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December 18, 2019

City of Oregon City
Attn: City Commission
625 Center St.
Oregon City OR 97045

RE: Stormwater Master Plan and Stormwater Grading Design Standards
File No. GLUA 19-00002; LEG 19-00001 & LEG 19-00005

Mr. Mayor and Commissioners:

I write on my own behalf.

This letter is in response to Ms. Richter's memorandum dated 12/9/2019, and the revised Legislative Staff Report and Recommendation issued 12/11/2019, both regarding the proposed Stormwater Master Plan and Stormwater Grading Design Standards. The Commission is scheduled to discuss this matter tonight at the December 18th meeting.

I. Factual errors

There are a few factual inaccuracies in Ms. Richter's memorandum. First, in discussing the December 3rd meeting with city staff that I and others participated in, Ms. Richter says that "[a]s a general proposition, all parties appeared to agree that the [Stormwater Master Plan (SMP)] and the amendments to the Standards would improve the quality of the storm water running into streams." Memo at 1. That is untrue. There was no such "general agreement" at the meeting. In fact, the specific question of whether the SMP and the Standards (as drafted) would improve the quality of the City's stormwater was not discussed at the meeting. In any event, I do not agree that, as drafted, the SMP and the Standards will "improve the quality of the storm water running into streams." But with a few simple revisions (discussed below), the SMP and the Standards can achieve that goal.

Second, the memo sometimes refers to the community members that participated in the December 3rd meeting as “the opponents.” *See, e.g.*, Memo at 2, 5. Referring to participating community members as “opponents” is inaccurate and inappropriate. Those of us that participated in the December 3rd meeting were invited there to share our constructive comments. We were, and are, trying to improve the draft SMP and the Standards because we care about our community and watersheds. Far from “opponents” of improved stormwater treatment, we are advocates for it. This is not an adversarial process; it is lawmaking. It is unfortunate that the Deputy City Attorney views involved community members as “opponents” instead of valued stakeholders in the legislative process.

On a related note, Ms. Richter’s memo conflates the various participants’ comments. For example, although only one community member made a comment regarding Goal 2 (coordination with other governmental agencies), the memo makes it seem that *all* participating community members expressed a view on Goal 2. *See, e.g.* Memo at 2. There are other examples of this imprecise use of language throughout the memo. For my part, at the meeting I only offered comments regarding compliance with Goal 6 (water quality standards).

II. Legal errors

Beyond factual misstatements, there are also legal errors in the memo. Those are addressed below.

A. Adoption of the SMP will have a “direct effect” on Oregon City’s regulations.

Ms. Richter states that “[t]he SMP does not have a direct effect on the regulations governing private development or the existing water quality protections throughout the City.” Memo at 1. That is untrue. The SMP, if adopted, will become part of the Oregon City Comprehensive Plan. All city regulations must be adopted in compliance with the Comprehensive Plan, so the SMP will have a “direct effect on the regulations governing private development.” Those regulations include the proposed Standards, which will be implemented through the OCMC. That is a “direct effect.”

B. Goal 5 (natural resources)

Next, although my comments are focused on Goal 6, I should respond to one of Ms. Richter’s statements regarding Goal 5 (natural resources). The memo says that:

“[T]he project identified in the SMP will improve stormwater capacity and containment of storm water that 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.”

Memo at 3. That statement is nonsensical. If adoption of the SMP will improve riparian areas by limiting polluted stormwater discharges, then by definition it will significantly affect Goal 5 natural resources (including streams and the wildlife that depend on clean water). *See also* Draft SMP at 6-1 (“Stormwater runoff also has significant potential to impact in-stream water quality and natural systems.”). Clearly, improving the quality of stormwater discharges will have more than a *de minimis* impact on Goal 5 resources. That applies to both the SMP and the Standards.

C. Goal 6

A copy of Goal 6 is attached. Goal 6 requires cities “to maintain and improve the quality of the air, water and land resources of the state.” With regard to water quality, Goal 6 requires that “[a]ll waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards.” The proposed SMP and Standards do not ensure compliance with state water quality standards, including those at OAR 340, Div. 41.

