

MEMORANDUM

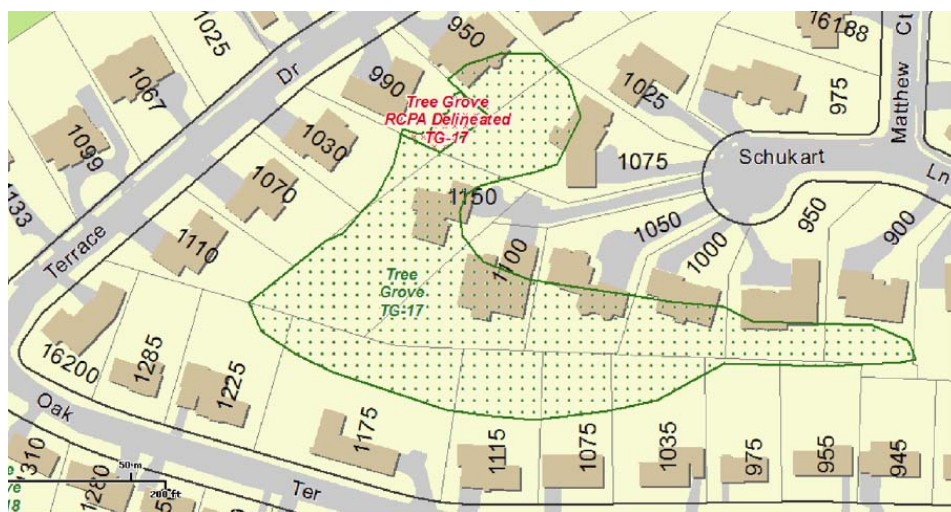
TO: Planning Commission (Jon Gustafson, Chair, and Members)
 Andrea Christenson, Natural Resources Planner
 Denny Egner, Assistant Planning Director, Long Range

FROM: Evan P. Boone, Deputy City Attorney

SUBJECT: Classification of amendments to the Sensitive Lands Overlay Districts on the Comprehensive Plan Map and Zoning Map to remove a 2.3-acre Resource Conservation (RC) District designation from 18 properties– “Legislative” or “Quasi-Judicial” Land Use Decision? [LU 12-0011]

DATE: 4/17/12 (Replaces April 10, 2012 Memorandum)

Question: Is the removal of RC Overlay District designation of TG-17 from portions of 18 lots, pursuant to LOC 50.16.020 and 50.16.025 a “legislative” or “quasi-judicial” action?



Answer: I find ambiguity in LOC 50.16.020. Referring to the legislative history of both LOC 50.16.020 and 50.75.005, I conclude that the application should be processed as a quasi-judicial application and follow the quasi-judicial hearing procedure. [This memorandum supersedes the procedural classification in Page 3, Section IV Procedure of the Staff Report in LU 12-0011.]

Discussion:

The City is considering amendment of the Comprehensive Plan map and Zoning Map to remove an RC Overlay District which was established to protect TG-17. The RC Overlay District consists of 2.3 acre, and comprises a portion of 18 lots:

General "Legislative v. Quasi-Judicial" Determination – LOC 50.75.005

I have considered the legislative v. quasi-judicial classification of a text amendment three times before:

1999 (MC Zone): The City amended one zone (MC) to restrict the size of retail uses to under 35,000 sq. ft., in order to comply with a Comprehensive Plan policy that was previously adopted but not implemented in the Code. I concluded that the amendment should be classified as a "quasi-judicial." CAO Memorandum, Jan. 6, 1999.

2009 (IP Overlay): The City created an overlay zone in the IP zone, that expanded the number of uses permitted within the overlay area, by adding uses also found in the GC zone. CAO Memorandum, April 13, 2009.

2009 (HC, MC, IP - amendment to limit the size of certain uses to comply with Metro's Title 4. I concluded that the amendment should be classified as "legislative". CAO Memorandum, August 11, 2011.

Those determinations were made under LOC 50.75.005:

Section 50.75.005 Legislative Decisions Defined.

1. A "Legislative Decision" is an amendment to the policies, procedures, standards, criteria or Map designations of the Comprehensive Plan, and this Community Development Code, **unless such amendment applies to a small number of identified properties only or is required to effect a particular development permit application.**
2. An amendment to the policies, procedures, standards, criteria or Map designations of the Comprehensive Plan, or this Community Development Code which is **not a "legislative decision" as defined in subsection (1) of this section shall be considered "quasi-judicial" and shall be processed as a major development.**

As explained in my prior memoranda, I applied the "Legislative v. Quasi-Judicial" determination factors under the principles stated in Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287 Or. 591, 601 P.2d 769 (1979). I summarize those factors and would apply them as follows in this case, if LOC 50.75.005 were applicable:

- *Development Permit Application: is the amendment required to effect a particular development permit application?*

None of the text amendments were to enable a specific development proposal.

- *Does the Process, Once Started, Require Reaching a Decision?*

MC Zone:	Yes (Needed to Carry Out Comp Plan Policy)
IP zone:	No (Policy question whether to extend GC uses into overlay area of IP Zone)
IP, MC, and HC:	Yes (Needed to comply with Metro Code)
RC Removal (TG-17)	Yes (Needed to comply with LOC 50.16.020)

- *Does this Involve the Application of Facts to Preexisting Criteria?*

MC Zone:	Yes (Compliance with Comp Plan Policy)
IP Zone:	No (Application was to enlarge area for uses, not to bring uses in area into compliance with criteria).
IP, MC, and HC:	Yes (Needed to comply with Metro Code)
RC Removal (TG-17)	Yes (LOC 50.16.020 and -.025)

- *Small Number of Identifiable Properties?*

MC Zone:	13 parcels (100% of zone)
IP Zone:	24 parcels / 25.3 acres (19.7% of zone)
IP, MC, and HC:	112 parcels / 184 acres (100% of zone)
RC Removal (TG-17)	Portions of 18 parcels / 2.3 acres (100% of the RC Overlay Zone for that tree grove, but there are countless other RC Overlay Districts.)

