will apply notwithstanding provisions in the SMP and Standards.

LUBA considered and resolved nearly identical issues in *Graser-Lindsey v. City of Oregon City,* 74 Or LUBA 488, 513 (2016), *aff'd,* 284 Or App 314 (2017). In that case, an opponent argued that Goal 6 required the specific incorporation of state water quality standards in OAR 340, Division 41 as standards and criteria for future development applications to ensure that state standards are satisfied and to require that all future discharges satisfy the applicable standards. LUBA rejected these arguments and agreed with the city that:

> "nothing in Goal 6 requires the BRCP to require that stormwater discharges from development within the BRCP area will comply with the OAR Chapter 340 Division 41 standards, or to require that future area plans and zoning ordinance that implement the BRCP contain similar language." *Id* at 513.

Nothing in the current proposal requires any deviation from LUBA's conclusion, as stated above, that statutes that may limit or prohibit certain discharge, such as ORS 468.B.025(1)(b) or .050 will continue to apply whether or not the SMP or Standards expressly include the prohibition. Not only did LUBA affirm the city's approach but the Court of Appeals did as well.

Compliance with Goal 6 at the post-acknowledgment plan amendment stage (the type of decision at issue here) requires nothing more than a finding "explaining why it is reasonable to expect that applicable state and federal environmental quality standards can be met by the proposed use. …This is sufficient to establish compliance with the overall requirement of Goal 6 …" *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 581 (1995). As pointed out above, adoption of the SMP and amendments to Standards will not increase the amount of discharge or the level of pollutants reaching streams or tributaries. Rather, adoption of the proposed ordinances will improve water quality satisfying the applicable state and federal environmental quality standards. Therefore, Goal 6 is satisfied.

Goal 13 – Energy Conservation

Goal 13 calls for the development of land and uses in ways that conserve energy. The City Commission has received testimony advocating for inclusion of a stormwater hydroelectric power pilot project within the SMP based on a study done in 2009. The 2009 study did not recommend a demonstration project, although such an intent could be interpreted as such. Regardless, the proposal before the Commission fully complies with Goal 13 without a hydroelectric project. That said, neither Public Works staff nor its water quality consultant, knows of any similar project happening elsewhere. There are examples of micro-hydro efforts being made with potable water; the reliable flows and lack of debris make it a more suitable conveyance method. Certainly, the Standards or the SMP would not prohibit the City from

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1.4.4 Additional Requirements
The requirements presented in these standards do not exclude or replace the requirements of other applicable codes or regulations, such as the Willamette Basin Total Maximum Daily Load Program, the industrial NPDES permitting program, or any other applicable federal or state regulations or permit requirements.

supporting new technologies but this process may not be the best vehicle to address this proposal and, instead, the Commission should focus on the limited proposal that has been included.

CONCLUSION

City Public Works staff, along with the qualified and experienced consultants from Brown & Caldwell who drafted the SMP and Standards, agree that these amendments will improve, or at the very least, maintain the existing riparian protections and water quality within the City. Adopting the SMP will allow the City to make improvements to existing deficiencies, and seek funding assistance, as required by state and federal water quality standards. Adopting the amendments to the Standards will provide greater clarity to developers and city staff for implementing the high water quality standards that are already in place. These amendments comply with the Statewide Land Use Goals and Ordinances 19-1014 and 19-1015 can be adopted.