From:	James Nicita
To:	Frank O"Donnell; Rachel Lyles Smith; Rocky Smith, Jr.; Denyse McGriff
Cc:	Tony Konkol; Kattie Riggs; John M. Lewis; Laura Terway; Christina Robertson-Gardiner
Subject:	Public Comment - PC-119 and PC-116 Storm Water Master Plan and Storm Water Grading and Design Standards
Date:	Monday, December 2, 2019 4:51:29 PM
Attachments:	Goal 5 Comments.pdf 2019-01-03 Final Opinion and Order 2018-102.pdf

---

I write to submit some further comments on files PC19-119 and PC 19-116, respectively, proposed "Ordinance No. 19-1014, Adopting the Stormwater Master Plan as an Ancillary to the Comprehensive Plan (GLUA 19-00002: LEG 19-00001)," and proposed "Ordinance No. 19-1015, Adopting Public Works Stormwater and Grading Design Standards (GLUA 19-00002: LEG 19-00005)." I respectfully request that these comments be added to the respective hearing records of both items.

These comments again highlights my opinion that staff and the city attorney do not provide the City Commission pertinent information for decision making; and in my opinion they withhold such pertinent information intentionally.

I am attaching to this email the LUBA I pursued with Sha Spady and her brother Bill Spady. It is LUBA No. 2018-102.

This case is pertinent to the current proceedings on the city's proposed amendments to the storm water and grading design standards. Why? Because the case addresses these very same stormwater and grading design standards. They were precisely at issue in that case.

So, if the case is so pertinent, why did not staff and the city attorney even mention this case in the staff report or during the first hearings on both agenda items?

In fact, LUBA held that the city did not establish that stormwater grading and design standards were adequate as a Goal 5 program to protect Newell Creek as a Goal 5 resource. The proposed update to the stormwater and grading design standards do not meet Goal 5 for the very same reasons raised in that case.

LUBA sustained the city's decision based on the city's ESEE analysis, only because LUBA found that the Goal 2 coordination challenge to the city's ESEE analysis had not been raised with sufficient specificity below.

That will not be the case this time, because Goal 2 is being raised in these proceedings with more than sufficient specificity.

As for the ESEE analysis required in the current proceedings, I believe the city as part of these proceedings should update its Goal 5 inventory of water resources that should be Goal 5 protected resources. For example, the creek running through lower Water Board Park is not on the inventory. Likewise, the creek that emerges out of the historic water works in Canemah, and runs through wetlands as it descends to the Willamette River, is not on the Goal 5 inventory. There are many additional creeks and wetlands in the city that should be added to the inventory as part of the current updates to the stormwater master plan and the stormwater and grading design standards. The city must update the Goal 5 inventory during a PAPA pursuant to OAR 660-023-0030. Under OAR 660-023-0010(5), both the stormwater master plan and the revisions to the stormwater and grading design standards are PAPAs.

James Nicita
302 Bluff Street
Oregon City

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES J. NICITA,
Petitioner,

and

PATRICIA SPADY and WILLIAM SPADY,
Intervenors-Petitioners,

vs.

CITY OF OREGON CITY,
Respondent,

and

HISTORIC PROPERTIES, LLC,
Intervenor-Respondent.

LUBA No. 2018-102

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

James J. Nicita, Oregon City, filed the petition for review and argued on his own behalf and on behalf of intervenors-petitioners.

Carrie A. Richter, Portland, filed a joint response brief and argued on behalf of respondent. With her on the brief was Bateman Seidel, P.C.

Michael C. Robinson, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson & Wyatt, P.C.

BASSHAM, Board Member; RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 01/03/2019

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a decision approving comprehensive plan map and zoning map amendments to allow mixed-use commercial and residential development.

REPLY BRIEF

Petitioner and intervenors-petitioners (collectively, petitioners) move to file a reply brief to respond to new matters in the joint response brief. There is no opposition to the motion and it is allowed.

MOTION TO TAKE OFFICIAL NOTICE

Petitioners moved to file a "Memorandum of Additional Points and Authorities," requesting that LUBA take official notice of page 30 from a document that describes technical assistance provided under the state agency coordination program of the Oregon Department of Fish and Wildlife (ODFW). We understand petitioners to request that LUBA consider the page in resolving an argument under petitioners' third assignment of error, which alleges that the city failed to coordinate with ODFW.

Intervenor-respondent Historic Properties, LLC (intervenor) objects to the motion, arguing that petitioners request that LUBA consider page 30 for its evidentiary value, and that it is inappropriate to take official notice of the document under Oregon Evidence Code (OEC) 202 for an evidentiary purpose.