Applying LOC 50.75.005 and, by its incorporation of the general “legislative v. quasi-judicial” factors found in Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287 Or. 591, 601 P.2d 769 (1979), I conclude that removal of an RP Overlay District would be “quasi-judicial” where there is a relatively small number of parcels involved (portions of 18 parcels), the small acreage affected (2.3 acres), that the application is being examined against specific criteria (LOC 50.16.025), and that a decision is required to be made (LOC 50.16.025).

However, before reaching a conclusion, LOC 50.16.020 is considered because it also appears to undertake a legislative v. quasi-judicial classification specifically for RP and RC Overlay District designation or removal (even though it refers to LOC 50.75.005), or at least there is ambiguity how LOC 50.16.020 would classify an RP or RC Overlay District determination or removal.

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Sensitive Lands Overlay District Classification – LOC 50.16.020(2)

Removals of Sensitive Lands Overlay Districts are to be reviewed pursuant to LOC 50.16.025 and 50.16.020, and to be processed as either legislative or quasi-judicial.

LOC 50.16.025 Removing an Overlay District Designation.

1. In order to remove an overlay District designation the review body shall find that one of the following criteria is met:

...

b. There was a mistake in the analysis of quality or quantity in the original designation of the resource and a re-application of the ESEE analysis demonstrates that the designation no longer meets the criteria; or

...

...

3. A removal application pursuant to subsection (1)(a) or (1)(b) above shall be processed in the same manners as a designation application pursuant to LOC 50.16.020.

...

50.16.020 Criteria for Designating Property within an Overlay District.

1. Goal 5 Analysis Required. In order to include an individual property, a portion of a property, or a group of properties within an RP or RC Overlay District, the reviewing body shall find that the resource on the site or sites has been ranked and evaluated through an Economic, Social, Environmental, and Energy (ESEE) Process Analysis in compliance with Statewide Land Use Planning Goal 5 and merits a Resource Protection (RP) and/or Resource Conservation (RC) designation.

2. Procedure. An RP or RC designation may be imposed, modified or removed pursuant to either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties. **A group of properties shall be processed as a legislative Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1), and a single property shall be processed as a quasi-judicial Comprehensive Plan Map and Zoning Map amendment pursuant to LOC 50.75.005 (2).**

....

Under the text of LOC 50.16.020(2), there is at best confusion and at worst contradiction in the manner for City-wide, area-wide, and small group of properties designations to be handled, when reading the provisions of LOC 50.16.020 and as it references LOC 50.75.005, together:

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Number of Properties	LOC 50.16.020 / Classification	LOC 50.75.005 / Classification	Comment
Single property	Quasi-judicial (“single property”)	Quasi-Judicial (“small number of identified properties”)	One parcel is the smallest of a small number of identified properties
Small number of Identified Properties	Unknown / (Is a small group different than a “group of properties”?)	Quasi-Judicial (“small number of identified properties”)	Given the gap in LOC 50.16.020 in the scheme between “small group” and “area-wide”, and the omission of “city-wide”, there is ambiguity as to how LOC 50.16.020 is to handle both of these.
Group of Properties	Legislative	Depends / (“small number of identified properties” – Quasi-judicial; otherwise - Legislative)	
Area-wide	Legislative / (An “area-wide” is a large number of a parcels in an area of the City. “Area-wide” is not defined by the resource.	Legislative / (It is beyond a “small number of identified properties”)	
City-Wide	Unknown / a mix of groups and individual properties throughout the City is beyond a “group of properties”)	Legislative / (It is beyond a “small number of identified properties”)	

Ambiguity is shown in the reference of LOC 50.16.020 to LOC 50.75.005.

Section 50.75.005 Legislative Decisions Defined.

1. A "Legislative Decision" is an amendment to the policies, procedures, standards, criteria or Map designations of the Comprehensive Plan, and this Community Development Code, **unless such amendment applies to a small number of identified properties only or is required to effect a particular development permit application.**
2. An amendment to the policies, procedures, standards, criteria or Map designations of the Comprehensive Plan, or this Community Development Code which is **not a "legislative decision" as defined in subsection (1) of this section shall be considered "quasi-judicial" and shall be processed as a major development.**

Thus, when LOC 50.16.020(2) states that certain classes of properties are to be “*processed as a legislative [or quasi-judicial] Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1) [or (2)]*”, and LOC 50.75.005 doesn’t have the same classes of properties, there are omissions and conflicts that arise between the two.

When interpreting the Code, the rules of interpretation stated in PGE v. BOLL, 317 Or 606 (1993) are applied. If the text is clear, then the text is applied. If there is ambiguity in the text, then one looks to the context, legislative history, and statutory construction, in an effort to discern the legislative intent:

“The analysis is a multi-level procedure. First, the court must examine the text and context of the statute. The text of a statute is the best evidence of legislative intent. State v Person 316 Or 585 (1993) Courts may not insert what has been omitted or omit what has been inserted. ORS 174.010 Words of common usage should be given their ordinary meaning. The context of a statute includes all provisions within the questioned statute and other related statutes. Southern Pac. Trans Co v Dept of Revenue 316 Or 495 (1993) The specific statutory intent should control over a general inconsistent intent. If possible, the construction of a statute’s intent should give effect to all statutory provisions. ORS 174.010 If the text and context reveal a clear intent, then additional inquiry is unnecessary.”

