



May 23, 2023

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City of Gresham Planning Staff

RE: City of Gresham File No. SD/MIS 20-260000343 (MPLAN21-00652)
Response to March 22, 2023 Majidi Memorandum
Our File No.: 137484-266113

Dear City of Gresham Planning Staff:

Our office represents Leeper Development Group, Inc.

This letter responds to a March 22, 2023, memorandum issued by the City of Gresham’s Natural Resources Program Manager Kathy Majidi (the “Majidi Memo”). The Majidi Memo argues that the City of Gresham (the “City”) must deny the Veranda Subdivision and Master Plan because Wetlands 1, 2, 3, and 5—located on the project site—are locally significant.¹ The Majidi Memo is not supported by law or the weight of the evidence.² The wetlands on the project site are degraded, dominated by non-native pasture grasses, and generally lack wetland and shade vegetation. Further, the Veranda application, if approved, will provide substantially more water quality benefits to Kelley Creek than the existing degraded wetlands. **The applicant therefore**

¹ Wetland 4 is located outside the area proposed for development on the Veranda property.

² Ms. Majidi claims her memo is supported by individuals at a state agency, in consultant groups, and a law firm. None of the individuals are named, nor did any of those individuals—with the exception of Pacific Habitat Services (PHS)—produce an analysis supporting the Majidi’s Memo. Thus, it is difficult to know to the depth of their reviews or whether any review is reflected in the Memo. Further, we cannot assess whether they are in fact qualified to offer a review of the wetlands or the relevant laws. Reliance upon anonymous hearsay does not meet the substantial evidence test upon which any land use decision issued by the City must rely. No reasonable person would rely upon the unproven or secret claims over the expert opinion and analysis provided by AKS. *Hurst v. City of Roge River*, ___ Or LUBA ___ (LUBA No. 2021-115, Sep 1, 2022) slip op at 14 (citing *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993)).

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requests that the City determine that the wetlands are not locally significant and proceed to approve the Veranda Subdivision and Master Plan.

This letter, accompanied by a further technical memo from AKS, responds to and addresses the erroneous statements and conclusions contained within the Majidi Memo. Contrary to Ms. Majidi's assertions, the City does not have the authority to apply ESRA-PV 4.1432, Subpart B to preclude the development of housing within the proposed Veranda Subdivision and Master Plan and may not reject the "documentation" submitted by the applicant, which demonstrates that the degraded wetlands do not qualify as locally significant.

A. ESRA-PV and DSL's Locally Significant Wetland Rule.

The first issue raised in the Majidi Memo is related to the application and interpretation of the City's ESRA-PV Code and an Oregon Department of State Lands' ("DSL") rule, that is, OAR 141-086-0350(2)(b), which the City's code incorporates by reference.

Ms. Majidi argues that the portion of the ESRA-PV Code regarding locally significant wetlands refers to "state legislation" that is "not discretionary." Ms. Majidi further argues that an applicant must submit "objective, evidentiary documentation (such as groundwater well logs or themistor readings)..." to "demonstrate that the [presumed locally significant] wetlands aren't providing a cooling benefit." Both of these arguments are incorrect.

As an initial matter, the Majidi Memo is incorrect in stating that the DSL rule is not discretionary.³ The rule at issue is OAR 141-086-0350(2), which states:

(2) **Mandatory LSW Criteria.** A local government shall identify a wetland as locally significant if it meets one or more of the following criteria:

(a) The wetland performs any of the following functions at the levels indicated below using the Oregon Freshwater Wetland Assessment Methodology:

- (A) "Diverse" wildlife habitat; or
- (B) "Intact" fish habitat; or
- (C) "Intact" water quality function; or
- (D) "Intact" hydrologic control function.

(b) The wetland or a portion of the wetland occurs within a horizontal distance less than one-fourth mile from a water body listed by the Department of Environmental Quality as a water quality limited water body (303(d) list), and the wetland's water quality function

³ The Majidi Memo incorrectly refers the DSL rule as state legislation. The relevant law is a rule promulgated by a state agency; it is not a statute created by legislation. The distinction between a statute and a rule is an elementary legal principle. The fact that the Majidi Memo fails to make this basic distinction calls into question the extent to which the memo was in fact reviewed or vetted by legal counsel.