As it stands today, Oregon City is making no effort to ascertain whether its waste and process discharges (including stormwater discharges) violate the water quality standards of OAR 340, Div. 41. Although Oregon City participates in the *federal* NPDES program via its MS4 permit, that permit does not ensure compliance with Oregon’s *state* water quality standards. The federal and state standards overlap to some degree, but they are not identical.¹ Oregon City’s annual Water Quality Report does not report on compliance with the state’s water quality standards,² and there does not appear to be any procedure for ensuring compliance. Oregon City’s Stormwater Monitoring Plan, for example, only tests for compliance with the federal standards, not the state standards.³ *Id.* at 2.

¹ OAR 340, Div. 41 contains both numeric and narrative water quality standards. The numeric criteria can be found in the tables available here:
https://secure.sos.state.or.us/oard/viewSingleRule.action;JSESSIONID_OARD=x_EVIYFkjB7LqP8t-9XpdcfguRd9oS_5Hn0nLDW6lFAMZ6yk9YkP!-2071884724?ruleVrsnRsn=256054
The narrative standards are described in OAR 340-041-0007.

² The 2019 Water Quality Report is the most recent. It is available at:
https://www.oregoncity.org/sites/default/files/fileattachments/public_works/page/4529/ccr19website_version.pdf

³ The Stormwater Monitoring Plan can be accessed here:
https://www.oregoncity.org/sites/default/files/fileattachments/public_works/page/4428/clackamas_monitoring_plan_final_01-2017.pdf

The City has more than 248 stormwater outfall pipes associated with 160 miles of piped stormwater infrastructure. Draft SMP at 2-5. The stormwater discharges from those pipes have a serious impact on water quality.⁴ We know that the Willamette River, Abernathy Creek, and the Clackamas River are polluted (the legal term of art is “water-quality limited”), and that Oregon City’s untreated stormwater outfalls are contributing to that pollution. *See* Draft SMP at 5-2 and 5-3. Oregon City’s stormwater outfalls consistently contain untreated dissolved copper, zinc, lead, and many other pollutants. *See id.* at 5-3.

Again, Goal 6 requires that Oregon City “maintain and improve” its water quality. If we do not require compliance with the state water quality standards in our SMP, how can we hope to maintain, let alone improve, our water quality? We cannot. Without requiring compliance with the state water quality standards, we will not monitor for compliance. And without monitoring for compliance, it is not “reasonable to expect that applicable state and federal environmental quality standards can be met.” *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 581 (1995).

Ms. Richter’s memo states that “adoption of the SMP and [the] amendments to [the] Standards will not increase the amount of discharge or the level of pollutants reaching streams or tributaries.” Memo at 7. But how is that possible? Under the proposed SMP and Standards, the creation of new impervious services in Oregon City is allowed. The draft Standards only require 80% treatment. Standards at 4-3. Therefore, we find ourselves in the following position: (1) we are not monitoring for compliance with the statewide water quality standards; (2) we know we are already discharging large quantities of untreated stormwater; and (3) we are proposing to authorize even more untreated stormwater discharges (with new development of impervious surfaces, i.e. pavement and rooftops). That cannot possibly lead to compliance with the water quality standards of OAR 340, Div. 41 unless the City expressly requires new development to ensure compliance with those standards.

Finally, Ms. Richter asserts that this entire discussion is moot because the OCMC *already* requires compliance with statewide water quality standards. Memo at 6. That is not correct. The provisions of the code cited by Ms. Richter do not require compliance with OAR 340, Div. 41. And if they did require compliance, then why is staff so adamantly objecting to adding the same requirement to the SMP and Standards? If our proposed addition to the SMP and Standards would be redundant with existing requirements, where is the harm in redundancy? In any event, to my knowledge, the City is not currently enforcing compliance with the state’s water-quality standards set forth in OAR 340, Div. 41. If I am wrong, I would be happy to learn it.

⁴ From the draft SMP, at page 5-1: “There is a direct link between stormwater runoff and the City’s surface water and groundwater quality and quantity. As land is developed, creation of new impervious surfaces and loss of vegetation increases stormwater runoff during rainfall events, altering the natural hydrologic cycle. Runoff that flows over roadways, parking areas, rooftops, and other impervious surfaces collects pollutants that are transported within the watershed to streams, rivers, and groundwater resources. Properly managing stormwater is vital to protecting the City’s water resources for a great number of uses, including fish and wildlife habitat, recreation, and drinking water.”