Doe v. Medford School District 549C, 232 Or. App. 38 (2009)

This statutory construction method is also applicable to interpretation of land use regulations:

“Under ORS 197.829(1), Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) and Church v. Grant County, 187 Or App 518, 69 P3d 759 (2003), the city council's interpretation and our review of that [land use code] interpretation are guided by the principles articulated in PGE v. Bureau of Labor and Industries.”

Siporen v. City of Medford, 349 Or. 247, 262 (2010)

Looking to the legislative history, the relevant subsection of the Sensitive Lands Article read, as adopted in 1997:

2. Procedure. An RP or RC designation may be imposed, modified or removed pursuant to either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties. **The former shall be processed as a legislative Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1), and the latter shall be processed as a quasi-judicial Comprehensive Plan Map and Zoning Map amendment pursuant to LOC 50.75.005 (2).**

The “former” thus referred to “City or area-wide Goal 5 analysis” and was to be processed as a legislative amendment pursuant to LOC 50.75.005(1) and “latter” referred to “Goal 5 analysis of a single property or small number of individual properties” and was to be processed as a quasi-judicial amendment.

This text was changed in 2009 [Ord. 2527 (LU 08-0051)], with the following commentary (highlighted in grey shade) and Council Report dated Oct. 6, 2008, Attachment 1, page 5 describing the change as housekeeping:

2. Procedure. An RP or RC designation may be imposed, modified or removed pursuant to either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties. ~~The former~~ A group of properties shall be processed as a legislative Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1), and a

single property ~~the latter~~ shall be processed as a quasi-judicial Comprehensive Plan Map and Zoning Map amendment pursuant to LOC 50.75.005 (2).

“Former” and “later” are thought to be confusing.

From the legislative history, it is clear that there was no intent to alter the procedural classification of how designation of a small group of properties or a City-wide designation would be classified: legislative or quasi-judicial. Rather, the identification of what was “former” and what was “latter” was in error:

“either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties.”

CONCLUSION:

In the issue at hand there are portions of 18 parcels involved. Based on the legislative history and that “area-wide” is in reference to an area of the City, not merely as affected by a single resource, I interpret “a group of properties” in LOC 50.16.020 to refer to an “area-wide” group and maybe even “city-wide”, but not to a “small number of identified properties.” See LOC 50.75.005(1) and (2). LOC 50.16.020(2), as revised, does not address how a small group of properties / small number of properties is to be classified, although it does refer to LOC 50.75.005(1). I therefore refer to the general provisions of LOC 50.75.005 (which is what LOC 50.16.020 refers to) and, for the reasons stated in *General “Legislative v. Quasi-Judicial” Determination* above, conclude that the application should be processed as a quasi-judicial application.

**Ordinance 25XX
Attachment B**

**PROPOSED AMENDMENTS TO THE SENSITIVE LANDS
PROVISIONS OF THE
LAKE OSWEGO COMMUNITY DEVELOPMENT CODE
(LOC CHAPTER 50)**

General Notes:

1. The general purposes of the update to the Sensitive Lands provisions is to: correct inadvertent errors in text or reference; clarify text which has been found to be confusing, by codifying the Planning Division's interpretation; resolve conflicts between code sections; simplify code provisions, where possible; present "policy" items for consideration, due to perceived changes to community goals; and to Comply with Metro's Title 13 requirements. Although this update continues the 2002 reorganization purpose of "streamlining and clarifying", it also contains proposed amendments which are substantive.

2. Commentary has been included following most of the proposed amendments. This commentary, marked with yellow highlight and indented following the code section or subsection proposed for amendment, is intended as a brief summary of the reasons underlying the proposed amendment. It was prepared during the editing process. It is hoped to be helpful, but the reader should understand that the commentary was not scrutinized to the same degree as the proposed amendments.

- vertical expansion of an existing non-conforming structure, within the footprint of the non-conforming structure; and
- ii. The development does not remove any vegetation designated as native vegetation in the Lake Oswego Plants List; and
 - iii. All replacement vegetation used is listed as "native vegetation" in the Lake Oswego Plants List.

Staff Comment: The purpose of this amendment is to allow development which doesn't result in new structures (replacement of non-conforming structures are permitted, i.e., patio, deck), there is no removal of native vegetation, and any replacement vegetation is from the native plant list within the City's Plants List.

4. Wetlands, stream corridors, and tree groves that are not contained within a RP or RC District shall not be subject to the regulations of this Article. However, an application for development that impacts a stream corridor or wetland may still be subject to state or federal wetland or stream regulations. Notice of such applications will be sent to the Division of State Lands (DSL) or the Army Corp. of Engineers.

5. In addition to the notification required for the particular development by LOC Articles 50.80 - 50.82, the City shall notify the Oregon Division of State Lands and the Army Corp. of Engineers upon receipt of a complete application for development, change or intensification of use within an RP District that impacts a wetland or stream corridor.

6. Mitigation Required for Violation. If development occurs in violation of this Article, the violator shall not only be subject to any and all enforcement and penalties that can be brought or imposed for violation of this Code, he or she shall be responsible for mitigating any damage caused by the violation to a protected resource pursuant to LOC 50.16.100 to 50.16.110.

Section 50.16.020 Criteria for Designating Property Within An Overlay District

~~1.1~~ **Goal 5 Analysis Required.** In order to include an individual property, a portion of a property, or a group of properties within an RP or RC Overlay District, the reviewing body shall find that the resource on the site or sites has been ranked and evaluated through an Economic, Social, Environmental, and Energy (ESEE) Process analysis ~~Analysis~~ in compliance with Statewide Land Use Planning Goal 5 and merits a Resource Protection (RP) and/or Resource Conservation (RC) designation.