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is described as “intact” or “impacted or degraded” using OFWAM. The 303(d) list specifies which parameters (e.g., temperature, pH) do not meet state water quality standards for each water body. A local government may determine that a wetland is not significant under this subsection upon documentation that the wetland does not provide water quality improvements for the specified parameter(s).

Contrary to Ms. Majidi’s arguments, the section title “Mandatory” does not dictate or mean that the rule provides no discretion to the local jurisdiction. Majidi Memo, p.3 (asserting that because the rule and the associated criteria are listed under the subsection heading “Mandatory LSW Criteria,” the rule provides no discretion for determining whether a wetland is locally significant.) A rule’s subsection heading does not dictate the substance of a rule.⁴ It is clear that the plain language of the rule *does* provide discretion to the City: It “*may* determine that a wetland is not significant upon documentation that the wetland does not provide water quality improvements.” OAR 141-086-0350(2)(b) (emphasis added). In other words, the rule provides the City with discretion to determine whether a wetland is locally significant when the wetland would otherwise qualify as locally significant because it is within ¼ mile of a 303(d) listed water body—the exact situation here. Relying upon the section header text to be outcome determinative is simply incorrect and without legal merit.

The discretion provided to the City under OAR 141-0860-350(2)(b) is incorporated by reference into ESRA-PV 4.1432, Subpart B, which provides that:

A wetland identified during the course of a development permit review that meets the state of Oregon’s definition of a ‘Locally Significant Wetland’ shall be subject to the standards of the ESRA-PV sub-district. These wetlands shall be officially added to the City’s Pleasant Valley Plan District ESRA Map by the Manager, under a Type I procedure, after the development permit becomes final.

As referenced in the City code, Oregon’s definition of “Locally Significant Wetlands” is “those wetland sites that provide functions or exhibit characteristics that are pertinent to community planning decisions made at a local scale, for example within a UGB. These wetland sites *shall be identified by local governments according to the criteria and procedures in sections 141-086-0340 and 141-086-0350.*” OAR 141-086-0330(5) (emphasis added). Thus, the definition of locally significant wetland refers back to the criteria and procedures in OAR 141-086-0350, which provide the local government with *discretion* to determine that a wetland is not significant under subsection (2)(b).

Under ORS 197.307(4) (aka the needed housing statute), “a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development

⁴ It is well established that statute or rule headings are provided for “the reader’s convenience” and do not establish the legal significant in determining the meaning of a statute or rule. *See e.g., ORS 174.540; Exch. Props., Inc. v. Crook Cty.*, 164 Or App 517, 520, 992 P2d 486, 488 (1999).

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of housing, including needed housing.” The City’s standard for determining whether a wetland is locally significant relies explicitly upon the DSL rule, which explicitly provides *discretion* for the City to “determine that a wetland is not locally significant upon documentation that the wetland does not provide water quality improvements.” This is not a clear and objective standard because it does not provide any clear and objective metric to be applied when evaluating whether a wetland located within ¼ of a mile of a 303(d) listed stream “provide[s] water quality improvements.” As a consequence, the City may not apply ESRA-PV 4.1432 to regulate the development of the needed housing proposed by the Veranda Subdivision and Master Plan.⁵

Second, even if the ESRA-PV code’s incorporation and reliance on the DSL rule could be interpreted to be non-discretionary (i.e., clear and objective), the Majidi Memo incorrectly interprets other parts of the DSL rule to arrive at its conclusion that the wetlands are locally significant. Specifically, the Memo claims that the DSL rule requires the applicant to demonstrate that the wetlands provide “no cooling benefit” and are “devoid of any water cooling benefit.” Majidi Memo, pp. 1, 4. The plain language of the rule contradict Ms. Majidi’s interpretation of the rule.⁶

The rules states that: “A local government may determine that a wetland is not significant under this subsection upon documentation that the wetland *does not provide water quality improvements* for the specified parameter(s).” OAR 141-086-0350(2)(b) (emphasis added). The plain language of the rule therefore requires, not that the wetlands provide *no cooling benefit* as Ms. Majidi argues, but that the wetlands provide *no improvement to water quality* in Kelley Creek.

