

120 DAYS = N/A
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DATE MAILED: 8/18/2009



CITY OF TIGARD

Washington County, Oregon

NOTICE OF FINAL ORDER BY THE CITY COUNCIL

Case Number:	DEVELOPMENT CODE AMENDMENT (DCA) 2008-00005
Case Name:	SENSITIVE LANDS PERMIT REQUIREMENTS
Applicant's Name/Address:	City of Tigard 13125 SW Hall Boulevard Tigard, OR 97223-8189
Owner's Names/Addresses:	N/A
Address/Location of Property:	Citywide
Tax Map/Lot Nos.:	N/A

A FINAL ORDER INCORPORATING THE FACTS, FINDINGS AND CONCLUSIONS **APPROVING** A REQUEST FOR A **DEVELOPMENT CODE AMENDMENT (ORDINANCE NO. 09-11)**.

THE CITY OF TIGARD **PLANNING COMMISSION** AND CITY COUNCIL HAVE REVIEWED THE APPLICANT'S PLANS, NARRATIVE, MATERIALS, COMMENTS OF REVIEWING AGENCIES, THE PLANNING DIVISION'S STAFF REPORT AND RECOMMENDATIONS FOR THE APPLICATION DESCRIBED IN FURTHER DETAIL IN THE STAFF REPORT. THE **PLANNING COMMISSION** HELD A PUBLIC HEARING TO RECEIVE TESTIMONY ON **FEBRUARY 23, 2009 AND APRIL 6, 2009** FOR THE PURPOSE OF MAKING A RECOMMENDATION TO THE CITY COUNCIL ON THE REQUEST. THE **CITY COUNCIL** ALSO HELD A PUBLIC HEARING TO RECEIVE TESTIMONY ON **MAY 12, 2009, JULY 14, 2009 AND AUGUST 11, 2009** PRIOR TO MAKING A DECISION ON THE REQUEST. THIS DECISION HAS BEEN BASED ON THE FACTS, FINDINGS AND CONCLUSIONS CONTAINED WITHIN THIS FINAL ORDER.

Subject: ➤ A Community Development Code Amendment amending Section 18.775.070.B.5, removing a criterion which prohibits pathways located within or adjacent to the floodplain to be below the elevation of the average annual flood and, instead; require that pedestrian/bicycle pathway projects within the floodplain include a wildlife habitat assessment that shows the proposed alignment minimizes impacts to significant wildlife habitat while balancing the community's recreation and environmental educational goals. **At the August 11, 2009 public hearing, the Council approved the subject application as amended.**

ZONE: Citywide. **APPLICABLE REVIEW CRITERIA:** The Statewide Planning Goals and Guidelines adopted under Oregon Revised Statutes Chapter 197 [Goal 1, Public Involvement; Goal 2, Land Use Planning; Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces; Goal 7, Areas Subject to Natural Hazards; Goal 8, Recreational Needs]; Applicable federal [FEMA] or state statutes or regulations; Applicable METRO regulations [Metro Urban Growth Management Functional Plan, Title 3, Water Quality and Flood Management, and Title 13, Nature in Neighborhoods]; Applicable Tigard Comprehensive Plan Goals [Goal 1, Public Involvement; Goal 2, Land Use Planning; Goal 5, Natural Resources and Historic Areas; Goal 7, Hazards; Goal 8, Parks, Recreation, Trails, and Open Space]; Applicable provisions of the City's implementing ordinances [TDC Chapters 18.380, 18.390 and 18.775].

Action: ➤ Approval as Amended Approval with Conditions Denial

Notice: Notice was published in the newspaper, posted at City Hall and mailed to:
 Affected Government Agencies Interested Parties

Final Decision:

THIS IS THE FINAL DECISION BY THE CITY AND IS EFFECTIVE ON SEPTEMBER 10, 2009.

The adopted findings of fact, decision and statement of conditions can be obtained from the City of Tigard Planning Division, Tigard City Hall, 13125 SW Hall Boulevard, Tigard, Oregon.