This uses the defined term in LOC 50.02.005:

ESEE Process Analysis. The Economic, Social, Environmental, and Energy Analysis required under Statewide Land Use Planning Goal 5. The purpose of the ESEE analysis is to balance the relative value of an inventoried natural resource against conflicting uses and thereby determine an appropriate level of protection through land use regulations. The ESEE Analysis that formed the factual basis for the Sensitive Lands Program (LOC Article 50.16) and was used initially to designate properties for protection under the program is the Lake Oswego Resource Areas Report and ESEE Analysis, dated April 1, 1997, as revised on July 15, 1997.

2. Procedure. An RP or RC designation may be imposed, modified or removed pursuant to either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties. ~~The~~ A group of properties shall be processed as a legislative Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1),

and former A single property the latter shall be processed as a quasi-judicial Comprehensive Plan Map and Zoning Map amendment pursuant to LOC 50.75.005 (2).

"Former" and "later" are thought to be confusing.

3. Addition of Resources.

a. Submission of Application. Within 90 days of receiving evidence that a previously unmapped resource is likely to meet the criteria for resource designation, the City Manager shall submit an application for designation of resource to the reviewing authority pursuant to subsection (2) above.

b. Criteria. The reviewing authority shall adopt a Comprehensive Plan Map and Zoning Map Amendment to add the resource to the Sensitive Lands Atlas, and designate the RP District or RC District, as applicable, if the reviewing authority finds that the proposed resources are "significant resources," by meeting the requirements of either subsection (5) [stream or wetland] or subsection (6) [tree grove], then the ESEE analysis shall be applied, and if it is found that the resources are required to be protected, the Comprehensive Plan Map and Zoning Map Amendments to add the resource to the Sensitive Lands Atlas, and designation of the RP District or RC District shall be applied.

Title 3, which implements Goal 5, requires a mechanism to update resource maps. LOC 50.16.025 "Removing an Overlay District Designation" already provides for removal of resource as a quasi-judicial Comp Plan amendment; and the amendment to LOC 50.16.025 below will also allow "delineate to zero," via a ministerial process. Adding resource is problematic. It requires a Comprehensive Plan amendment, and there are no current procedures or timelines for adopting changes.

54: Methodologies. The methodologies for determining whether or not the criteria for designation of a resource has been met shall be the following:

a. Lake Oswego ESEE Process Analysis Methodology to be Utilized. The City shall determine:

i. Tree Grove: The Wildlife Habitat Assessment Score (HAS): or
ii. Stream Corridors and Wetlands: The Oregon Freshwater Wetland Assessment Methodology utilize the Wildlife Habitat Assessment Score (HAS) and Methodology developed in the City of Lake Oswego Resource Areas Report and ESEE Process Analysis for evaluation and comparison of inventoried sites pursuant to Statewide Land Use Planning Goal 5. The HAS is a numerical ranking applied in an ESEE Inventory which represents the relative wildlife values of a given natural resource site. Six features are evaluated to determine the total Wildlife Habitat Assessment Score: Water; Food; Cover; Disturbance; Linkage; Unique Features. In addition, the City shall consider the scenic value of the resource pursuant to the methodology established in the ESEE Process Analysis. See Appendix 50.16-A.

Comment [EPB1]: PC Comment: Should this have a specific year reference?

This change, along with the amendment in subsection 6 below, makes it clear that the HAS score is determined based upon the methodology used in the 1994/95 Analysis, not that the then Analysis and inventory is limited to what the report then found. Particularly in cases involving annexations, the 1994/95 Analysis did not include all of the properties within the USB that are now seeking annexation.

The Oregon Freshwater Wetland Assessment Methodology reference is to address subsection (b) below.

b. (5) Use of Oregon Freshwater Wetland Assessment Methodology



CITY OF LAKE OSWEGO

COUNCIL REPORT

TO: Alex McIntyre, City Manager

FROM: Dennis Egner, AICP
Long-Range Planning Manager

Jonna Papaefthimiou, AICP
Natural Resources Planner

SUBJECT: Housekeeping Changes to the Community Development Code (LU08-0052)
and Housekeeping and Substantive Changes to the Sensitive Lands
Ordinance (LU08-0051)

DATE: October 6, 2008

ACTION

No action is required; this item is for information only.

INTRODUCTION

The purpose of the study session is to update the Council on two sets of proposed amendments to the Community Development Code. The Planning Commission is currently holding hearings on the proposed amendments. Based on their work to date, staff expects that the Commission will forward a recommendation on Sensitive Lands changes to the Council in November. Depending on their progress, a recommendation on Housekeeping changes should follow soon thereafter.

BACKGROUND

On September 22, the Planning Commission opened public hearings on a set of amendments intended to update the Community Development Code (CDC). The last similar update to the code was in 2004. Since that time, staff has become aware of a number of changes that are needed to correct, clarify, and improve the code. The City Attorney's office has worked in collaboration with Planning staff to draft the proposed changes. To facilitate the review of a large volume of amendments, the Planning Commission has divided the changes into component parts: General Housekeeping, Housekeeping with Policy Implications, and Sensitive Lands. The code update package brought to the public hearing also included the infill recommendations made by the Infill Task Force. The Planning Commission is currently reviewing Sensitive Lands and General Housekeeping changes. The Sensitive Lands amendments are expected to be completed in

November. The housekeeping and infill amendments are expected to be completed and ready for Council Review in early 2009.