This distinction matters. As explained below, only Wetland 1 has a temporary seasonal surface water connection to Kelley Creek during the cool, wet season. Wetlands 2, 3, and 5 lack any surface water connection to Kelley Creek at any time of the year. Thus, the wetlands on the Veranda site *might* contribute water to a creek that is already adequately cooled during the winter months, but that temporal connection would not improve water quality temperature in Kelley Creek during a time when it is already cool.

⁵ LUBA has ruled that denial of a needed housing project—which the Veranda Subdivision and Master Plan is—on the basis of criteria that are not clear and objective will result in a reversal by LUBA and a mandatory award of attorney fees to the applicant. *Tom Walter and Walter Development Company v. City of Eugene*, 74 Or LUBA 671 (2016).

⁶ The City’s interpretation of the state rule also receives no deference. No deference is afforded to a local government’s interpretation of an administrative rule, it is instead reviewed under ORS 197.835(9)(a)(D) to determine whether the local government improperly constructed the applicable law. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246, 256 (2015). Similarly, no deference is provided to when a local government’s code is contrary to state rule or regulation. ORS 197.829(1)(d); *Hood Valley Residents v. Hood River County*, 75 Or LUBA 452(2017).

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In addition, during the summer, when temperatures in Kelley Creek are elevated, none of the wetlands have a subsurface connection to Kelley Creek. As such, none of the wetlands are contributing to cool groundwater discharge during the summer months, and thus, none are providing improved water temperatures to Kelley Creek during that time. In light of the above, there is no logical or factual argument under which the Majidi Memo can claim that the wetlands provide *improved* water quality to Kelley Creek. Under state law Wetlands 1, 2, 3 and 5 cannot, therefore, be considered locally significant. Any interpretation contrary to this is both incorrect as a matter of law and is not supported by the evidence.

Third, the Majidi Memo wrongly re-writes the DSL rule to insert words and requirements that it does not contain an effort to preclude the use of the Oregon Rapid Wetland Assessment Protocol (“OWRAP”) functional assessment method to provide that wetlands are not locally significant. OAR 141-086-0350(2)(b) says that “[a] local government may determine that a wetland is not significant under this subsection upon documentation that the wetland does not provide water quality improvements for the specified parameter(s).” Rather than apply the actual state rule, however, the Majidi Memo inserts “objective, evidentiary documentation” into this requirement and uses this insertion to disqualify the professional and expert analysis provided by the AKS ORWAP. It is a basic rule of statutory construction “not to insert what has been omitted.” ORS 174.010. Ms. Majidi’s interpretation of the DSL rule to require “objective, evidentiary documentation” and to preclude the use of or exclude AKS’s ORWAP assessment, violates this basic rule and has no other basis in the law. There is no legitimate basis as for why the expert opinion provided by AKS does not meet the “documentation” standard found in OAR 141-086-0350(2)(b).

The Majidi Memo further asserts that ORWAP “has not been identified by the state as an acceptable alternative to the Oregon Freshwater Wetland Assessment Method (OFWAM) for assessing local significance.” Majidi Memo, p. 3, p. 9-10. In so asserting, Majidi again misunderstands or misconstrues the state’s rule. The rule requires the use of OFWAM to evaluate local significance for certain wetlands, including a wetland that is located within ¼ mile for a 303(d) listed water body is “intact” or “impacted or degraded.” But, with regards to exercising discretion to determine whether a wetland located within ¼ mile of a 303(d) listed stream is (or is not) significant, the rule simply requires “documentation that the wetland does not provide water quality improvements for the specified parameter(s).” In other words, the rule specifically *does not require* the use of OFWAM to document that a wetland located within ¼ mile of a 303(d) listed stream does not provide water quality improvements and, thus, does not qualify as locally significant. If the agency had intended to require OFWAM as the only method to determine whether a wetland located within ¼ mile of a 303(d) listed stream was locally significant, it would have said so when it adopted its rule. It did not.