The cited paged from the ODFW stage agency coordination program is an "official act" of a state agency, and thus subject to official notice under OEC 202(2).[1] As far as we can tell, petitioners cite the page to demonstrate that as a matter of law technical assistance was available to help the city in addressing impacts on natural resources, which is apparently intended to somehow support petitioners' argument that the city failed to coordinate with ODFW. That purpose is non-evidentiary, and we shall consider the page for that limited purpose. The motion to take official notice is allowed.

FACTS

The challenged decision is on remand from LUBA. *Nicita v. City of Oregon City*, 75 Or LUBA 38, *aff'd* 286 Or App 744, 399 P3d 1087, *rev den* 399 P3d 1087 (2017) (*Nicita I*). On remand, the city again approved intervenor's application to amend the comprehensive plan designation of the subject property from low and medium density to Mixed Use Corridor, and to rezone the property from lower density residential districts to Mixed Use

---

[1] OEC 202 provides, in relevant part:

"Law judicially noticed is defined as:

"* * * * *

"(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States."

Corridor-2 (MUC-2). A significant difference between the prior zoning and the MUC-2 zoning is that the MUC-2 zone allows maximum site coverage of 90 percent, compared to the 40 to 55 percent site coverage allowed under the prior zoning.

The southern portion of the subject property is subject to a Natural Resources Overlay District (NROD) that extends 50 feet from the banks of Newell Creek, which is an inventoried resource in the city's comprehensive plan inventory of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) resources. In the city's original decision, the city assumed that the NROD regulations would suffice to protect the resource from the new or increased impacts of new uses allowed under the amendments, including increased stormwater runoff from impervious surfaces into the creek. LUBA remanded the original decision in order for the city to re-evaluate under OAR 660-023-0250 whether new commercial and higher density residential uses allowed under the proposed post-acknowledgment plan amendments (PAPA) could conflict with Newell Creek.[2]

---

[2] LUBA held:

> "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

On remand, intervenor submitted additional evidence regarding increased impacts of development allowed under the MUC-2 zone on Newell Creek, including expert testimony concluding that the city's existing NROD regulations and other applicable regulations are sufficient to avoid new or increased impacts on Newell Creek. The planning commission held an evidentiary hearing and recommended approval of the proposed amendments. The city council approved the amendments, adopting additional findings and conditions. This appeal followed.

---

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." 75 Or LUBA at 51-52 (emphasis in original, footnote omitted).

INTRODUCTION

OAR 660-023-0250 addresses the applicability of Goal 5 and the Goal 5 rule at OAR chapter 660, division 023, to post-acknowledgement plan amendments such as the decision before us. OAR 660-023-0250(3) provides, in relevant part:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "* * * * *
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

Under OAR 660-023-0250(3), a local government must initially evaluate whether new uses approved by a PAPA "could be" conflicting uses with respect to a particular Goal 5 resource site. As the phrase "could be" suggests, that initial evaluation presents a fairly low threshold. On its face, a zone change that significantly increases the volume or intensity of development impacts on a natural resource compared to development under the existing zoning almost certainly would, without more, exceed that low threshold, by allowing uses that "could be" conflicting uses. As we explained in *Nicita I*, a local government can avoid further analysis under OAR 660-023 only if it concludes, supported by substantial evidence, that existing regulations that protect the resource are sufficient to "eliminate the possibility of conflicts" from more intensive

development allowed under the proposed zoning. 75 Or LUBA at 51. If the answer to that question is no, the local government 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 the protected resources continue to be met. One of the key steps in the Goal 5 planning process requires an analysis of the economic, social, environmental and energy (ESEE) consequences of allowing, limiting or prohibiting the proposed new conflicting uses, and an ultimate determination whether to allow, limit or prohibit new conflicting uses. OAR 660-023-0040.

In the present case, the city concluded, based on expert testimony submitted by intervenor, that the city's existing NROD regulations and other applicable city regulations are sufficient to eliminate new or increased conflicts or impacts on Newell Creek from more intensive development allowed under the MUC-2 zone. In the alternative, the city assumed that the rezone could cause new or increased conflicts, and adopted an ESEE analysis submitted by one of intervenor's experts, which concludes that the positive ESEE consequences of allowing new conflicting uses under MUC-2 zoning outweighed the negative ESEE consequences to the resource.

Under the first and second assignments of error, petitioners argue that the city's primary conclusion that the city's existing regulations are sufficient to eliminate new or increased conflicts with Newell Creek is not supported by

adequate findings and substantial evidence. Under the third assignment of error, petitioners challenge the adequacy of the ESEE analysis.