DISCUSSION

In September, Staff held two Public Open House events to provide information about proposed Housekeeping and Sensitive Lands changes. The Planning Commission has subsequently devoted two meetings to hearings on the proposed changes, with additional deliberation set for October 13th. The purpose of this study session is to update the Council regarding this process and to provide the Council with information about the first two parts of the code update.

Sensitive Lands Changes (LU 08-0051)

Proposed changes to the Sensitive Lands Code fall into the categories described below. A summary table and narrative description of all the changes is provided as attachment 1.

1. Changes to comply with Metro Titles 3 and 13

In 1998, Metro adopted Title 3, which implements State Land Use Goal 6, "Air, Water, and Land Resources Quality." The City is not formally in compliance with Title 3, but Metro staff generally believes that the City could satisfy the "Substantial Compliance" requirements with only minor changes; for this reason, Metro has not initiated any enforcement actions up to now.

In 2006, Metro adopted Title 13 and gave jurisdictions until January 2009 to comply with that Title. Title 13 implements State Land Use Goal 5, "Natural Resources, Scenic and Historic Areas, and Open Spaces." Title 13 is less prescriptive than Title 3, and it allows cities to design their own compliance programs within the guidelines of the ordinance. However, Title 3 compliance is a prerequisite for compliance with Title 13. Therefore, the City of Lake Oswego must now work towards both Title 3 and Title 13 compliance. Most of the changes related to map administration and some efforts at increased resource protection are proposed to comply with these Titles.

2. "Housekeeping" changes that define terms and clarify practices already in place

These are the bulk of the changes, and they occur in all the subsections of the code. A very small number actually correct scrivener's errors. Most are proposed because the code is not entirely descriptive, or seems to be contradictory (e.g. to prohibits something specifically allowed elsewhere). In these cases, Planning staff and the City Attorney's office have necessarily made an interpretation as to the intended meaning. These working understandings are proposed to be formally recorded through housekeeping changes. Housekeeping changes will not impact current practices; they will merely record them for consistency and transparency. If any proposed housekeeping changes are not adopted, a different, substantive change should be proposed to replace staff's current understanding; otherwise the practices described in "housekeeping" will remain in place.

3. Substantive changes intended to improve the ordinance by:

Simplifying the review process for very small developments

The City's code now sets a high standard, requiring review of all land disturbance within a resource area. This means that projects which would be considered exempt in another district – repair of existing structures, pathways, plantings to improve water quality – require review in a formal land-use process when they take place in or near designated sensitive lands. Staff and landowners generally find the review process burdensome for very small projects. In these cases the review also does not provide much environmental benefit, except the opportunity to discuss the project and recommend best construction practices to the builder (e.g. recommend native plants, describe how to install temporary protective fencing). Taken together, this group of changes eliminates formal review of very small projects, and simply requires landowners to employ best practices. With these changes, the City would continue to provide information and code enforcement to ensure that best practices were employed.

Providing more descriptive maps and diagrams

Administration of the code depends upon the application of diagrams that show where resources are located and how their boundaries are determined. The proposed changes would not change the meaning of these visual aids, but they would provide more realistic pictures and descriptive text to make the diagrams more understandable. These changes would also amend administration of the atlas so that it would show not only streams, wetlands, and tree groves, but also the required buffers around streams and wetlands, in order to give a more realistic impression of the area affected by the code.

Improving resource protection on all resource lots

These proposed changes are intended to strengthen resource protection, primarily by closing perceived “loopholes” where the map or code allows development within a resource area that is not in keeping with the broader goal of resource protection.

Allowing water-related uses along the Willamette and Tualatin Rivers

It is likely that the City will apply a resource protection overlay to the Willamette River when the Sensitive Lands Atlas is updated, because Metro requires additional protections along the Willamette to comply with Title 3. When this change occurs, the code in place at that time will apply to the river. Before this change takes place, some code changes are needed to allow reasonable recreational and water-dependent uses along the river.

Housekeeping Changes (LU 08-0052)

Proposed housekeeping amendments affect most sections of the Code. The majority of these changes serve to clarify and record staff-level interpretations of ambiguously worded sections, to correct redundant or repetitive language, to provide more descriptive definitions, and to eliminate both “loopholes” that permit development not in keeping with the intent of a section and “knotholes” that apparently prohibit development for inconsequential reasons. The changes address a variety of goals, but taken as a whole, their primary purpose is to make the Community Development Code more comprehensible, internally consistent, and therefore more useful to

builders, residents, and city staff. A narrative that summarizes all the proposed housekeeping changes is provided as attachment 2.

RECOMMENDATION

Review the general content of the proposed changes, and identify and discuss any areas of concern.

ATTACHMENTS

- 1. Description of Proposed Sensitive Lands Amendments**
- 2. Description of Proposed Housekeeping Amendments**

ATTACHMENT 1:

**SUMMARY OF PROPOSED AMENDMENTS
TO THE LAKE OSWEGO SENSITIVE LANDS CODE (LOC 50.16)**

Summary Table

This table lists each proposed change to chapter 50.16 and its primary purpose. The following pages provide a narrative description of each change.