The Majidi Memo is trying to impose a requirement outside the construct of the state rule. City staff should know better: where an administrative agency uses a particular term in one provision, but omits that term from a related provision, the term does not apply in the related provision. *See*

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In re Marriage of Perlenfein and Perlenfein, 316 Or 16, 22-23 (1993) (citing to ORS 174.010). The state agency (DSL) required the use of OFWAM in some parts of the rule, but not in others. Thus, contrary to Ms. Majidi's assertions, it is evident that DSL did not require or intend to require that OFWAM be the sole type of "documentation" that local jurisdictions would rely on to determine local significance under OAR 141-086-0350(2)(b).

For each of these reasons, the Majidi Memo is legally incorrect to assert that ORWAP cannot be "the documentation" demonstrating that wetlands on the site do not provide water quality improvements to Kelley Creek. Further, Ms. Majidi is legally incorrect to assert that ESRA-PV 4.1432, Subpart B does not afford the City the ability to exercise its discretion to determine, based upon the ORWAP, that the wetlands are not locally significant. In fact, under the standards listed in the rule and as explained above, the wetlands cannot be found as locally significant.

B. Wetlands are Not Locally Significant.

The Majidi Memo next claims that Natural Resource staff identified Wetland 1 (and other wetlands) as locally significant in discussions with the applicant in 2017. Majidi Memo, pp. 2, 3, and 4. The Memo's characterization of this issue glosses over the facts. As Ms. Majidi well knows (or should know), the City does not make a determination of local significance until a wetland is identified as such during the course of reviewing a development permit. Thus, a pre-application position from staff is not the same as a finding that wetlands are locally significant, nor was Ms. Majidi's position at that time based in any evidence that has been presented during the last *six years*; it was merely her opinion or uninformed assumption. As such, it is both unfair and incorrect for staff to assert that the applicant should have known starting in 2017 that the wetlands at issue were locally significant. Moreover, the wetlands on the property were neither delineated nor mapped as locally significant on the City's Pleasant Valley Plan District ESRA map when the applicant began conversations with the City about the development of the Veranda property. *See* Jan. 2023 AKS Memo, p. 1. There is no objective or defensible basis for the Memo's assertion that the applicant should have known that the wetlands were locally significant.

The Majidi Memo chronicles some (but not all) of the work that the applicant put into delineations and seeking to assess Ms. Majidi's assumption that there were wetlands, or locally significant wetlands, on the Veranda property. (Note – in its discussion of these efforts, the Majidi Memo wrongly implies that the applicant withdrew the effort to refute the Schott delineation with DSL for the reason that Oregon's DEQ staff determined that Kelley Creek was listed on the 303(d) list. *See* Majidi Memo, p. 4. The withdrawal should not be construed or assumed to signify the applicant's agreement to let the Schott's wetland delineation or DSL's concurrence thereon stand as the final say on the location or extent of wetlands on the property.)

It is undisputed that since the outset of consideration of development of the Veranda property the applicant's representative, Jim Leeper, has consistently and constantly raised alarm over the

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immoveable and apparently pre-determined position of the City's Natural Resource staff that the property had locally significant wetlands where none had been identified on the property by any other jurisdiction—state, federal or local—and where no formal assessment had ever been completed. The City cannot predetermine the outcome of an application based upon mere assumptions of staff and without any evidentiary basis.

Furthermore, Mr. Leeper strongly disagrees that City Natural Resources staff have sought to “offer assistance” or “support” to him as the applicant. *See* Majidi Memo, pp. 2, 4 (making assertions along these lines). To the contrary, City Natural Resource staff have, from the beginning and repeatedly, sought to block applicant Leeper's efforts to develop the Veranda property. The efforts to block the development have escalated recently with PHS's apparent City-directed trespass on the Veranda property for the purpose of conducting an unauthorized site visit for their ORWP assessment.⁷ That trespass activity was even cited as support for the Majidi Memo. And, even more recently, Ms. Majidi has *sought to have DSL designate road side ditches located adjacent to the Veranda property as jurisdictional waters of the state*. This action will make it difficult for the City to maintain their roads at this location without permits and appropriate mitigation. These actions provide a troubling pattern of predetermination and interference with the applicant's reasonable development expectations.