FIRST AND SECOND ASSIGNMENTS OF ERROR

A. Downstream Fish Habitat

Petitioners first argue that the findings identify only "Newell Creek" as the relevant Goal 5 resource, apparently limited to the portions of Newell Creek on the subject property, without acknowledging that the city's Goal 5 inventory identifies downstream portions of Newell Creek as including habitat for anadromous fish such as salmon and trout.

Intervenor responds that no issue was raised below regarding impacts on fish habitat located downstream of the property, and argues that those issues are thus waived, because they were not raised either in the first proceeding leading to *Nicita I* or in the proceedings on remand. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (issues that were resolved, or could have been raised and resolved in earlier appeals on the same application, cannot be raised in an appeal of a subsequent decision on remand); ORS 197.763(1).[3] On the merits,

---

[3] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning

intervenor argues that anadromous fish are not a distinct Goal 5 "resource" for purposes of OAR 660-023-00250(3), and in any case the record reflects that the portion of Newell Creek located on the subject property is inaccessible to anadromous fish. Record 647.

Petitioners do not dispute that they raised no issues below regarding impacts on anadromous fish habitat in Newell Creek downstream of the subject property, but argue that having raised general concerns regarding stormwater and pollution impacts on Newell Creek in general, the county and intervenor should not be surprised on appeal that petitioners now raise related issues regarding impacts of stormwater runoff and pollution on downstream fish habitat. *See Boldt v. Clackamas County*, 21 Or LUBA 40, *aff'd* 107 Or App 619, 813 P2d 1078 (1991) (the "raise it or waive it" principle embodied in ORS 197.763(1) does not limit the parties on appeal to the exact same arguments made below, but does require that the issue was raised below with sufficient specificity so as to prevent "unfair surprise" on appeal).

We disagree with petitioners. Goal 5 resources such as riparian or wildlife habitat are site and resource-specific, and if petitioners wished the city to adopt findings addressing impacts on downstream fish habitat, it was incumbent on petitioners to raise some issue below regarding impacts on downstream fish habitat during the proceedings below. Despite several

---

commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

opportunities to do so, petitioners raised no such issues, and the city and intervenor reasonably understood that the scope of the analysis included potential impacts on the portions of Newell Creek located on or near the subject property. Petitioners' argument on appeal that the city erred in failing to address impacts on downstream anadromous fish habitat amounts to an "unfair surprise." *Boldt*, 107 Or App at 622. Accordingly, that issue is waived.

B. Temperature Impacts

Petitioners argue that the county erred in failing to adopt any findings addressing an issue they raised below, namely that increased impervious surfaces would increase the temperature of the elevated volume of stormwater runoff entering the creek, because water flowing across heat-gathering surfaces such as asphalt parking lots is warmed, and if that warmer water enters Newell Creek it could harm water quality. Record 1037.

Intervenor responds initially, that petitioners failed to raise issues below regarding impacts on stream temperature with sufficient specificity and thus this issue is waived under ORS 197.763(1). We disagree with intervenor. In the reply brief petitioners cite to testimony in the record where petitioner Nicita twice raised issues regarding impacts on stream temperature.[4] That testimony is sufficient to provide the city and others with fair notice of the issue.

---

[4] Petitioners cite to the following statements made during the June 11, 2018 planning commission hearing:

Intervenor also argues that on appeal petitioners' arguments regarding temperature are insufficiently developed for review. However, those arguments seem relatively straightforward: increased impervious surfaces means not only more stormwater runoff, but warmer stormwater runoff, and if that warmer runoff is directed into the creek instead of infiltrated into the soil the result could be warmer stream temperatures, which "could" harm the Goal 5 resource, Newell Creek water quality. OAR 660-023-0250(3).

Finally, intervenor argues that the lack of findings addressing this issue is not a basis for reversal or remand, because other findings generally conclude that NROD and other city standards will assure that water quality is maintained, implicitly encompassing water quality issues related to stream temperature. Intervenor argues that the NROD purpose statement at Oregon City Municipal Code (OCMC) 17.49.010 states that the NROD regulations are intended to

---

> [Videotape 1:24:45] "[I]ncreased imperviousness is going to increase temperature[.]"
>
> [Videotape 1:45:07]: "One of the critical ways you solve the temperature problem is infiltration so the ground cools it. Now if you're going to increase imperviousness and add more pavement that heats the water and you can't infiltrate it, then you are going to discharge it into Newell Creek and because of that it 'could' impact the resource with higher water temperature. And I don't know any of the BMPs [best management practices] in the stormwater management plan or the [Stormwater and Grading Design] manual that addresses temperature, and the temperature issues is the critical one for salmon habitat."

implement federal requirements for shading streams and "reduction of water temperatures[.]" Intervenor contends that the NROD and other applicable regulations rely upon a required 50-foot vegetated buffer to provide shade in order to cool stream temperatures, and petitioners cite no reason to believe that such measures will not be effective at preventing or mitigating impacts on stream temperature from warmer stormwater runoff.

