Schwabe

Kenneth Katzaroff
Admitted in Washington and Oregon
D: 206-405-1985
C: 206-755-2011
KKatzaroff@SCHWABE.com

November 13, 2023

VIA E-MAIL

City of Gresham Planning Department
Gresham City Hall
1333 NW Eastman Parkway
Gresham, OR 97303-3825

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

Dear Planning Commission Members:

The purpose of this letter is to correct several statements made in the City of Gresham, City Attorney's office letter to this Commission, dated November 6, 2023. With all due respect to the City Attorney's office, the City Attorney is incorrect on the law.

Locally Significant Wetlands Rules

The City Attorney claims that it is relying upon the Locally Significant Wetland (LSW) Criteria found at OAR 141-086-0350(2)(b) to determine that the wetlands on the Veranda site are locally significant, and that the City has *discretion* to decide whether to even consider evidence that the wetlands do not provide water cooling. The City Attorney is incorrect.

OAR 141-086-0340(1) states that "LSW criteria are applied by the local government." OAR 141-086-0340(2)(b) makes it clear that functional assessments must be performed "prior to applying the LSW criteria[.]" OAR 141-086-0350(2)(b) then provides that wetlands are locally significant if they are within ¼ mile of a listed water body, unless evidence is presented that shows the wetland does not provide water quality improvements.

The City Attorney has interpreted this standard to mean that it is *required* to protect the wetland and that the City has *discretion* to review additional evidence. That interpretation is in direct conflict with OAR 141-086-3040(2), which clearly states that function and quality assessment information "is required *prior* to applying LSW criteria[.]" (Emphasis added).

Moreover, the City Attorney is incorrect that use of the word "may" in OAR 141-086-0350(2)(b) indicates that the City has discretion to review additional evidence. The Supreme Court of Oregon has recently affirmed the Court of Appeals findings that "may" can mean "shall" depending on the context of the legal document. *See Friends of Columbia Gorge, Inc., v.*

Columbia River Gorge Comm'n, 346 Or 415 (2009). In that case, the Supreme Court agreed that the context for the usage of the words "may" and "shall" must be reviewed. *Id*., at 426-427. Here, given that the LSW rule itself specifically states that quality assessments must be reviewed "prior to applying the LSW criteria", the City's interpretation that "may" provides the discretion its interpretation describes is clearly wrong.

Moreover, as will be detailed more in our expert testimony, the City is incorrect that the *wetland* can be determined to be locally significant as a result of *groundwater* located more than 12 inches below ground surface, which may provide a cooling benefit to Kelley Creek. A wetland cooling benefit is distinct from a groundwater cooling benefit. The rules are clear: a wetland can only be determined to be locally significant if *the wetland itself* provides a cooling benefit. OAR 141-086-0350(2).

Wetlands is defined in Oregon administrative rules to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." OAR 141-086-0330(8). This definition makes it clear that a wetland must include soils that are saturated or inundated *by* surface water or ground water. Thus, wetland hydrology is not the same as groundwater. More importantly, the locally significant wetland rule relates to *benefits of the wetland* on water bodies, and is silent on benefits provided by groundwater.

The City's interpretation of the LSW rules is clearly wrong. It makes a highly-selective and twisted review of the rules without giving effect to the entirety of the rules. The City's interpretation is indefensible and will not receive deference before LUBA or the courts.

Needed Housing Rules

The City Attorney's letter also claims the needed housing laws, including ORS 197.307(4), do not apply to the application because, it claims, the applicant chose to follow a path of discretionary code provisions instead of a clear and objective path under ORS 197.307(6). The City is incorrect.

The City claims that a "a master plan provides an alternative to complying with the clear and objective standards of the MDR-PV and LDR-PV zones[.]" However, that statement misconstrues (or misapplies) the code that was in effect at the time, under which the Veranda application is vested. Applicable GDC 4.1471 specifically requires master plan approval in advance of or concurrent with partition or subdivision approval – it was not optional or discretionary. And, while master plans can include refinement (as recognized by staff), the application did not *select* a discretionary path versus a clear and objective path; the code that applied at the time of application only included a single path. The City Attorney (and staff) ignores this reality. Moreover, the ESRA and LSW code are applicable criteria *in any instance*, so the City's argument is without merit.

Respectfully,

SCHWABE, WILLIAMSON & WYATT, P.C.

Kenneth Katzaroff

JKKA:aks

PDX\137484\266113\JKKA\40620762.1