Appeal: A review of this decision may be obtained by filing a notice of intent with the Oregon Land Use Board of Appeals (LUBA) within 21 days according to their procedures.

Questions: If you have any questions, please call the City of Tigard Planning Division or the City Recorder at (503) 639-4171.

CITY OF TIGARD, OREGON
TIGARD CITY COUNCIL
ORDINANCE NO. 09- 11

AN ORDINANCE AMENDING THE TIGARD COMMUNITY DEVELOPMENT CODE SECTION 18.775.070.B.5, REMOVING A CRITERION WHICH PROHIBITS PATHWAYS LOCATED WITHIN OR ADJACENT TO THE FLOODPLAIN TO BE BELOW THE ELEVATION OF THE AVERAGE ANNUAL FLOOD AND, INSTEAD; REQUIRE THAT PEDESTRIAN/BICYCLE PATHWAY PROJECTS WITHIN THE FLOODPLAIN INCLUDE A WILDLIFE HABITAT ASSESSMENT THAT SHOWS THE PROPOSED ALIGNMENT MINIMIZES IMPACTS TO SIGNIFICANT WILDLIFE HABITAT WHILE BALANCING THE COMMUNITY'S RECREATION AND ENVIRONMENTAL EDUCATIONAL GOALS. (DCA2008-00005), AS AMENDED*

WHEREAS, the City's Planning Division has requested to amend Chapter 18.775 - Sensitive Lands of the Tigard Development Code to remove a criterion which prohibits pathways located within or adjacent to the floodplain to be below the elevation of the average annual flood and, instead; require that pedestrian/bicycle pathway projects within the floodplain include a wildlife habitat assessment that shows the proposed alignment minimizes impacts to significant wildlife habitat while balancing the community's recreation and environmental educational goals; and

WHEREAS, notice was provided to the Department of Land Conservation and Development 45 days prior to the first evidentiary public hearing; and

WHEREAS, the Tigard Planning Commission held public hearings on February 23, 2009 and April 6, 2009, and recommended approval of the proposed amendment, as amended to require a wildlife assessment to ensure that the proposed alignment minimizes impacts to significant wildlife habitat; and

WHEREAS, notice of the public hearings was published in the Tigard Times Newspaper at least 10 business days prior to the public hearings; and

WHEREAS, the Tigard City Council has considered applicable Statewide Planning Goals and Guidelines adopted under Oregon Revised Statutes Chapter 197; any federal or state statutes or regulations found applicable; any applicable Metro regulations; any applicable Comprehensive Plan Policies; and any applicable provisions of the City's implementing ordinances; and

WHEREAS, the City Council has found the following to be the only applicable review criteria:
The Statewide Planning Goals and Guidelines adopted under Oregon Revised Statutes Chapter 197 [Goal 1, Public Involvement; Goal 2, Land Use Planning; Goal 5, Natural Resources, Scenic and Historic Areas, and Open Spaces; Goal 7, Areas Subject to Natural Hazards; Goal 8, Recreational Needs]; Applicable federal [FEMA] or state statutes or regulations; Applicable METRO regulations [Metro Urban Growth Management Functional Plan, Title 3, Water Quality and Flood Management, and Title 13, Nature in Neighborhoods]; Applicable Tigard Comprehensive Plan Goals [Goal 1, Public Involvement; Goal 2, Land Use Planning; Goal 5, Natural Resources and Historic Areas; Goal 7, Hazards; Goal 8, Parks, Recreation, Trails, and Open Space]; Applicable provisions of the City's implementing ordinances [TDC Chapters 18.380, 18.390 and 18.775].

*City Recorder's Note, The motion adopting Ordinance No. 09-11 was: "Motion by Councilor Buehner, seconded by Councilor Webb, for adoption of Ordinance No. 09-11, including de minimis changes substituting "wildlife habitat assessment" for "wildlife assessment" and including, "Pedestrian/bicycle pathway projects..." and also including Mr. Harper's memo dated August 11, 2009, as part of the findings." Mr. Harper's memo is on file in the City Recorder's office as part of the August 11, 2009 Council meeting packet materials for Agenda Item No. 8.