We disagree with intervenor that general findings regarding adequacy of the city's regulations to ensure "water quality" are sufficient to address the specific issue petitioners raised regarding stream temperatures. No findings address that issue, and intervenor cites us to no evidence in the record addressing temperature impacts. In the absence of any findings and evidence on this point, intervenor cites no basis for LUBA to reject this argument. Accordingly, we agree with petitioners that the city's conclusion that the city's existing regulations will eliminate the possibility of conflicts with Newell Creek are inadequate, for failure to address impacts on stream temperature.

C. Impact of Pollutants on Water Quality

Next, petitioners argue that the city's findings fail to adequately explain why increased stormwater runoff from the more extensive impervious surfaces allowed under the MUC-2 zone would not "conflict[]" with Newell Creek by increasing the amount of pollutants from parking lots, etc., that would enter the creek, thus harming water quality. OAR 660-023-0250(3).

As noted, the MUC-2 zone allows a maximum lot coverage of 90 percent, almost double what was allowed under the prior residential zoning, and there is no dispute that the increased percentage of impervious surfaces (e.g., roofs and parking lots) will significantly increase the volume of stormwater runoff from development on the property. As we understand it, stormwater is commonly infiltrated into the soil, where it filters down to the water table and eventually to the nearest water body. However, due to the potential for landslides on the subject property, intervenor's consultant recommended that stormwater facilities on the property not employ infiltration, but instead that stormwater be detained in ponds or facilities, then released at a prescribed rate into the creek, in quantities and at velocities that do not exceed pre-development rates. Under the city's regulations, such detention facilities are scaled in size to the amount of runoff generated by the proposed extent of impervious surfaces.

Petitioners argue that the city's finding are inadequate and not supported by substantial evidence, because the findings do not address impacts on water quality from increased levels of pollutants, such as toxic metals and petroleum-based compounds picked up from stormwater flowing over impervious surfaces such as parking lots. Before the county, petitioner submitted a study regarding a different development site near the Clackamas River, Clackamette Cove, to demonstrate that stormwater runoff from impervious surfaces carries a mix of pollutants, including toxic metals and petroleum-based compounds.

However, petitioners argue that the city's findings fail to demonstrate that increased stormwater flows from impervious surfaces will not carry a greater volume of pollutants to Newell Creek, harming water quality and thus "conflicting" with the Goal 5 resource. OAR 660-023-0250(3). Petitioners note that the city's Stormwater and Grading Design Manual (Manual) states that water quality facilities shall be designed to capture and treat 80 percent of the runoff volume, with the goal of 70 percent suspended solids removal. Record 1542. However, petitioners argue that the Manual includes no standards or requirements for removing toxic metals and petroleum-based compounds. Further, petitioners argue that the Manual requires only treatment of 80 percent of the runoff volume, which means that 20 percent of the runoff volume will be untreated. Because the increase in impervious surfaces will increase the total volume of runoff, petitioners argue that the absolute amount of untreated, polluted runoff entering Newell Creek will also increase, which "could" impact water quality.

Intervenor responds by citing to findings at Record 51-55 that, intervenor argues, adequately explain why the city's existing regulations, including the NROD regulations at OCMC 17.49, the city's water pollution control standards in OCMC chapter 17.47, the city's federal National Pollution Discharge Elimination System (NPDES) "MS-4" stormwater discharge permit and standards in the city's Manual, are sufficient to ensure that the increased

quantity of stormwater runoff from more impervious surfaces will not result in increased amounts of pollution and contaminants entering the creek.

Most of the city's findings at Record 51-55 focus on increased water quantity and water velocity, which apparently will be addressed by facilities sized to the amount of runoff generated by impervious surfaces, and that are designed to avoid "pulsed runoff" by slowly releasing runoff into the creek over time in quantities and at velocities that do not exceed pre-development rates. Record 53. However, the findings at Record 51-55 do not, for the most part, address impacts of pollution on water quality, with the exception of the following finding:

> "Petitioner argued that the stormwater runoff from the site could be a conflicting use because it will contain contaminates 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 [PAPA] 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." Record 55.

