



MEMORANDUM

DATE: November 6, 2023
TO: Gresham Planning Commission
FROM: City of Gresham, City Attorney's Office
RE: Veranda Master Plan and Subdivision (SD/MIS 20-26000343 MPLAN 21-00652) Response to the Applicant's legal issues raised and materials submitted

The purpose of this memo is to provide the Planning Commission guidance on the legal issues raised at the October 23, 2023 hearing and in materials submitted by Schwabe on October 14, 2023 and October 23, 2023.

Burden of Proof and Planning Commission's Role

The applicant has the **burden of proof** to demonstrate that the application meets all of the applicable criteria.

This is a quasi-judicial application, so the Planning Commission must apply the evidence to the criteria like a jury in a trial. The Planning Commission is not in a policy-making or risk assessment role. To reach a decision, the Planning Commission must **interpret the approval criteria** and make a decision based upon **substantial evidence** after **weighing all evidence**.

Summary of Issues

On the issue of whether wetland #1 should not be considered a **locally significant wetland**, the applicant has the burden of proof to demonstrate that the wetland is not providing a cooling benefit to Kelley Creek. It is not staff's or the public's responsibility to demonstrate that it is providing a cooling benefit.

The issue ultimately is whether the applicant's documentation that wetland #1 does not provide a cooling benefit to Kelley Creek is credible and correct. If there are problems with the applicant's analysis, as GSI's October 31, 2023 report concludes, the Planning Commission could find that those issues undermine the credibility of the applicant's documentation and affects whether the applicant can carry its burden of proof to demonstrate that no cooling benefit is occurring.

On the issue of whether the City may apply discretionary approval criteria, or if only **clear and objective approval criteria** can apply, the applicant has not explained why the City’s application of the discretionary master plan criteria is unlawful when, as here, the applicant has chosen to pursue the alternative permitting path that allows greater flexibility.

**Locally Significant Wetland
Interpret the Approval Criteria: (OAR 141-086-0350(2)(b)).**

Wetland #1 meets the objective mandatory standards for being characterized as a locally significant wetland (LSW). The Planning Commission must interpret the “may” in the rule (attached to this memo) to determine whether the Planning Commission has the discretion to rely upon the objective criteria only and not consider documentation about the wetland’s contribution to water quality improvements, or if the Planning Commission is required to consider such documentation. The consequences of the interpretational question are:

- (1) If the Planning Commission interprets the “may” in the rule to mean that it is not required to consider documentation that could be relied upon to characterize wetland #1 as not being a LSW, then the Planning Commission’s analysis could end there. Or, the Planning Commission could voluntarily exercise its discretion and elect to consider documentation related to wetland #1 and find that it may not be a LSW.
- (2) If the Planning Commission considers documentation related to characterizing wetland #1 as not being a LSW, then it must weigh the documentation related to whether the wetland provides water quality improvements. Guidance for weighing evidence is provided below.

The City Attorney’s October 13, 2023 memo (Exhibit R) provides a detailed analysis of how the Planning Commission may interpret OAR 141-086-350(2)(b). Schwabe’s October 17, 2023 memo provides rulemaking history for the administrative rule.

The Planning Commission must apply OAR 141-086-0350(2)(b) to give effect to the agency’s intent in adopting that rule. In making this interpretation, the Planning Commission must first consider the text and context of the rule, as the best evidence of the agency’s intent. The text of OAR 141-086-0350(2)(b) is unambiguous. It provides that a local government “may” determine that a qualifying wetland is not LSW.

Second, the Planning Commission may also consider rulemaking history offered by the applicant, to the extent that the Planning Commission considers that regulatory history to be helpful to identify the meaning of the rule. However, rulemaking history cannot be relied upon to interpret a rule in a way that is contrary to its plain text.

The rulemaking history provided by the applicant does not change the City Attorney’s October 13, 2023 advice. The word “may” in the rule is permissive, meaning that the Planning Commission has the discretion to characterize a wetland as not being LSW, but the Planning Commission is not required to do so.

**Locally Significant Wetland:
Weigh the Evidence and Base the Decision on Substantial Evidence**

The Planning Commission must consider all evidence presented to it, and make its decision based upon “substantial evidence.” The Planning Commission is not required to accept any expert’s report or opinion without question or scrutiny. When there is conflicting evidence, as in this case, the Planning Commission must choose which evidence it will rely upon, and that choice must be one that a “reasonable person” could have made based upon all of the evidence in the record.

When evaluating conflicting evidence, the Planning Commission should consider:

- Whether the evidence addresses the applicable criteria;
- Whether there is a data gap either because the evidence is not responsive to the criteria or because it has been undermined by other evidence; and
- When there is conflicting evidence, which evidence is more credible or reliable.

Clear and Objective v. Discretionary Criteria

State law requires that the City apply only clear and objective standards, conditions and procedures regulating the development of housing, such as the Veranda subdivision application. ORS 197.307(4). State law *also* provides that an alternative process that includes discretionary criteria may be made available to an application for housing, so long as: the applicant retains the option of pursuing a clear and objective path, the density allowed is at or above the density allowed by that path, and the process complies with applicable statewide land use planning goals and rules. ORS 197.307(6).

Schwabe’s October 23, 2023 letter identifies approval criteria and findings in the October 5, 2023 staff report that it believes are not clear and objective and argues that those subjective standards cannot be a basis for denying the subdivision application. The City Attorney disagrees with Schwabe’s analysis and conclusion because it fails to address that the Veranda applicant has elected to pursue the alternative discretionary path, a master plan, for the subdivision. State law allows the City to apply discretionary approval criteria to the application for needed housing when, as here, the applicant chooses to pursue the alternative permitting path that allows greater flexibility.

As detailed in the October 5, 2023 staff report, the subject property is zoned MDR-PV and LDR-PV. The development standards in the MDR-PV and LDR-PV zone and the City’s subdivision process are clear and objective, in compliance with state law. However, the proposed subdivision does not comply with the development standards in the MDR-PV and LDR-PV zone when those zones’ boundaries are applied. Instead, the applicant has elected to rely upon the

flexibility of refining the Sub-districts boundaries provided by the master plan.¹

As explained in the October 5, 2023 staff report:

The master plan provides an alternative to complying with the clear and objective standards of the MDR-PV and LDR-PV zones, and state law allows such an alternative process to include standards that are not clear and objective so long as the applicant retains the option of pursuing a clear and objective path, the density allowed is at or above the density allowed by that path, and the process complies with applicable statewide land use planning goals and rules. ORS 197.307(6). The Pleasant Valley master plan meets the criteria in ORS 197.307(6). The applicant has elected to pursue refinement of the Sub-districts rather than strictly applying the Sub-district boundaries, the allowed density is preserved, and the master plan process complies with all applicable law. Accordingly, the discretionary criteria in the master planning section of the Code may be applied to the proposal.

¹ The Gresham Development Code that applies to this application provides the discretionary path. The Verenda application opted-in to the discretionary path pursuant to GDC 4.1470(B) and 4.1472.

Attachment: OAR 141-086-0350(2)(b)

As relevant to this application, DSL's rule provides:

OAR 141-086-0350(2)(b)

Locally Significant Wetland Criteria

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

(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 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)."

Emphasis added.