C. The Memo is Contradicted by Site-Specific Evidence.

Seeking to establish that Wetland 1 is locally significant, the Majidi Memo suggests that there is a subsurface/groundwater connection between the wetlands and Kelley Creek and that Wetland 1 has a lasting surface water connection that improves water temperatures in Kelley Creek. The Majidi Memo relies on broad, unconnected generalizations that Kelley Creek is listed on the 303(d) list for temperature, that there is a possibility of a subsurface/groundwater connection between wetlands on the site and Kelley Creek, and that there may be some evidence of a connection between Wetland 1 (it does not mention other wetlands in the project site) and a roadside ditch to Kelley Creek to support its assertion of local significance. Majidi Memo, pp. 4-9. However, none of these sweeping assertions are causally linked by Ms. Majidi or any *actual evidence* to demonstrate that the degraded wetlands in fact provide water quality improvements to Kelley Creek. This is because the Memo's generalized assertions are overcome by site-specific evidence.

⁷ We note that the City's development permit application authorizes the City and its agents, authorized representatives, and independent contractors to enter the site for “inspection” of the site in conjunction with the land use application. The site assessment procured by Majidi from Pacific Habitat Services does not qualify as an inspection – nor was the secretive nature of the work undertaken in such a way as to fall within the purpose of the permit application's authorization.

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Of note, the Majidi Memo does attempt to rely on an ORWAP assessment of Wetland 1 performed by Pacific Habitat Services (PHS).⁸ However, the PHS ORWAP was based on a *single*, unauthorized visit to one wetland outside the growing season in February 2023. The ORWAP manual is clear that an assessment may not be accurately determinable during a single site visit, particularly when the site visit is outside the early growing season. PHS's (unauthorized) site visit falls into both categories, and pertains to only one of the wetlands on the project site. Thus, it is not the type of documentation that can support a determination of local significance.

AKS, in contrast, has conducted multiple site visits, including site visits throughout the early growing season, and generated an ORWAP based upon those visits. Based on its observations during those site visits, AKS determined that the Veranda wetlands, including Wetland 1, scored “lower” for providing a functional opportunity for water-cooling ecosystem support to Kelley Creek – aka, the wetlands did not demonstrate that they will provide water quality improvements to Kelley Creek.

Beyond the questionable PHS ORWAP that was obtained by an illegal trespass, the Majidi Memo offers no site-specific evidence to support its assertion that it has properly found the wetlands to be locally significant. The Memo's sweeping generalizations are insufficient proof to override the applicant's site specific documentation and evidence, which includes soil samples as well as a multiple-visit-based ORWAP assessment that the wetlands do not improve water quality in Kelley Creek, and, therefore, are not locally significant.

The Memo rests heavily on the idea that local geology supports a connection between the wetlands on site and shallow groundwater discharge. In support of the theory that there is a year-round shallow groundwater connection, Ms. Majidi asserts that “remnants of tile drains...are evidence of shallow groundwater presence in the areas of the delineated wetlands.” Ms. Majidi refers to the Multnomah County soil survey, which notes a fragipan starting at 15-18 inches for the types of soils located on the Veranda site. Ms. Majidi believes this fragipan is preventing “free downward drainage” and creating a “very high, perched groundwater” on the site. Ms. Majidi's opinion, however, is not correct and is unsupported upon review of the actual facts.

Soils surveys are not necessarily representative of site specific conditions.⁹ That is why localized data is critical to understand actual conditions at the site. Here, we have site specific soil data, collected by AKS during their February, March, April, and May 2023 site visits. That data documents that there is *not* a fragipan within 18-inches of the surface in the vicinity of

⁸ It is ironic that this is the only site-specific information that the City has to support its position given that the City spends a substantial part of its memo attempting to discount ORWAP as a method for assessing local significance on the property and provided by AKS. Either it accepts ORWAP (which the law allows) or it doesn't.