Intervenor argues that petitioners do not specifically challenge the above-quoted finding, and failure to challenge that finding is fatal to petitioners' general findings and evidentiary challenge.

We might agree with intervenor if the above-quoted finding were less conclusory. The finding concludes that the city's existing regulations will assure that increased volume of contaminates will not conflict with the resource, but does not explain why. The finding notes that "low impact swales" were used at the Clackamette Cove site, and implies that similar low impact swales will be required by city regulations as part of development of the subject property under the MUC-2 zone. However, it is not clear why the city believes that swales are sufficient to eliminate the possibility that increased levels of pollutants from increased impervious surfaces will harm water quality in Newell Creek. As petitioners argue, and intervenor does not dispute, the city's stormwater manual states that stormwater treatment facilities are designed to capture and treat only 80 percent of runoff volume. It is undisputed that the MUC-2 zone nearly doubles the amount of impervious surfaces permitted on the subject property, which will result in increased runoff volume. Petitioners argue that that increased stormwater runoff volume will carry an increased volume of pollutants to Newell Creek, even presuming swales or other stormwater facilities are employed that would treat up to 80 percent of the runoff. An increased volume of untreated, polluted runoff from entering the creek certainly "could be" a conflict with a Goal 5 resource for purposes of OAR 660-023-0250(3). Intervenor cites no findings or evidence in the record addressing this issue. We agree with petitioners that the city's conclusion that the city's existing regulations will eliminate the possibility of conflicts with

Newell Creek are inadequate, for failure to address the issue of impacts from increased levels of pollutants entering the creek.

D. Goal 5 Program

Under a portion of the second assignment of error, petitioners argue that the city erred in relying upon the city Manual and other regulations that have not been adopted specifically as part of the city's acknowledged Goal 5 program to protect natural resources such as Newell Creek. Petitioners contend that the Manual was adopted to implement a different statewide planning goal, Goal 11 (Public Facilities and Services). According to petitioners, in evaluating whether new uses could conflict with Goal 5 resources under OAR 660-023-0250(3) the city may consider only regulations such as the NROD regulations that were specifically acknowledged as part of the Goal 5 program to protect natural resources.

Intervenor notes that the Manual is incorporated into the city's comprehensive plan as an ancillary plan, and further that other code provisions that the city's decision cites and relies upon, such OCMC 17.47 (Erosion and Sediment Control), are part of the city's acknowledged land use regulations. Intervenor argues that the city commission rejected petitioners' argument below that the city can consider only regulations such as the NROD regulations that were adopted to implement Goal 5, for purposes of determining whether new

uses could conflict with Newell Creek.[5] Intervenor contends that petitioners do not challenge that finding or the interpretations therein, and thus fail to demonstrate that the city erred in relying on local standards that do not directly implement Goal 5.

We agree with intervenor. Petitioners do not acknowledge or challenge the finding quoted at n 5. That problem aside, petitioners cite to no authority for the proposition that the only local regulations that can be considered for purposes of determining whether new uses subject to such regulations could conflict with Goal 5 natural resources under OAR 660-023-0250(3) are regulations specifically adopted to implement Goal 5 natural resource protections. We reject the argument. If a local government has adopted acknowledged land use regulations that apply to the subject property and function to protect inventoried natural resources, the local government can

---

[5] The city commission's findings state:

> "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] 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." Record 53.

consider those regulations, in determining whether such uses could conflict with Goal 5 resources for purposes of OAR 660-023-0250(3). Petitioners' arguments on this point do not provide a basis for reversal or remand.

The first and second assignments of error are sustained, in part. However, as explained below, in the alternative the city assumed that the new uses allowed in the MUC-2 zone "could conflict" with the Goal 5 resource of Newell Creek, and adopted an ESEE analysis pursuant to OAR 660-023-0040. Because we reject petitioners' challenges to the ESEE analysis, the errors identified under the first and second assignments of error do not warrant remand.

THIRD ASSIGNMENT OF ERROR

As explained in *Nicita I*, if the city cannot eliminate the possibility that proposed commercial and high density residential uses could conflict with Newell Creek, the city must repeat the steps in the Goal 5 planning process that are necessary to ensure that the city's Goal 5 obligations are met. As an alternative, the city assumed that the new uses allowed in the MUC-2 zone "could" conflict with the Goal 5 resource of Newell Creek, and adopted an ESEE analysis written by intervenor's consultant, Reed, intended to satisfy the applicable requirements of OAR 660-023-0040(3). The ESEE analysis prepared by intervenor's consultant, Reed, concluded that the net benefits of allowing the conflicting MUC-2 uses would outweigh the negative impacts, and would cause no greater conflicts between development of the subject property

and Newell Creek, compared to development under the former low density residential zoning. Based on the ESEE analysis, the city essentially chose to continue unchanged its program of allowing conflicting uses, as mitigated by existing regulations designed to protect natural resources such as Newell Creek.