A similar, and gargantuan, misstatement about Goal 6 compliance is made in the revised proposed staff findings at page 28:

Further, the Oregon City Comprehensive Plan provides: “Waste discharges, defined as solid waste, thermal, noise, atmospheric and water contaminants and pollutants that cause harm to human health or the environment, must not ‘violate or threaten to violate federal or state statutes.’” Therefore, all development occurring within the City must comply with the applicable state and federal clean water standards.

That is flat-out wrong. While, in the Goal 6 introduction section, the Comprehensive Plan *acknowledges* the above-quoted language (which comes directly from Goal 6), it is nothing more than an acknowledgment. The Plan never actually adopts that language; there is no Plan goal or policy that “all development occurring within the City must comply with the applicable state and federal clean water standards.” But there should be. That is what I am suggesting. The language of Goal 6 needs to be adopted as a Plan goal and a policy via the SMP (and implementing Standards). After all, the SMP is part of the Comprehensive Plan.

A copy of Oregon City’s Comprehensive Plan Goal 6 section is attached. It is short. You can easily see that our current Comp Plan does not require compliance with the state’s minimum water-quality standards.

Finally, Ms. Richter cites three particular LUBA cases, and I disagree with her treatment of those. She cites *Nicita v. Oregon City*, *Graser-Lindsey v. City of Oregon City*, and *Salem Golf Club v. City of Salem*. First, Ms. Richter states that the *Nicita* case doesn’t apply here because “the proposed [adoption of the SMP and Standards] will not authorize any greater levels of stormwater runoff including a greater level of pollution.” That is wrong. The draft SMP and Standards *will* allow for increased stormwater pollution because they authorize new development, which will increase polluted and untreated runoff. As noted above, the Standards only call for 80% treatment of stormwater created by new sources.

Second, the *Graser-Lindsey* case does not apply here. That case involved the Beaver Creek Road Concept Plan, which was never intended to regulate city-wide stormwater discharges. The SMP and implementing standards *are* intended to regulate city-wide stormwater discharges. This is exactly the correct time and place to address Goal 6 compliance with the state’s minimum water-quality standards.

And third, even if the *Salem Golf Club* case provides the correct standard (and I do not believe that it does), that standard is not met by the draft SMP and Standards. Under *Salem Golf Club*, compliance with Goal 6 can be accomplished by “explaining why it is reasonable to expect that applicable state and federal environmental quality standards can be met by the proposed use[.]” But here, as explained above, it is *unreasonable* to expect that the water-quality standards of OAR 341-40 will be met, because we aren’t even trying to comply with them, let alone monitor for compliance. Without enforcement and monitoring, the only reasonable expectation is that we are currently violating Oregon’s water quality standards.

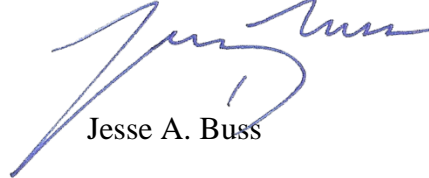
Conclusion

Far from an “opponent” here, I am an advocate for Oregon City and our goal of complying with Oregon’s water-quality standards. I was asked to present my views on this matter, and I appreciate the opportunity to be heard.

I hope the Commission will consider adding the language of Goal 6 as a goal, policy, and criterion of the SMP and implementing Standards. How will we ever achieve compliance with our state’s water-quality standards unless we make it our policy to do so?

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jesse Buss", with a large, stylized flourish extending from the end of the name.

Jesse A. Buss

Enclosure (Goal 6)

Section 6

Quality of Air, Water, and Land Resources

Land and Conservation and Development Commission (LCDC) Statewide Planning Goal 6 deals with maintaining and improving the quality of these resources. Waste discharges, defined as solid waste, thermal, noise, atmospheric and water contaminants and pollutants that cause harm to human health or the environment, must not “violate or threaten to violate” federal or state statutes. With respect to the air, water and land resources described or included in state environmental quality regulations, such discharges “shall not (1) exceed the carrying capacity of such resources, considering long-range needs; (2) degrade such resources; or (3) threaten the availability of such resources.”

All manner of land uses can be sources of waste. The City’s influence over potential impacts from waste can be through direct regulation, such as with stormwater treatment standards, through ensuring compliance with federal and state standards, and through actions, such as education and development incentives, to encourage the reduction of impacts.