⁹ It is notable however, that the City completely ignored the fact that the USDA/NRCS Soil Survey maps the soils on site—including the area where wetlands are located—as either non-hydric or as having a maximum of 3% hydric inclusions. See Schotts Report, Figure 4.

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wetlands on this site. Thus, infiltrating precipitation is not prohibited from “free downward drainage” nor is there documentation that there is a sustained, shallow (very high, perched) groundwater at the site. The actual and undisputed evidence using localized data provided by AKS overrides the more generalized soil survey data and debunks the presumption that tile drains on site are evidence of year-round shallow groundwater levels.¹⁰

The AKS ORWAP provides evidence that the wetlands on the Veranda site, and Wetland 1 in particular, provide a “lower” functional rating for water cooling compared with other wetlands cataloged in the state. Therefore, the on-site wetlands do not provide an improvement for 303(d) temperature attenuation within Kelley Creek during the time of year when it is needed to support a finding of local significance. Moreover, contrary to the Memo’s supposition, there is no evidence that wetlands have a continuous connection to a shallow groundwater table. Therefore, the wetlands also do not contribute meaningful groundwater discharge during the warm season.

The Majidi Memo also argues that groundwater discharges from Wetland 1 to a roadside ditch. Majidi Memo, pp. 8-9. According to the AKS Memo and onsite observations, Wetland 1 is degraded with no vegetation that would support the idea that there is shallow subsurface hydrology (shallow groundwater) outside the wet season. Thus, there is no documentation or evidence supporting the idea that groundwater from Wetland 1 (or other wetlands on the site) is discharging to Kelley Creek at a time that would improve water quality therein. In fact, the documentation that does exist is to the contrary. And, even if Wetland 1 were discharging shallow groundwater to the roadside ditch (which eventually connects to Kelley Creek), it is not discharging it at a time when the shallow groundwater would provide water quality improvements to Kelley Creek.

In summary, the Majidi Memo presents no site-specific evidence to support her erroneous opinion that Wetland 1 (or Wetlands 2, 3, or 5) are locally significant. Instead, the applicant has provided the City with evidence and documentation showing that the wetlands are not meaningfully connected to Kelley Creek so as to provide water quality improvements to the creek. The City has the documentation it needs to determine that Wetlands 1, 2, 3, and 5 are not locally significant and should find as such.

¹⁰ The City’s position is that the Schott’s delineation report says remnant tile drains on the site are evidence of shallow groundwater. This goes too far. The Schott’s report states that the pasture (where the site is located) has been extensively tiled and that many drain tiles were observed to be broken at the site during the first site visit. The report then “assumed that the broken tiles were artificially affecting site drainage and the extent of the wetlands.” Scotts Report, pp. 1, 4. However, the tiles were repaired to continue farming and the report then documents that there was no change in wetland area between the initial field work in April 2018 and the field work in March 2019, and after the tiles were repaired. Thus, contrary to the Memo’s assertion, the Schott’s report does not say that drainage tiles are “largely plugged and/or broken,” nor does it say that “drainage tiles were installed to lower the groundwater table,” and, finally, it does not say that remnant tiles are evidence of shallow groundwater at the site. *See* Majidi Memo, p. 6 (for this over-extrapolation of the Schott’s report).

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D. The Veranda Development Will Provide Water Quality Improvements to Kelley Creek.

As explained in the AKS Memo, the Veranda development—with its voluntary additional enhancement activities—will provide a significant ecological benefit to Kelley Creek, particularly when compared to the effects of the degraded wetlands. Furthermore, impacts to any wetlands, regardless of whether they are locally insignificant, will require mitigation in accordance with state wetland regulations and requirements. This too will enhance local watersheds over and above the degraded wetlands.

We encourage the City, utilizing the site-specific information provided by AKS, to approve the Veranda housing development and secure the environmental benefits the applicant has agreed to provide—real and meaningful enhancements that will truly improve water quality in Kelley Creek.

Very truly yours,



Elizabeth E. Howard



Kenneth Katzaroff

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