Petitioners advance three challenges to the ESEE analysis. First, petitioner argues that the city's "findings simply recite [Reed's] evidence and arguments. Thus they are not valid ESEE findings." Petition for Review 20. We do not understand the argument. The city's decision consists of the ordinance, and findings and a staff report attached to the ordinance. The attached findings in turn incorporate by reference the ESEE analysis. Record 53. Petitioners appear to argue that the findings attached to the ordinance that describe the incorporated ESEE analysis are not themselves "valid ESEE findings" because those findings simply recite the conclusions of the ESEE analysis. Petition for Review 20. That may be so, but the city clearly relied on the incorporated ESEE analysis itself to provide the findings necessary to support the conclusions drawn under OAR 660-023-0040(3), not the findings document attached to the ordinance. To the extent petitioners argue that the incorporated ESEE analysis does not constitute "valid ESEE findings" that argument is insufficiently developed for review. *Id.*; *Heiller v. Josephine Co.*, 50 Or LUBA 562, 565-66 (2005).

Petitioners next argue that the ESEE analysis does not comply with OAR 660-023-0040(1)(a) because it does not identify the conflicting use.

Specifically, petitioners argue that the ESEE analysis does not identify as conflicting uses discharges of polluted and warmed stormwater into Newell Creek.

OAR 660-023-0040 prescribes a four-step analysis: (1) identify conflicting uses, (2) determine the impact area, (3) analyze the ESEE consequences of allowing, limiting or prohibiting conflicting uses, and (4) based on the ESEE analysis, develop a program to achieve Goal 5 with respect to the resource, implementing the decision to prohibit, limit or allow conflicting uses. OAR 660-023-0040(1) states that "[t]he ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected." To perform the first step, identifying conflicting uses, the local government must examine land uses allowed outright or conditionally within the zones and the impact area.[6]

In the present case, the ESEE analysis identifies the conflicting use as the commercial and high-density residential development allowed in the MUC-2

---

[6] OAR 660-0023-0040(2) provides, in relevant part:

> "Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. * * *"

zone. Record 93. The ESEE analysis compares the ESEE consequences of continuing to apply single-family residential zoning to the site, with the ESEE consequences of applying the MUC-2 zone. Petitioners do not argue that that approach is inappropriate, for purposes of demonstrating that a post-acknowledgment plan amendment is consistent with Goal 5. The ESEE analysis does not specifically address pollution from stormwater, but generally concludes that the greater development intensity and imperviousness allowed under the MUC-2 zone may result in greater direct impacts on water quality and water temperature in Newell Creek, compared to development under the single-family residential zone, although the analysis concludes that adverse impacts of development under the MUC-2 zone are offset by various ESEE benefits of development under that zone. Record 94-95. Petitioners have not demonstrated that in the present context OAR 660-023-0040(2) requires a more detailed identification of conflicting uses.

Finally, petitioners argue that OAR 660-023-0040(4) requires that the ESEE analysis "must consider any applicable statewide goal or acknowledged plan requirements[.]" Statewide Planning Goal 2 (Land Use Planning) includes a requirement that the city coordinate with "affected governmental units." Petitioners contend that the city failed to coordinate with Metro, Clackamas Community College, the Fisheries Department of the National Oceanic and Atmospheric Administration (NOAA Fisheries), or the Oregon Department of Fish and Wildlife (ODFW).

Intervenor responds that the city's original decision included findings regarding compliance with all applicable statewide planning goals, including the Goal 2 coordination requirement, and petitioners did not raise any issues regarding coordination on appeal to LUBA. Consequently, intervenor argues, petitioners are precluded from raising new issues regarding Goal 2 coordination in the appeal of the city's decision on remand. *Beck*, 313 Or 148. On the merits, intervenor argues that petitioners do not explain why the cited governmental bodies are "affected governmental units" within the meaning of Goal 2, or if so why the city is obligated to further coordinate with affected governmental units on remand. *See Melton v. City of Cottage Grove*, 30 Or LUBA 331, 337-38 (1996) (on remand a city has no obligation to coordinate with affected governmental units if LUBA's remand did not require coordination and the application does not change on remand).