Air Quality

The quality of air is increasingly recognized as a key factor in the health of individuals, the attractiveness and livability of communities, and the ability of the community to attract and accommodate growth and development. Oregon City has a relatively high quality of air during most of the year, but it also receives airflows from other parts of the urban region that can carry airborne pollutants. Air quality tends to be lower when prevailing winds are from the northwest.

Motor vehicles are the largest source of air pollution in Oregon, and there is growing concern about “personal pollution” from cars, woodstoves, gasoline-



powered lawn mowers, boat engines, paint, outdoor burning, and aerosol products such as hairspray and air fresheners. Other sources of air pollution are dust from agriculture and land development and particulates in smoke from agriculture, forestry, and industry. The Portland metropolitan area is currently designated an “Air Quality Maintenance Area,” which means that the area has a history of not meeting National Ambient Air Quality Standards. However, a variety of pollution reduction programs have enabled the region to meet federal air quality standards.

Air quality standards are set by the Oregon Department of Environmental Quality (DEQ). Oregon City should continue to work with DEQ to ensure that existing and new sources of industrial and commercial pollution comply with state and federal standards and to encourage citizens to reduce the amount of air pollution they generate. One of the most important ways Oregon City can help reduce air pollution is to promote land-use practices and transportation alternatives that reduce the use of single-occupancy vehicles. It is also important for the City to encourage the conservation and enhancement of tree cover as a means of filtering particulate pollution in the air.

Water Quality

The City’s ground- and surfacewater resource is significant and adequate for its residents. Water resources are:

- the Willamette and Clackamas rivers
- tributaries of Abernethy, Newell, and Beaver creeks and associated minor creeks
- bogs and wetlands
- groundwater under the city

Because land-use practices, development design, and city infrastructure can affect the quality and quantity of water resources, the City will protect and

restore these resources through a variety of means. One way is through the Water Resources Overlay District, which is a zoning overlay with development standards to protect surface waters. The overlay district implements the requirements of Title 3 of Metro’s *Urban Growth Management Functional Plan* (1998). Another way is through civic projects to restore water features. Restoration and protection of these resources is covered primarily in Section 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources).





DEQ has mapped groundwater flows, also called aquifers, that are known to or have the potential to carry pollutants. Most of these sensitive aquifers are along Abernethy Creek in the floodplain along the Clackamas River. The aquifer in the Abernethy Creek area near the former Rossman's landfill has been contaminated during the past 100 years with a variety of pollutants from the landfill and other activities. Clearance from DEQ may be necessary for future development of properties in this area. DEQ does not allow the construction of drinking or irrigation wells because the contaminated groundwater in the aquifer could be released into the environment and adversely impact public health and safety. DEQ allows only groundwater wells that monitor contaminants associated with the landfill.

Erosion is defined as the movement of solids (earth, mud, and rock) by wind, water, or gravity. Erosion can be a natural process or caused by human activity. Erosion can cause a loss of productive soil, damage stormwater and the sanitary sewer infrastructure, and degrade water quality in streams and rivers, thus affecting habitat quality for aquatic species. Excessive sediment deposition behind dams can decrease reservoir storage capacity and increase the risk of flooding. Removing excess sediment from behind dams and areas of unwanted deposition, such as reservoirs and streams, can be costly. Soil runoff from construction sites is by far the largest source of excess sediment deposition in developing urban areas.

Complying with LCDC Statewide Planning Goal 6 requires adopting policies and standards that protect water quality. The erosion and sediment control requirements of Title 3 will significantly reduce sediment loading to receiving streams. LCDC Statewide Planning Goal 6 and Title 3 requirements are implemented in Oregon City through the Water Resources Overlay District, Erosion and Sediment Control standards, and other provisions of the *City of Oregon City Municipal Code* (1991).

Quality of Land Resources

Nighttime Light Pollution. Artificial light has extended many human activities well into evening and night and provides much-needed safety along roadways and at intersections. However, much of the nighttime light is wasted into space, as confirmed by satellite images of the earth at night from space. Nighttime light can interfere with viewing starry skies and other outdoor experiences, intrude through windows into homes, and lead to unsafe situations from glare and shadows. In Oregon City, the Haggart Astronomical Observatory at Clackamas Community College is an educational resource for the entire community that is diminished by nighttime light pollution.

New nighttime lighting technology makes nighttime light appropriate for the situation and prevents safety problems and pollution. The technology is readily available, and its benefits to the community are easy to understand. All that is required is a commitment to applying the technology in a flexible and appropriate way.