CODE SECTION	TITLE 3/ TITLE 13	HOUSE- KEEPING	SIMPLIFY REVIEW	IMPROVE MAPS	IMPROVE PROTECTIO NS	WILLAMETT E RIVER USES
50.16.005 (1)	X					
50.16.005 (2)				X		
50.16.005 (3)		X		X		
50.16.015 (2) (A)		X				
50.16.015(2)(A)(I-III)		X				
50.16.015(2)(B)					X	
50.16.015(3)(C)					X	
50.16.020 (1)		X				
50.16.020 (2)		X				
50.16.020 (3)(A)	X					
50.16.020 (4)(A)		X				
50.16.020 (4)(B)	X					
50.16.020 (5)(C)	X					
50.16.020 (5)(D)	X					
50.16.020 (6)	X					
50.16.025 (1)(C)	X					
50.16.025 (4)		X				
50.16.030 (1)(I-IV)			X			
50.16.030 (2)			X			
50.16.035(1)(A)(I)		X				
50.16.035(1)(A)(II)					X	
50.16.035(1)(A)(III)					X	
50.16.035(1)(B)		X				
50.16.035(1)(B)(II)	X					
50.16.035(1)(C)					X	
50.16.035(2)		X				
50.16.035 (3)				X		
50.16.035(4)(B)			X			
50.16.040 (1)		X				
50.16.040(1)(A)			X			
50.16.055 (3)(E)					X	
50.16.055(3)(G)		X				
50.16.055(4)(B)					X	
50.16.060(2)		X				
50.16.060(3)(A)(I)		X				
50.16.060(3)(A)(II)(A-C)			X			

CODE SECTION	TITLE 3/ TITLE 13	HOUSE- KEEPING	SIMPLIFY REVIEW	IMPROVE MAPS	IMPROVE PROTECTIO NS	WILLAMETT E RIVER USES
50.16.060(3)(A)(II)(D)		X				
50.16.060(3)(A)(III)(A)		X				
50.16.060(3)(A)(III)(B)		X				
50.16.060(3)(A)(III)(D)		X				
50.16.060(3)(C)		X				
50.16.060(3)(D)		X				
50.16.060(3)(E)		X				
50.16.060(3)(F)		X				
50.16.060(3)(G)(2)		X				
50.16.060(3)(K)	X					
50.16.060(4)	X					
50.16.065		X				
50.16.070(1)(C)					X	
50.16.070(3)					X	
50.16.070(4)		X				
50.16.075(1)		X				
50.16.075(2)(C)		X				
50.16.075(2)(E)		X				
50.16.075(2)(A)(II)		X				
50.16.075(s)(A)(III)		X				
50.16.075(2)(A)(IV)		X				
50.16.075(2)(A)(V)(A)(1)		X				
50.16.075(2)(A)(V)(A)(2)		X				
50.16.075(2)(A)(V)(B)(2)					X	
50.16.075(2)(A)(V)(C)		X				
50.16.075(2)(A)(V)(D)		X				
50.16.075(2)(A)(V)(E)						X
50.16.075(2)(A)(VII)		X				
50.16.075(2)(A)(VII)	X					
50.16.075(2)(A)(VIII)		X				
50.16.075(3)	X					
50.16.075(4)		X				
50.16.085			X		X	
50.16.090(1)(D)					X	
50.16.090(4)		X				
50.16.095		X				
50.16.095(1)		X				
50.16.095(1)(A)		X				
50.16.095(1)(B)		X				
50.16.095(6)		X				

CODE SECTION	TITLE 3/ TITLE 13	HOUSE- KEEPING	SIMPLIFY REVIEW	IMPROVE MAPS	IMPROVE PROTECTIO NS	WILLAMETT E RIVER USES
50.16.095(7)		X				
50.16.105					X	
50.16.110(1)(A)		X				
50.16.110(1)(B)		X				
50.16.110(8)		X				
APPENDIX		X		X		

Narrative Description of Proposed Changes

Changes to comply with Metro Titles 3 and 13

The following changes have been discussed with Metro staff and are proposed to comply with Title 3 and 13:

Section 50.16.005 Overview

Subsection (1) clarifies additional purposes of the Sensitive Lands Ordinance, to: protect human health, protect wildlife habitat, comply with State Land Use Goals 5 and 6, comply with Metro Code sections 3 and 13, and comply with Federal laws such as the Clean Water Act. Since the City is using this code to comply with State Land Use Goals and Metro titles, it must state that in the purpose.

Section 50.16.020 Criteria for Designating Property Within an Overlay District

Changes to this section would expand the definition of "significant resource" to include all perennial streams and all wetlands that provide significant water-quality and flood-control functions, even if they are not particularly valuable wildlife habitat. This section would also provide a mechanism and timeline (90 days) for initiating map updates when errors or omissions are found. These changes are required to comply with Metro Title 3. In detail:

Subsection (3)(a) requires the City to initiate a map change within 90 days of receipt of evidence that a potentially significant resource has been omitted from maps.

Subsection (4)(a) clarifies that any correct resource assessment, not just the 1994 data, can be used to designate resources.

Subsection (4)(b) and subsection (5)(c) adopts the Oregon Freshwater Assessment Methodology as a method of identifying significant wetlands. This is a widely-used environmental assessment method developed by the Oregon Department of State Lands; it identifies whether a wetland is providing water filtration and flood storage. Because the City uses the Sensitive Lands Code to protect both wildlife habitat and water quality, it needs a mechanism to evaluate water quality functions.

Subsection (5)(d) indicates that streams that flow year-round should be considered significant, and evaluated through the ESEE process. Perennial streams are important in maintaining minimum flow levels and reducing summer temperatures in fish-bearing streams lower in the watershed, even if some upper reaches have low habitat value. Metro requires this.

Subsection (6) again clarifies that any correct Habitat Assessment Score, not just the 1994 inventory, is applicable.

Section 50.16.025 Removing an Overlay District Designation

This section provides an opportunity for the City to remove an incorrect resource designation; it is the corollary to the ability to designate a new resource. Specifically:

Subsection (1) (c) allows a designation to be removed if the applicant (which can be the City) shows that it was mapped in the wrong location.

Section 50.16.035 Delineation of Resources

Subsection (1)(b)(ii) says that when a wetland exists adjacent a steep slope, the resource buffer will be applied from the top of the slope, similar to the top of bank for a stream.