We agree with intervenor that petitioners' Goal 2 coordination argument is waived, because that argument could have been made during the original appeal to LUBA, but was not. Goal 2 applied just as much to the city's original decision as it does to the decision on appeal, and if the city fell short in complying with the Goal 2 coordination requirement petitioners could have raised that issue before LUBA. On remand, the application remained the same, and while the city considered new evidence and adopted additional findings nothing about LUBA's remand or the nature of the proceedings on remand required the city to make new or additional efforts to coordinate with affected

governmental units. While OAR 660-023-0040(4) requires that the ESEE analysis must consider any applicable statewide goals, OAR 660-023-0040(4) does not require the city on remand to repeat its initial unchallenged findings regarding compliance with goal requirements, or open the door for a petitioner to raise issues regarding goal compliance that could have been, but were not, raised in the original proceeding and appeal. Accordingly, petitioners' failure to raise Goal 2 coordination issues during the earlier appeal precludes petitioners from raising that issue on appeal of the city's decision on remand.

The third assignment of error is denied.

DISPOSITION

We sustained portions of petitioners' first and second assignments of error, challenging the city's primary approach to determining compliance with Goal 5. However, because we have rejected petitioner's challenge to the city's alternative approach to determining compliance with Goal 5, petitioners' first and second assignments of error do not provide a basis for reversal or remand.

The city's decision is affirmed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2018-102 on January 3, 2019, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Carrie Richter
Bateman Seidel
888 SW Fifth Avenue, Suite 1250
Portland, OR 97204

James J. Nicita
Attorney at Law
302 Bluff Street
Oregon City, OR 97045

Michael C. Robinson
Schwabe Williamson & Wyatt PC
1211 SW 5th Avenue Suite 1900
Portland, OR 97204

Dated this 3rd day of January, 2019.

Kelly Burgess
Paralegal

Kristi Seyfried
Executive Support Specialist

JAMES J. NICITA

302 Bluff Street
Oregon City, OR 97045
Telephone: 503-799-0725
james.nicita@gmail.com

I write to submit the following comments on items #6a and #6b on the Oregon City Commission agenda for Wednesday, November 6, 2019; namely PC19-119 and PC 116, respectively, "First Reading of Ordinance No. 19-1014, Adopting the Stormwater Master Plan as an Ancillary to the Comprehensive Plan (GLUA 19-00002: LEG 19-00001)," and "First Reading of Ordinance No. 19-1015, Adopting Public Works Stormwater and Grading Design Standards (GLUA 19-00002: LEG 19-00005)." I respectfully request that these comments be added to the respective hearing records of both agenda items.

My comments relate to statewide planning Goals 5 and 2.

I. STATEWIDE PLANNING GOAL 5

The staff report proposed findings at p. 22 state regarding Goal 5:

> *To protect natural resources and conserve scenic and historic areas and open spaces.*
>
> **Finding: Complies as Proposed.** This goal is implemented through the applicable Goals and Policies in Section 5 of the Oregon City Comprehensive Plan: Open Spaces, Scenic and Historic Areas, and Natural Resources. The Oregon City Municipal Code contains review criteria for uses within overlay districts to assure that designated Goal 5 resources are appropriately considered when development is proposed. In particular, the Natural Resource Overlay District designation: "provides a framework for protection of Metro Titles 3 and 13 lands, and Statewide Planning Goal 5 resources within Oregon City. The Natural Resource Overlay District (NROD) implements the Oregon City Comprehensive Plan Natural Resource Goals and Policies, as well as Federal Clean Water Act requirements for shading of streams and reduction of water temperatures, and the recommendations of the Metro ESEE Analysis.
>
> Regardless of the proposed amendments, the applicability of the Natural Resource Overlay District is the same. Addition of new impervious area within the NROD will be required to undergo review per Chapter 17.49 of the Oregon City Municipal code. Mitigation will be required for any new impervious surface added.

Response: The two agenda items, the amendments to the storm water master plan and the storm water and grading design standards, both constitute post-acknowledgement plan amendments (PAPAs) under the Goal 5 implementing rule at OAR 660-023-0010(5).

By the operation of OAR 660-023-0250(3), the collective PAPA must demonstrate direct compliance with Goal 5 if the PAPA affects a Goal 5 resource and therefore, contrary to the above-quoted section of the staff report, the City cannot rely on the Natural Resources Overlay District.

1. OAR 660-023-0250(3)(a)

Specifically, under OAR 660-023-0250(3)(a), the PAPAs amend a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5, including habitat protection.