Noise Pollution. Noise is a part of city life. Noise is generated by, for example, vehicular traffic, emergency vehicles, industrial activities, railroads, aircraft, leaf blowers, sound systems, and construction. Loud, persistent noise is recognized as a serious environmental problem by both state and federal authorities. In 1971, the Oregon Legislature authorized the Environmental Quality Commission to adopt and enforce noise control standards, which are administered through DEQ. The standards cover noise from motor vehicles and industrial and commercial activities.

The most significant sources of noise in Oregon City are major vehicular corridors (for example, Interstate 205, McLoughlin Boulevard, Highway 213, Molalla Avenue, and South End Road), the railroad corridor through downtown and the Canemah neighborhood, the industrial operations of the Blue Heron Paper Mill, and the natural roar of Willamette Falls, especially during the winter. Nuisance noise can also originate from neighborhoods and homes. Local noise control is handled primarily through the Nuisance Code (Section 6 of the *City of Oregon City Municipal Code*) and through design review of development projects to ensure that industry and commercial activities do not negatively impact the immediate neighborhood environment.

Mineral and Aggregate Operations. The Oregon Department of Geology and Mineral Industries has inventoried four areas within Oregon City's Urban Growth Boundary that contain mineral and aggregate resources. These areas are listed in the Natural Resources Inventory of the 1982 *Oregon City Comprehensive Plan*. There are currently no commercial mineral or aggregate removal operations at any of the four sites. Although mineral and aggregate removal operations can be beneficial to a local economy, they are not compatible with urban land uses and quality of life in Oregon City because of noise, dust, traffic, water quality, and other issues.

Goal 6.1 Air Quality

Promote the conservation, protection and improvement of the quality of the air in Oregon City.

Policy 6.1.1

Promote land-use patterns that reduce the need for distance travel by single-occupancy vehicles and increase opportunities for walking, biking and/or transit to destinations such as places of employment, shopping and education.

Policy 6.1.2

Ensure that development practices comply with or exceed regional, state, and federal standards for air quality.

Policy 6.1.3

Set an example through City operations by using and demonstrating practices and technologies that reduce air pollution and protect air quality.

Policy 6.1.4

Encourage the maintenance and improvement of the city's tree canopy to improve air quality.

Goal 6.2 Water Quality

Control erosion and sedimentation associated with construction and development activities to protect water quality.

Policy 6.2.1

Prevent erosion and restrict the discharge of sediments into surface- and groundwater by requiring erosion prevention measures and sediment control practices.

Policy 6.2.2

Where feasible, use open, naturally vegetated drainage ways to reduce storm-water and improve water quality.

Goal 6.3 Nightlighting

Protect the night skies above Oregon City and facilities that utilize the night sky, such as the Haggart Astronomical Observatory, while providing for night-lighting at appropriate levels to ensure safety for residents, businesses, and users of transportation facilities, to reduce light trespass onto neighboring properties, to conserve energy, and to reduce light pollution via use of night-friendly lighting.

Policy 6.3.1

Minimize light pollution and reduce glare from reaching the sky and trespassing onto adjacent properties.

Policy 6.3.2

Encourage new developments to provide even and energy-efficient lighting that ensures safety and discourages vandalism. Encourage existing developments to retrofit when feasible.

Policy 6.3.3

Employ practices in City operations and facilities, including street lighting, which increases safety and reduces unnecessary glare, light trespass, and light pollution.

Goal 6.4 Noise

Prevent excessive noise that may jeopardize the health, welfare, and safety of the citizens or degrade the quality of life.

Policy 6.4.1

Provide for noise abatement features such as sound-walls, soil berms, vegetation, and setbacks, to buffer neighborhoods from vehicular noise and industrial uses.

Policy 6.4.2

Encourage land-use patterns along high-traffic corridors that minimize noise impacts from motorized traffic through building location, design, size and scale.

Goal 6.5 Mineral and Aggregate Operations

Protect the livability and environment of Oregon City by prohibiting commercial aggregate extraction operations within the city and Urban Growth Boundary.

Policy 6.5.1

Prohibit new commercial aggregate removal operations and encourage relocation of existing operations. Aggregate removal for habitat improvement or for public recreational needs is not considered a commercial operation.