October 23, 2023

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VIA E-MAIL

City of Gresham Planning Department
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RE: Leeper Development, LLC – Veranda Master Plan and Subdivision – SD/MIS 20-26000343 (MPLAN 21-00652)

Dear Planning Commission Members:

This letter responds to several findings in the October 5, 2023 staff report. This letter also, again, raises that several City standards *cannot* be applied against the project because they do not meet the state's Needed Housing laws (ORS 197.303; 197.307(4)). Although we have previously explained this to the City, it nevertheless continues to attempt to require compliance with code provisions that simply cannot apply. ORS 197.307(4).

ORS 197.307(4) provides that "…a local government may *adopt and apply* only clear and objective standards, conditions, and procedures regulating the development of housing, including needed housing."

ORS 197.307(6) permits a local government to nevertheless apply criteria that are not clear and objective, so long as there is an alternative set of criteria. However, this project is operating under a previous version of the code where no such alternative criteria existed.[1] As it relates to *this project and this application*, this section has no applicability.

The Applicant and the City still have a general disagreement about whether or not certain highly-degraded wetlands on the property deserve protection under the City's ESRA[2] code, as it cross-references and incorporates OAR 140-086-0350(2), and more specifically (2)(b), which is the only basis under which the wetland could be determined to be a "locally significant wetland." That rule states:

> "(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 wetlands water quality function is described as "intact" or "impacted or degraded"

[1] *See* Applicant is entitled to rely upon the code in existence as that time of application. ORS 227.178(3).
[2] "ESRA" is used synonymously with "ESRA-PV" and relates to buffer areas that do not apply to this application.

> 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)."

Importantly, that section is part of the *mandatory* criteria for identifying locally significant wetlands, and, it is mandatory for the City to review information and documentation that a wetland does not meet such criteria. If that were not the case, the City would *only* be making a decision that a wetland were within ¼ mile of a listed creek—and not whether it met any of the actual criteria. Put another way, it would be irrelevant as to whether or not water quality benefits were provided and thus irrelevant as to whether or not the wetland is "significant." That interpretation of the rule—which is specifically advanced by the City—is an invited legal error and is not a reasonable interpretation of the law.

AKS Engineering & Forestry ("AKS") has submitted substantial evidence to this record that the wetlands do *not* provide a water quality benefit.[3] The Planning Commission should agree with the technical opinion of AKS and find that the wetlands are not locally significant.

<u>Response to Specific Findings</u>:

- GDC 4.1473 – Level of Detail (Staff Report pg. 8):

    - Response: Staff is incorrect that this criterion is not satisfied. The basis for staff's finding is because the plan "does not provide for the preservation of natural resources" and due to staff's erroneous interpretation that the wetlands are locally significant.

      Staff's findings, however, are incorrect. GDC 4.1473 is *not* substantive applicable criteria, but instead relates to *application requirements*. Application requirements are not applicable criteria and do not form the basis for approval or denial. *Le Roux v. Malheur County*, 32 Or LUBA 124, 129 (1996).

      Staff is incorrect that the code compels denial based upon protection of natural resources. *See* Staff Report pg. 9. As described above, that wetlands on the site are not locally significant because they provide no water quality benefits.

      Moreover, GDC 4.1473 includes many terms that are not clear and objective and violate the Needed Housing law. This means that the entire provision may not be

[3] AKS has also submitted substantial evidence that *groundwater* is also likely not providing substantial cooling benefits based upon test pits. However, the LSW criteria is related to *wetland* benefits and not to *groundwater* benefits. Nothing in the OARs or the City's code permits it to protect wetlands due to unassociated groundwater benefits and doing so would violate the codification requirement. *See Waveseer of Oregon, LLC v. Deschutes County*, __ Or LUBA __ (LUBA No. 2022-038, Aug 10, 2020) (interpreting virtually identical requirement as it relates to county requirements).

applied. We refer to the below paragraphs the "Needed Housing Argument" and cite to it as it relates to additional criteria identified in this letter:

LUBA and Oregon courts have applied the needed housing statute to land use regulations of all kinds, including approval criteria. Land use regulations are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999). And, regardless of whether a given regulation is "designed to balance or mitigate impacts," it must also be both clear and objective. *Id*. at 155-56 ("Dictionary definitions of 'clear' and 'objective' suggest that the kinds of standards frequently found in land use regulations lack the certainty of application required to qualify as 'clear' or 'objective.'").