They amend the storm water master plan, which is an ancillary plan to the Oregon City comprehensive plan, that is adopted to protect significant inventoried Goal 5 resources, including the Willamette River, the Clackamas River, Abernethy Creek, and Newell Creek, as well as the anadromous fish habitat that is by definition part of these Goal 5 resources.

They amend the storm water and grading design standards, which is a land use regulation adopted to protect significant inventoried Goal 5 resources, including the Willamette River, the Clackamas River, Abernethy Creek, and Newell Creek, as well as the anadromous fish habitat that is by definition part of these Goal 5 resources.

(OAR 660-023-0090(1)(c): "Riparian corridor" is a Goal 5 resource that includes the water areas, fish habitat, adjacent riparian areas, and wetlands within the riparian area boundary.")

The inventory description within Section 5 of the Oregon City Comprehensive Plan, at p. 35 states as follows:

> In Oregon City, the Clackamas River along the northern boundary of the city, as well as Abernethy, Newell, Holcomb, Potter, and other creeks provide both spawning and rearing habitat for steelhead trout, coho salmon, and cut-throat trout, which are not currently warranted for listing under the ESA. Riparian corridors, the areas on either side of a stream, are critical to protecting the stream ecosystem and quality of habitat for salmonids and other stream-dependent species.

[Note that this definition incorrectly states the Goal 5 definition of riparian corridor quoted above.]

Because of the foregoing, the PAPAs affect the Goal 5 resources.

2. OAR 660-023-0250(3)(b)

Furthermore, under *OAR 660-023-0250(3)(b)* The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource sites. Using a river or a stream as a storm water waste dump is a "use." The storm water master plan and its capital improvement plan are creating, authorizing, and funding new "uses," i.e., new storm sewer discharges in new undeveloped areas of land where currently such discharges do not exist, such as in the Park Place and Beavercreek concept plan areas. Such discharges would enter such inventoried Goal 5 resource sites like Abernethy Creek and Newell Creek.

These new discharges "could" be conflicting uses with the Goal 5 resources, by the deposition of storm water pollutants such as petroleum compounds, toxic metals, and increased water temperature that could harm the water, the fish habitat, and the fish themselves, including salmon, steelhead, and lamprey.

3. Addressing Goal 5

Because of OAR 660-023-0250(3)(a) and (b) the amendments must address Goal 5 directly. The staff report however contains no findings of compliance with the applicable provisions of the Goal 5 implementing rule, including but not limited to the following:

Goal 5 and its implementing rule at OAR 660-023-0040 require an analysis of the economic, social, environmental and energy (ESEE) consequences of the proposed amendments. The staff report contains no such ESEE analysis.

Goal 5 and its implementing rule at OAR 660-023-0090 requires protection of riparian corridors in the city. The staff report makes no findings of compliance with this provision. Indeed, if the City is operating under the assumption that a riparian corridor does not include the in-stream water and habitat of the rivers and creeks named above, then there needs to be detailed findings addressing protection of riparian corridors as the latter are properly defined.

Goal 5 and its implementing rule at OAR 660-023-0110 require identification and protection of wildlife habitat in the city. The staff report contains no findings of compliance with this provision.

II. STATEWIDE PLANNING GOAL 2

The staff report proposed findings at p. 22 state regarding Goal 2:

To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.

Finding: Complies as Proposed. This goal is implemented through the applicable Goals and Policies in Section 2 of the Oregon City Comprehensive Plan: Land Use. Because the plan is an ancillary document to the City's Comprehensive Plan, the application was processed pursuant to the legislative hearing process outlined in Section 17.50.170 of the Oregon City Municipal Code.

Response: The staff report does not address a key provision of Goal 2, the coordination requirement. This provision states:

> Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances.

Goal 2 defines "affected governmental unit" as "those local governments, state and federal agencies and special districts which have programs, land ownerships, or responsibilities within the area included in the plan."

In this sense, the Oregon Department of Fish and Wildlife is clearly a. This agency's state agency coordination program adopted pursuant to ORS 197.180 includes a program of technical assistance that is very relevant to the issues relating to storm water impacts on Newell Creek and its fish. OAR 635-405-0045.

The Goal 2 coordination requirement generally encompasses a two-step process wherein (1) information is exchanged between the planning jurisdiction and the affected local governments and (2) the planning jurisdiction uses the information to balance the needs of the affected governmental units as much as possible. The planning jurisdiction must adopt findings to address legitimate concerns raised by the affected governmental units. *Thompson v. Jackson County,* 53 Or LUBA 317, 320 (2007).

To show compliance with statewide planning Goal 2, the City needs to coordinate with ODF&W, as well as other affected governmental units.

James J. Nicita