

To: Ken Kataroff
From: Kevin McConnell, City Attorney
CC: Kathy Majidi, Environmental Program Manager; Jim Wheeler, Planning Manager
Date: March 1, 2023
Re: Leeper Development - Veranda at Pleasant Valley Subdivision
File No. SD/MIS 20-26000343 (MPLAN 21-00652)

Ken:

This memorandum is in response to your January 20, 2023, communication (Schwabe memo) regarding your client Leeper Development's application for Veranda at Pleasant Valley Subdivision (Veranda), which advances arguments as to why the City should rescind the finding of local significance for the Veranda wetlands.

After review of the "locally significant" analysis submitted by AKS (AKS memo) as well as the arguments advanced in the Schwabe memo, the record reflects that 1) the Veranda wetlands qualify as locally significant due to their proximity to a water quality-limited waterway and 2) the AKS memo did not provide any data conclusively demonstrating that the Veranda wetlands provide no water cooling benefit to Kelley Creek. The City's analysis is set out below.

I. Responses to Schwabe memo (Schwabe arguments in bold):

1. **The City's ESRA-PV code that requires buffering of wetlands found to be locally significant refers to state legislation that is "discretionary".** *City Finding:* The state language is not discretionary; the relevant OAR language provides for submission of data that documents an absence of water quality benefits from a given wetland. To date, no objective, evidentiary documentation (such as groundwater well logs or thermistor readings showing elevated temperatures in the direct surface connection between Wetland 1 and Kelley Creek) has been submitted to Gresham to demonstrate that the wetlands aren't providing a water cooling benefit.
2. **The City has not previously applied similar findings of local significance to unmapped wetlands found during the development process; nor has the City provided evidence that Kelley Creek is listed such that wetland proximity is relevant to local significance.** *City Finding:* As development applications involving previously unmapped wetlands have moved through the

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city planning process, Planning staff request review of DSL reviewed wetland delineations by Natural Resources Program staff to assess local significance or Title 3 status. Newly delineated wetlands within ¼ mile of a water quality impaired water have been consistently determined to be locally protected wetlands. City staff have, in meetings, phone calls, and in formal pre-application notes, provided commentary to the developer team starting in 2017 that there were apparent, extensive wetlands on the Veranda parcel and within the SE 190th Drive ditches that would meet locally significant wetland criteria due to proximity to a water quality impaired water. In June of 2022, as Planning staff anticipated questions from the developer team, Natural Resource staff provided to Planning correspondence from Oregon DEQ that Kelley Creek was listed as water quality impaired at the time of the Veranda application (December 22, 2020).

II. Responses to AKS memo (AKS arguments in bold):

1. **Kelley Creek was not 303(d) listed at the time of the Veranda subdivision/Master Plan submittal (December 22, 2020).** *City Finding:* Oregon DEQ staff in charge of the state's 303(d) listings and the state database/mapping of 303(d) waterbodies have reviewed the AKS memo and responded that Kelley Creek was specifically assessed, Kelley Creek derived data was included as part of the Johnson Creek Watershed Assessment Unit and was on the 303(d) for temperature at the time of Veranda submittal (per the 2018/2020 Integrated Report, effective November 12, 2020). Kelley Creek continues to be 303(d) listed-for temperature and additional parameters (per the 2022 Integrated Report, effective September 1, 2022).
2. **The Veranda wetlands do not exist on the landscape where there would be a subsurface subsurface/groundwater connection to Kelley Creek.** *City Finding:* Wetlands supported by shallow groundwater are prolific throughout the east buttes at equivalent, or even higher, elevations on the buttes. The archaic remnants of tile drains on the Veranda parcel are evidence of shallow groundwater presence in the areas of the delineated wetlands. Groundwater discharge on the east buttes follows topography towards creeks at the base of the buttes.
3. **Wetland 1 lacks surface connection to Kelley Creek.** *City Finding:* Wetland 1 and immediately adjacent areas discharge by surface and groundwater pathways to the ditch along the east side of 190th for extended periods after rain events, with cover provided by ditch vegetation, a culvert system, and woody vegetation along the surface discharge route.
4. **An ORWAP (functions and values) assessment was conducted on Wetland 1 and the results show a “lower” rating for water cooling by that wetland,**

thus it should not be considered locally significant. *City Finding:* ORWAP results were submitted in lieu of any data. ORWAP has never been deemed by the state to be relevant to the assessment of local significance of wetlands, nor is it a methodology that can demonstrate that the wetland provides NO water cooling benefit to Kelley Creek such that the wetlands should not be considered locally significant. Additionally, PHS reviewed the AKS's in ORWAP analysis for Wetland 1; PHS's ORWAP scorings result in Wetland 1 receiving a "Higher" rating for water cooling by Wetland 1.

5. **Mitigation options should include Foster Creek Mitigation Bank as it is located within the watershed scale (HUC) required by Gresham's ESRA-PV code. *City Finding:*** This is inaccurate. Kelley Creek is subwatershed of the Johnson Creek watershed (a 5th field HUC). Both are within the Lower Willamette 4th field HUC. The Foster Creek mitigation bank is within the Clackamas 4th field HUC; the Johnson Creek watershed is NOT part of the Clackamas River watershed. Per Metro Title 13 standards, and per Gresham code since 2009, impacts to locally significant/Title 3 protected wetlands cannot be mitigated outside of the 5th field HUC scale in order to protect the hydrologic functions of the local watersheds as required under the Clean Water Act components administered by Oregon DEQ.

I understand that you will be sending a final response to the City's staff report after receipt of this memo. The city will provide a more comprehensive response to the Schwabe and AKS memos in short order.