50.16.060 RC District Development Standards

Subsection (3)(k) prohibits hazardous materials storage in RC (tree grove) areas, except in quantities for household use. This has not been a particular problem in Lake Oswego, but this protection is required to comply with Metro's Title 3.

50.16.060 RC District Development Standards

Subsection (4) is a new section that would require invasive plant removal whenever new structures are built near protected tree groves. Invasive plants represent a significant and well-recognized threat to the ecological health of natural areas. Development activities such as soil disturbance, changes in hydrology, removal of part of a tree grove, and dumping of landscape debris all stress plant populations and increase vulnerability to invasive plant infestations. This new section would require mitigation for these impacts through the removal of invasive plants from adjacent natural areas during development. This change is an innovative measure to help the City comply with Metro's Title 13.

The measure would be triggered whenever development occurred within 100 feet of a protected tree grove. The developer would be required to remove invasive plants from an area twice as large as the disturbance area of the development. Development area is defined as "area covered by buildings, roads, parking areas, patios, decks, paved walkways, sport courts, and swimming pools." It specifically excludes "landscaped areas" and "athletic fields."

Section 50.16.075 RP District Development Standards

Subsection (2)(a)(vii) prohibits hazardous materials storage in RP (water resource) areas except in quantities for household use.

Section 50.16.075 RP District Development Standards

Subsection (3) requires invasive plant removal when new structures are built within 100 feet of RP (water resource) areas; the intent and application is the same as for development near RC (tree grove) areas.

Section 50.16.110 Mitigation Requirements

Subsection (8) adds invasive plant removal as a mitigation measure consistent with 50.16.060 and 50.16.075, described above.

Housekeeping changes

The changes shown here are all strictly housekeeping, e.g. they will not affect the way the code is applied, but will only serve to correct apparent errors and record and clarify existing practices:

Section 50.16.005 Overview

Section (3) corrects the scale of maps (an error).

Section 50.16.015 Applicability

Subsection (2)(a)(i) and (ii) and (iii) adjusts the boundaries within which development is reviewed. The City regulates development 40 feet from water resources and 5 feet from tree groves; therefore, the City should review proposed development within this area to ensure it complies with the regulations. As stated, the land area that triggers development review is slightly less than the area regulated under that review (an apparent error).

Section 50.16.020 Criteria for Designating Property Within an Overlay District

Subsection (1) and (2) explain acronyms and eliminate a confusing use of "former" and later."

Section 50.16.025 Removing an Overlay District Designation

Subsection (4) allows an applicant to effectively remove a resource designation by delineating a resource as having zero land area (non-existent). Landowners must have a way to apply for map corrections on individual tax lots. "Mapping-to-zero" to zero is the method that has been used up to now.

Section 50.16.035 Delineation of Resources

Subsection (1)(a)(i) says that a stream or wetland itself cannot also be considered a tree grove, but the resource buffer may contain a tree grove. The code does not explicitly allow or disallow using water resource buffer as part of a required tree grove; staff have interpreted it as being allowed, since the stream buffer may also protect trees, and if it were not counted as tree protection area, more lots would become totally encumbered.

Section 50.16.035 Delineation of Resources

Subsection (1)(b) eliminates the "equivalent methodology" option for delineating wetlands; the City always uses the process proscribed by the US Army Corps of Engineers.

Section 50.16.035 Delineation of Resources

Subsection (2) replaces "City Manager" with "Reviewing Authority," because the City Manager may delegate this authority to another person.

Section 50.16.040 Modifications to Dimensional Standards and Setbacks of the Underlying Zone

Subsection (1) replaces "building setbacks" with "yard setbacks" as this is the term used elsewhere in the code.

50.16.055 RC District Protection Areas

Subsection (3)(g) says the RCPA shall "consist of viable habitat" instead of "maintain viable habitat" because the word "maintain" seems to imply ongoing maintenance obligations. The

This spells out the acronym ESEE for clarity. The term is defined in LOC 50.02.005:

ESEE Process Analysis. The Economic, Social, Environmental, and Energy Analysis required under Statewide Land Use Planning Goal 5. The purpose of the ESEE analysis is to balance the relative value of an inventoried natural resource against conflicting uses and thereby determine an appropriate level of protection through land use regulations. The ESEE Analysis that formed the factual basis for the Sensitive Lands Program (LOC Article 50.16) and was used initially to designate properties for protection under the program is the Lake Oswego Resource Areas Report and ESEE Analysis, dated April 1, 1997, as revised on July 15, 1997.

2. Procedure. An RP or RC designation may be imposed, modified or removed pursuant to either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties. ~~The~~ A group of properties shall be processed as a legislative Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1), and ~~former~~ A single property ~~the latter~~ shall be processed as a quasi-judicial Comprehensive Plan Map and Zoning Map amendment pursuant to LOC 50.75.005 (2).

"Former" and "later" are thought to be confusing.

3. Addition of Resources.

a. Submission of Application. Within 90 days of receiving evidence that a previously unmapped resource is likely to meet the criteria for resource designation, the City Manager shall submit an application for designation of resource to the reviewing authority pursuant to subsection (2) above.

b. Criteria. The reviewing authority shall adopt a Comprehensive Plan Map and Zoning Map Amendment to add the resource to the Sensitive Lands Atlas, and designate the RP District or RC District, as applicable, if the reviewing authority finds that the proposed resources are "significant resources," by meeting the requirements of either subsection (5) [stream or wetland] or subsection (6) [tree grove], and if an ESEE analysis shows that the resources are required to be protected.