LUBA has built on this core analytical framework by identifying several practical tests used to determine whether regulations are clear and objective. For example, clear and objective standards must have "objective benchmarks" for measuring the compliance of projects to which they apply. *Warren v. Washington County*, 78 Or LUBA 375, 388-89, *aff'd*, 296 Or App 595, 439 P3d 581 (2019). Conversely, phrases that require a "subjective analysis in order to determine [their] meaning" violate the needed housing statute. *Legacy Development Group, Inc. v. City of the Dalles*, __ Or LUBA __ (LUBA No. 2020-099, slip op at 12) (Feb. 24, 2021). LUBA has also explained that the term "clear" means "easily understood" and "without obscurity or ambiguity," and that the term "objective" means "existing independent of mind." *Nieto v. City of Talent*, __ Or LUBA __, __ (LUBA No 2020-100, Mar. 10, 2021) (slip op at 9 n 6). More fundamentally, standards that are susceptible to multiple interpretations are not clear and objective. *Parkview Terrace Development, LLC v. City of Grants Pass*, 70 Or LUBA 37, 52-53 (2014); see also *Walter v. City of Eugene*, 73 Or LUBA 356, 360-64 (2016) (citing a standard's "multiple possible interpretations" as a basis to find it not clear and objective).

ORS 227.173(2) also requires that "when an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance." An ordinance is clear and objective on its face when it "needs no interpretation based upon legislative history, or upon the application of rules of statutory construction." *State v. Thompson*, 20 Or App 61, 64 n. 1, 530 P3d 532 (1975).

Staff's finding that the application does not satisfy GDC 4.1473 is incorrect. Staff also agrees that the criteria is not clear and objective, but instead argues that the application should nevertheless be denied based upon its incorrect analysis that the wetlands are locally significant and therefore a 200-foot buffer is necessary. Staff is incorrect and the Planning Commission should determine that the wetland buffer does not apply because the wetland is not locally significant.

- GDC 4.1475 Size of Master Plan (Staff Report pg. 12):
  - Response: Staff's finding is incorrect because it is based upon the false predicate that the wetlands are locally significant when they are not. The applicant agrees that the criteria is not clear and objective and should be waived. *See* Needed Housing Arguments.
- GDC 4.1476 Housing Variety (Staff Report pg. 15):
  - Response: Staff's finding is incorrect because it is based upon the false predicate that the wetlands are locally significant when they are not. As such, the listed ESRA area does not apply and the density calculations were correct.
- GDC 4.1476 Housing Variety (Staff Report pg. 16):
  - Response: Staff's finding is incorrect because it is based upon the false predicate that the wetlands are locally significant when they are not. As such, the listed ESRA area does not apply and the density calculations were correct.
- GDC 4.1465 Neighborhood Transition Design Area Overlay Sub-District (Staff Report pg. 18):
  - Response: This code criteria is not clear and objective and is laden with subjective terms such as "appropriate access" and "making the ESRA a visible and valued part of the neighborhood" and "should be spaced similar to the street network" and therefore cannot apply. *See* Needed Housing Arguments.

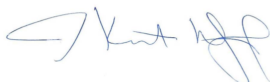
    Staff is also incorrect that the ESRA boundary applies, which only applies to locally significant wetlands. As discussed, there are no LSWs on the property.
- GDC 4.1484 Approval Criteria (Staff Report pg. 20 & 21):
  - Response: Staff is incorrect that the application does not meet applicable master plan criteria. As noted in its finding, staff makes the erroneous finding that there is development within a LSW, when the evidence shows no LSW exists.
- GDC 4.134 Prohibited Uses (Staff Report pg. 24):
  - Response: Staff's findings are incorrect because it erroneously states that the ESRA buffer applies when it does not. No LSWs exist on the subject property.
- GDC 4.1443 Standards for Land Divisions (Staff Report pg. 25):
  - Response: This criterion does not apply because the ESRA-PV does not apply to the subject property.

- GDC 4.1465.C Neighborhood Transition Design Area Overlay Sub-District Standards (Staff Report pg. 26):
    - Response: This criterion cannot be applied because it relates to subjective criteria ("[t]o the extent practicable…"). *See* Needed Housing Arguments. Staff's proposed finding is also based upon the incorrect assumption that the ESRA-PV applies.
- GDC 4.1408 Development Standards (Staff Report pg. 26-27):
    - Response: Staff's finding is erroneous and, again, relies upon the false predicate that the ESRA-PV applies when it does not. No locally significant wetlands exist on the site.

The City's recommendation for denial is based upon one core dispute: whether or not the wetlands on the subject property are locally significant. They are not, based upon the substantial evidence submitted by AKS to this record. Substantial evidence is evidence that a reasonable person would rely upon. *City of Portland v. Bureau of Labor & Indus.*, 298 Or 104, 119, 690 P2d 475 (1984). Substantial evidence includes expert testimony and technical reports. *Boucot v. City of Corvallis*, 64 Or LUBA 131, 138-139 (2011). It is insufficient to merely poke holes in the evidence. *May Trucking Co. v. Dept. of Transportation*, 203 Or App 464, 572-573, 126 P3d 695, 700-701 (2006) ("It was petitioner's obligation to make sure that there is evidence in the record supporting its position.") Stated differently, it is not enough for natural resources staff to merely poke holes in the evidence; substantial evidence must be provided to rebut the substantial technical evidence provided by AKS.

Applicant requests the opportunity to draft findings of approval for each of the criteria listed above.

Respectfully,



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