WHEREAS, the Tigard City Council held public hearings on May 12th, July 14th, and August 11, 2009 to consider the proposed amendment; and

WHEREAS, the Tigard City Council has determined that the proposed development code amendment is consistent with the applicable review criteria, and that approving the request would be in the best interest of the City of Tigard.

NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1: The specific text amendment attached as "EXHIBIT A" to this Ordinance is hereby adopted and approved by the City Council.

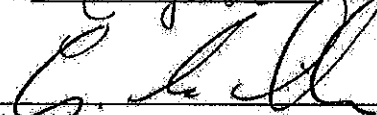
SECTION 2: The findings in the June 29, 2009 Supplemental Staff Report to the City Council, City Attorney's Supplemental Findings (Amended July 22, 2009), Minutes of the February 23, 2009 and April 6, 2009 Planning Commission hearings, and the Minutes of the May 12th, July 14th, and August 11th 2009 Council hearings are hereby adopted in explanation of the Council's decision.

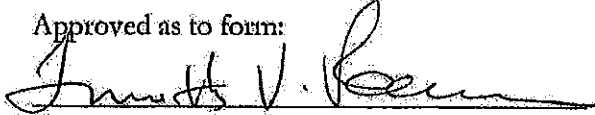
SECTION 3: This ordinance shall be effective 30 days after its passage by the Council, signature by the Mayor, and posting by the City Recorder.

PASSED: By UNANIMOUS vote of all Council members present after being read by number and title only, this 11th day of August, 2009.


Catherine Wheatley, City Recorder

APPROVED: By Tigard City Council this 11th day of August, 2009.


Craig Dirksen, Mayor

Approved as to form:

City Attorney

August 11, 2009
Date

EXHIBIT A

DCA2008-00005

SENSITIVE LANDS PERMIT REQUIREMENTS

This text amendment employs the following formatting:

~~Text~~ - Text to be removed

Text - Text to be added

18.775.070 Sensitive Land Permits

A. ~~Permits required.~~ An applicant, who wishes to develop within a sensitive area, as defined in Chapter 18.775, must obtain a permit in certain situations. Depending on the nature and intensity of the proposed activity within a sensitive area, either a Type II or Type III permit is required, as delineated in Sections 18.775.020.F and 18.775.020.G. The approval criteria for various kinds of sensitive areas, e.g., floodplain, are presented in Sections 18.775.070.B – 18.775.070.E below.

B. ~~Within the 100-year floodplain.~~ The Hearings Officer shall approve, approve with conditions or deny an application request within the 100-year floodplain based upon findings that all of the following criteria have been satisfied:

1. Land form alterations shall preserve or enhance the floodplain storage function and maintenance of the zero-foot rise floodway shall not result in any encroachments, including fill, new construction, substantial improvements and other development unless certified by a registered professional engineer that the encroachment will not result in any increase in flood levels during the base flood discharge;
2. Land form alterations or developments within the 100-year floodplain shall be allowed only in areas designated as commercial or industrial on the comprehensive plan land use map, except that alterations or developments associated with community recreation uses, utilities, or public support facilities as defined in Chapter 18.120 of the Community Development Code shall be allowed in areas designated residential subject to applicable zoning standards;
3. Where a land form alteration or development is permitted to occur within the floodplain it will not result in any increase in the water surface elevation of the 100-year flood;
4. The land form alteration or development plan includes a pedestrian/bicycle pathway in accordance with the adopted pedestrian/bicycle pathway plan, unless the construction of said pathway is deemed by the Hearings Officer as untimely;
5. ~~The plans for the pedestrian/bicycle pathway indicate that no pathway will be below the elevation of an average annual flood.~~ ***Pedestrian/bicycle pathway projects within the floodplain shall include a wildlife habitat assessment that shows the proposed alignment minimizes impacts to significant wildlife habitat while balancing the community's recreation and environmental educational goals.***
6. The necessary U.S. Army Corps of Engineers and State of Oregon Land Board, Division of State Lands, and CWS permits and approvals shall be obtained; and
7. Where land form alterations and/or development are allowed within and adjacent to the 100-year floodplain, the City shall require the consideration of dedication of sufficient open land area within and adjacent to the floodplain in accordance with the comprehensive plan. This area shall include portions of a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle pathway plan.

Gary Pagenstecher

From: Brian Harper [Brian.Harper@oregonmetro.gov]
Sent: Tuesday, August 11, 2009 4:10 PM
To: jfrewing
Cc: Tim O'Brien; Gary Pagenstecher
Subject: FW: Tigard Removal of Goal 5 Protection

Agenda Item 8
Council mtg
of 8.11.09

Council motion includes
this document as part of the
findings. Ordinance No. 09-11

Mr. Frewing,

My apologies for not responding sooner. I wanted to make sure that I assembled all the necessary information to answer your inquiry prior to contacting you. First, thank you for bringing this item to our attention here at Metro. It is sometimes difficult to track all of the changes that can and do occur at the local level on a day-to-day basis. Second, I was able to talk to Gary Pagenstecher with the City of Tigard this afternoon. He provided me with a copy of the information packet that will be in front of the Tigard Council tonight, as well as an explanation of the course of action that the City is taking in regards to trail construction. Based on this information, internal discussion here at Metro, and discussion with City staff, Metro has no clear objection to this change. There are several reasons why Metro has reached this determination:

- Exempted uses and development that are allowed under the Metro Title 13 Model Ordinance are allowed in local jurisdictions development standards. Currently, the Metro Title 13 Model Ordinance, Section 2.E allows limited types of development, redevelopment, operations, and improvements, including the following:
 1. *Low-impact outdoor recreation facilities for public use, outside of Water Quality Resource Areas, including but not limited to, multi-use paths, access ways, trails, picnic areas, or interpretive and educational displays and overlooks that include benches and outdoor furniture, provided that the facility meets the following requirements:*
 - a. *It contains less than 500 sq. ft. of new impervious surface; and,*
 - b. *Its trails shall be constructed using non-hazardous, pervious materials, with a maximum width of four feet.*
- In terms of clear and objective standards related to Title 13, the issue is slightly more complicated. Tigard clearly exerted a clear and objective standard previously by forcing this type of pathway development out of designated sensitive lands. However, Title 13 also requires a discretionary standard in addition to a clear and objective one, for all types of potential development as it relates to protected Title 13 areas. In this respect, Tigard did not previously provide a discretionary process for trail development (that I am currently aware of). Under their new proposal, the submittal of a wildlife assessment clearly classifies as a Discretionary Process for construction of a trail. The clear and objective standard would be to not develop in the protected area, but if it was still deemed necessary to do so, an additional wildlife assessment would be required before construction could be approved. (I realize that there is still the question of what a "wildlife assessment" entails, but the intent is above and beyond a clear and objective standard).
- You state in your e-mail that the recreation and environmental education goals of Tigard's Comprehensive Plan will override any impact on Goal 5 resources. Metro would contend that is not the intent of Tigard's proposed changes, nor the outcome. In this instance, Tigard is requiring a Wildlife Assessment for the direct purpose of weighing the potential benefits of a proposed trail against the potential costs it might have towards a Goal 5 resource area. Realistically, State and Regional Planning goals are not mutually exclusive. There are many instances where local, regional or state planning goals are at direct odds with one another. It was the goal of Title 13 to encourage the protection of valuable natural resources, while also taking into consideration that there will be instances where local jurisdictions must make decisions about prioritization of planning goals. In some instances, it is reasonable to expect that the construction of a trail, which will help meet a recreation/education/activity goal will take precedent over a habitat protection goal, provided all steps possible

are taken to minimize impact to the resource. In this case, Metro is confident that the City of Tigard understands this concept and will be adopting regulations to this effect.

Again, I wish to express our thanks for your effort to bring this matter to our attention. It is important that we work together with members of the public to scrutinize local land use decisions as they apply to our valuable natural resources. I do hope that the above explanation is clear and helps to clarify Metro's position on this matter. If you have any further questions of myself or questions in general regarding Title 13, please do not hesitate to contact me.

Brian Harper
Assistant Regional Planner
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503-797-1930 fax
brian.harper@oregonmetro.gov

www.oregonmetro.gov
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From: jfrewing [mailto:jfrewing@teleport.com]
Sent: Monday, August 10, 2009 3:11 PM
To: Tim O'Brien; Brian Harper
Subject: Tigard Removal of Goal 5 Protection

Tim O'Brien
Brian Harper

Gentlemen,

This memo reports what I believe is an action which takes City of Tigard out of compliance with its earlier commitment to Nature in the Neighborhoods provisions (Goal 5) of the METRO code.

Tigard has been a member of the Tualatin Basin Natural Resources Coordinating Committee for some time, and a year or so ago reviewed its development code for adequacy with the recommendations of the TBNRCC and made several changes for compliance. METRO and DLCD then approved the code provisions of the member Washington County cities and county as compliant with the METRO Nature in the Neighborhoods regulations and Goal 5.

Recently, Tigard has acted toward a change in its regulations which seriously impact (ie, detract from protection of) the fish and wildlife resources of the city. The city development code, upon enactment of the TBNRCC provisions, included (and had included for some time) a provision that for sensitive lands, plans for any pathway on sensitive lands would be required to show such pathways to be located above the elevation of the annual average flood. A recent proposal (a 'post acknowledgement plan amendment, PAPA), would have simply eliminated such requirement, allowing pathways even closer to streams and their important wildlife habitat, including Goal 5 resources. In the course of public review, the city proposal has been modified, still allowing pathways lower than the elevation of the annual average flood, but requiring "Pedestrian/bicycle pathways within the floodplain shall include a wildlife assessment that shows the proposed alignment minimizes impacts to significant wildlife habitat while balancing the community's recreation and

environmental educational goals.” This change allows a new conflicting use in the areas below the level of the annual average flood, which is the very area where many riparian plants and animals depend on close access to streams, lakes and wetlands. Goal 5 resources are in this area below the level of the annual average flood. Pathways in this area below the level of the annual average flood will conflict with Goal 5 resources; the findings by Tigard for their proposed change even state that the conflict will be that “necessary to achieve the City’s recreation and environmental education goals.” – indicating that there will be no balancing (no consideration), but that the recreation and environmental education goals override any impact on Goal 5 resources. The Goal 5 resources are thereby not protected as required by state law.

Additionally, while this revised language widens the area of concern, from the elevation of the annual average flood to the floodplain (100-year flood level), it replaces a clear and objective criterion with one which is essentially a submittal requirement – submittal of a piece of paper (actually, it doesn’t even require submittal of a study as part of an application!). The METRO code, at 3.07.1330 B.5 requires that even for TBNRCC cities, local codes must comply with “All other provisions of this Metro Code Section 3.07.1330”. The very next code section, METRO code 3.07.1330 C requires that implementing ordinances “shall contain clear and objective standards” and goes on to define ‘clear and objective’. Tigard staff and legal counsel agree that their proposed code change is subject to state Goal 5 and METRO regulations as approval criteria.

The proposed Tigard rule is not clear and objective. It does not contain a fixed numerical standard, it is not a nondiscretionary requirement (such as ‘above the annual average flood elevation’) and it is not a performance standard that ‘describes the outcome to be achieved, specifies the objective criteria to be used in evaluating outcome or performance, and provides a process for application of the performance standard, such as a conditional use or design review process.’

The Tigard City Council is scheduled to adopt its revised rule, described above, on August 11, 2009, to be effective 30 days later. Please review this matter and take action to enforce the protective measures for fish and wildlife in the Tigard code as of the date of its METRO approval in accordance with Title 13. Please let me know of your review and enforcement actions.

Thanks,

John Frewing 7110 SW Lola Lane, Tigard, OR 97223 jfrewing@teleport.com 503-245-5760