Title 3, which implements Goal 5, requires a mechanism to update resource maps. LOC 50.16.025 "Removing an Overlay District Designation" already provides for removal of resource as a quasi-judicial Comp Plan amendment; and the amendment to LOC 50.16.025 below will also allow "delineate to zero," via a ministerial process. Adding resource is problematic. It requires a Comprehensive Plan amendment, and there are no current procedures or timelines for adopting changes.

34. Methodologies. The methodologies for determining whether or not the criteria for designation of a resource has been met shall be the following:

a. Lake Oswego ESEE Process Analysis Methodology to be Utilized. The City shall determine:

- i. Tree Grove: The Wildlife Habitat Assessment Score (HAS); or
- ii. Stream Corridors and Wetlands: The Oregon Freshwater Wetland Assessment Methodology developed in the City of Lake Oswego Resource Areas Report and ESEE Process Analysis for evaluation and comparison of inventoried sites pursuant to Statewide Land Use Planning Goal 5. The HAS is a numerical ranking applied in an ESEE Inventory which represents the relative wildlife values of a given natural resource site. Six features are evaluated to determine



CITY OF LAKE OSWEGO COUNCIL REPORT

TO: Jack D. Hoffman, Mayor
Members of the City Council
Alex D. McIntyre, City Manager

FROM: Jonna Papaefthimiou, AICP, Natural Resources Planner

SUBJECT: Adoption of Ord. 2527, Amendments to Sensitive Lands Chapter of the Community Development Code; Adoption of Findings (LU 08-0051 (A))

DATE: 9 April 2009

ACTION

Move to adopt Ordinance 2527, which amends the Sensitive Lands Chapter of the Community Development Code.

INTRODUCTION/BACKGROUND

This memo provides final code language and findings for a decision on Ordinance 2527, changes to the Sensitive Lands Article of the Community Development Code.

The majority of the changes to the Sensitive Lands Article were recommended by the Planning Commission. These changes were proposed to correct and clarify existing language; make graphics easier to interpret; simplify the review of minor projects; and comply with Metro Titles 3 and 13. The Council studied the Commission recommendations on February 3 and February 17 and tentatively approved them on March 3, with the addition of a provision that specifically allows landowners to repair or rebuild a non-conforming home located in a resource area if it is destroyed by fire or natural disaster.

This report provides final code language and findings for adoption of Ordinance 2527, which was discussed in a public Hearing on March 3. It discusses and proposes language to identify when an owner may repair or rebuild a non-conforming house that has been destroyed by circumstances outside the owner's control, because this language was not presented at the previous Council hearing on this matter.

Code not within LOC Article 50.16. In order to utilize the rights granted by this subsection the reconstruction must be commenced within one year of the date of the damage and completed within two years of such date.

Section 6. Section 50.16.020 of the Lake Oswego Code is hereby amended as follows (new text shown in bold, double underlined type, deleted text shown in strikethrough type):

50.16.020 Criteria for Designating Property within an Overlay District.

1. Goal 5 Analysis Required. In order to include an individual property, a portion of a property, or a group of properties within an RP or RC Overlay District, the reviewing body shall find that the resource on the site or sites has been ranked and evaluated through an **Economic, Social, Environmental, and Energy (ESEE) Process Analysis** analysis in compliance with Statewide Land Use Planning Goal 5 and merits a Resource Protection (RP) and/or Resource Conservation (RC) designation.

2. Procedure. An RP or RC designation may be imposed, modified or removed pursuant to either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties. ~~The former~~ **A group of properties** shall be processed as a legislative Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1), and ~~the latter~~ **a single property** shall be processed as a quasi-judicial Comprehensive Plan Map and Zoning Map amendment pursuant to LOC 50.75.005 (2).

3. Addition of Resources.

a. Submission of Application. **Within 90 days of receiving evidence that a previously unmapped resource is likely to meet the criteria for resource designation, the City Manager shall submit an application for designation of resource to the reviewing authority pursuant to subsection (2) above.**

b. Criteria. **The reviewing authority shall adopt a Comprehensive Plan Map and Zoning Map Amendment to add the resource to the Sensitive Lands Atlas, and designate the RP District or RC District, as applicable, if the reviewing authority finds that the proposed resources are "significant resources," by meeting the requirements of either subsection (5) [stream or wetland] or subsection (6) [tree grove], and if an ESEE analysis shows that the resources are required to be protected.**

34. Methodologies. **The methodologies for determining whether or not the criteria for designation of a resource has been met shall be the following:**

a. Lake Oswego ESEE Analysis Methodology to be Utilized. The City shall determine:

i. Tree Grove: ~~utilize~~ **The Wildlife Habitat Assessment Score (HAS); or**

ii. Stream Corridors and Wetlands: **The Oregon Freshwater Wetland Assessment and Methodology developed in the City of Lake Oswego Resource Areas Report and ESEE Process Analysis for evaluation and comparison of inventoried sites pursuant to Statewide Land Use Planning Goal 5. The HAS is a numerical ranking applied in an ESEE Inventory which represents the relative wildlife values of a given natural resource site. Six features are evaluated to determine the total Wildlife Habitat Assessment Score: Water; Food; Cover; Disturbance; Linkage; Unique Features. In addition, the City shall consider the scenic value of the resource pursuant to the methodology established in the ESEE Analysis. See LOC Appendix 50.16-A.**

b. Oregon Freshwater Wetland Assessment Methodology. **The City shall utilize the then current Oregon Freshwater Wetland Assessment Methodology, as adopted by the Oregon Division of State Lands, to evaluate wetland sites with respect to water quality and hydrologic control functions.**

45. Applicability of RP Overlay District: The Resource Protection (RP) Overlay District shall protect environmentally significant stream corridors and wetlands. The following resources may be placed within the RP District: