



# Oregon

John A. Kitzhaber, M.D, Governor

## Department of Land Conservation and Development

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[www.oregon.gov/LCD](http://www.oregon.gov/LCD)

April 19, 2012



Sharon Konopa, Mayor  
City of Albany  
333 Broadalbin SW  
PO Box 490  
Albany, Oregon 97321-0144

**RE:** Land Conservation and Development Commission Hearing on the Appeal of Albany's Periodic Review Task 2 Approval

The Department of Land Conservation and Development (DLCD) report and recommendation concerning the appeal of the director's Order 001813 approving the city of Albany's periodic review work task submittal is enclosed. This matter is scheduled to be heard by the Land Conservation and Development Commission (LCDC) on May 10, 2012 at the offices of the Department of Land Conservation and Development, Agricultural Building Basement Hearing Room, 635 Capitol Street NE, Salem.

Commission rules allow the city and persons who filed valid objections and appeals to file written exceptions to the enclosed report. The exceptions must be filed with DLCD within 10 days from the date this report is mailed. This means that written exceptions to the report must be *received* by DLCD at its Salem office by **April 29, 2012** (see OAR 660-025-0160(4)).

LCDC will make a final decision on the submittals based on the written record. Oral argument will be allowed at the hearing, but it will be limited to the city and those who filed valid objections or an appeal (see OAR 660-025-0085 and OAR 660-025-0160). In order to complete the hearing in the available period, the time for argument will be limited.

Yours truly,

Rob Hallyburton  
Community Services Division Manager

cc: James Frank and Diana Amos (via e-mail and mail)  
Heather Hansen, Albany Planning Division Manager (via e-mail)



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April 19, 2012

TO: Land Conservation and Development Commission

FROM: Jim Rue, Acting Director  
Ed Moore, South Willamette Valley Regional Representative  
Amanda Punton, Natural Resource Specialist

SUBJECT: **Agenda Item 3, May 10-11, 2012, LCDC Meeting**

**APPEAL OF DIRECTOR APPROVAL OF  
ALBANY PERIODIC REVIEW TASK 2 – GOAL 5 RESOURCES**

**I. AGENDA ITEM SUMMARY**

**A. Type of Action and Commission Role**

On an appeal of a director's decision, the commission must make a decision pursuant to OAR 660-025-0160(6). Following the public hearing, the commission must either:

- (a) Approve the work task;
- (b) Remand the work task, or a portion of the work task to the local governments, including a date for re-submittal; or
- (c) Require specific plan or land use regulation revisions to be completed by a specific date.

**B. Staff Contact Information**

If you have questions about this agenda item, please contact Ed More, DLCD Regional Representative, at (971) 239-9453, or [ed.w.moore@state.or.us](mailto:ed.w.moore@state.or.us).

**II. SUMMARY OF RECOMMENDED ACTION**

For the reasons described in its report, the department recommends that the commission deny the appeal and approve the city of Albany's Periodic Review Task 2, related to Goal 5 requirements for locally significant wetlands, riparian areas and wildlife habitat.

The department has carefully reviewed the one valid objection filed in response to Albany's submittal. The department determined that Albany had adequately addressed its periodic review work task as set forth in its approved work program, had adequately explained its decisions, and had properly applied the standards and criteria for the decisions as specified in OAR 660-023-0110. As a result, and for the reasons set out below and in more detail in the director's order approving the task (Attachment A), the department recommends that the commission approve Albany's Periodic Review Work Task 2 as submitted.

### **III. BACKGROUND**

On September 28, 2011 Albany City Council approved Ordinance 5764 amending the city's comprehensive plan and development code. The amendments to the plan included inventories of Goal 5 resources; economic, social, environmental, and energy (EESA) consequence analyses; and conclusions to limit development in significant riparian, wetland and wildlife habitat resource areas (the EESA analysis is included as Attachment D). Amendments to the city's development code included new review procedures and approval standards for development within identified significant resource sites to implement the findings and conclusions of the city (Attachment E).

Ordinance 5764 includes findings that recognize the specific requirements of Task 2, and the specific inventory, public process, and analytical steps that were completed to satisfy the requirements of Goal 5 and the Goal 5 rules. On November 4, 2011 Albany distributed its notice of decision of the adoption of amendments (initiating the 21-day objection period) and submitted the task to the department as required in OAR 660-025-0130. On October 21, 2011 the department received objections to the submittal from James Frank Amos and Diana Amos. Of the two objections, only one, that of James Frank Amos, satisfied the requirements of a valid objection as set forth in OAR 660-025-0140. The objection from Diana Amos was found not to be valid so it was not addressed in the director's decision.

The department reviewed the task submittal and considered Mr. Amos's objection. The department disagreed with the allegations raised in the objection and issued Order 001813 on February 23, 2012 approving Albany's Task 2, as provided for in OAR 660-025-0150(1). On March 12, 2012, the department received a valid appeal of Order 001813 from Mr. Amos.

### **IV. REVIEW CRITERIA, PROCESS & RECORD**

#### **A. Decision-making Criteria**

Albany's Task 2 is subject to the requirements of Goal 5 and the Goal 5 rules. Goal 5 and the rules require cities to inventory riparian areas, wetlands and wildlife habitat and determine which are "significant" resources. The valid objection received by the department and this appeal of the director's order pertains only to the city's Goal 5 protection program for wildlife habitat. The decision-making criteria are found in OAR 660-023-0110 (Wildlife Habitat).

In addition to allowing a “standard” Goal 5 inventory as described in OAR 660-23-0030, the rule allows a jurisdiction a "safe harbor" option for identifying significant wildlife habitat. OAR 660-23-0110(4)(a) and (b) state:

- ( 4) Local governments may determine wildlife habitat significance under OAR 660-023-0040 [*sic*] or apply the safe harbor criteria in this section. Under the safe harbor, local governments may determine that "wildlife" does not include fish, and that significant wildlife habitat is only those sites where one or more of the following conditions exist:
  - (a) The habitat has been documented to perform a life support function for a wildlife species listed by the federal government as a threatened or endangered species or by the state of Oregon as a threatened, endangered, or sensitive species;
  - (b) The habitat has documented occurrences of more than incidental use by a species described in subsection (a) of this section;

#### **B. Procedural Requirements and Validity of Appeal**

OAR 660-025-0150(4)(a) states that persons who filed a valid objection may appeal a director's approval or partial approval of a work task to the commission.

OAR 660-025-0150(4)(d) states that a person appealing the director’s decision must:

- (A) Show that the person participated at the local level orally or in writing during the local process;
- (B) Clearly identify a deficiency in the work task sufficiently to identify the relevant section of the submitted task and the statute, goal, or administrative rule the local government is alleged to have violated; and
- (C) Suggest a specific modification to the work task necessary to resolve the alleged deficiency.

OAR 660-025-0160(5) provides that the commission will hear appeals (such as this case) based on the record unless the commission requests new evidence or information.

OAR 660-025-0085(5)(c) states that oral argument is allowed from the local governments and those who filed an appeal. The local governments may provide general information on the task submittal and address those issues raised in the department review and appeal. Persons who submitted an appeal may address only those issues raised in their appeal. The commission may take official notice of certain laws, as specified in OAR 660-025-0085(5)(e).

OAR 660-025-0160(6) states that, in response to an appeal, the commission must issue an order that does *one or more* of the following:

- (a) Approves the [submittal];
- (b) Remands the [submittal] to the local government, including a date for re-submittal; [or]

- (c) Requires specific plan or land use regulation revisions to be completed by a specific date[.]

The department received two appeals from the owners of one property affected by the Albany Goal 5 plan amendments completed as part of Albany Periodic Review Work Task 2. The department has analyzed the validity of each appeal. Only the appeal of James Frank Amos is treated as valid.

**C. The Written Record for This Proceeding**

1. This DLCD staff report.
2. Albany Task 2 Approval Order #001813 dated February 23 2012.
3. Objection filed by James Frank Amos to City of Albany's Periodic Review Task 2 submittal dated October 19, 2011.
4. Albany original submittals which include:
  - a. Albany Periodic Review Work Task 2 Record, Exhibit F, Goal 5 EESE Analysis Thornton Lakes Significant Turtle Habitat, Record Pages 90–109
  - b. Albany Periodic Review Work Task 2 Record, Significant Natural Resource Overlay Districts, Record Pages 140–151
5. Appeal filed by James Frank Amos
6. Any valid exceptions to the department's report and response from the department.

**V. DEPARTMENT ANALYSIS**

The department's review of the original Periodic Review Task 2 decision by Albany and Mr. Amos' objection is contained in the director's report attached to Order 001813 (Attachment A) and will not be repeated here. In his appeal of the director's order approving Albany's Task 2 submittal, Mr. Amos states that the portion of the property made off-limits by Albany's regulations is the portion which has by far the greatest economic value, the lakefront portion. In his appeal, Mr. Amos states that the logical building site on the property is the high ground approximately midway along the lake frontage, on the site of the original homestead, which was demolished due to the condition of the structure. It is the appellant's desire to be able to further develop the property in the future (Attachment C, pp. 1-2).

**A. Content of Appeal**

The appellant summarizes the effects of three overlays adopted by Albany to protect identified significant wetland, riparian and wildlife habitats as part of Albany's Goal 5 program. However, in his original objection to Albany's Task 2 submittal, the only concern raised by Mr. Amos related to the program to protect wildlife (i.e., the wildlife overlay to protect the Western pond

turtle and painted turtle populations at East Thornton Lake). Mr. Amos did not raise objections to Albany's wetland and riparian overlay protection measures in his original objection to the department. Only the issue relating to wildlife (turtle) habitat protection was presented, so only issues relating to turtle habitat protection may be appealed to the commission.<sup>1</sup>

The appellant states that there is insufficient documentation to support the city's determination of significant turtle habitat on his property. He recognizes the city's application of the safe harbor option for designating significant habitat and concludes that the city has not met the requirements of OAR 660-23-0110(4).<sup>2</sup> Although not part of the remedy in his original objection, Mr. Amos now requests that the city amend its habitat inventory.

### **B. Department Response to Appeal**

The director's decision included reviews of both the inventory process used by the city and the program to protect the resource that the city adopted for consistency with OAR 660-023-0110. In response to Mr. Amos' objection (Attachment B), the department provided an explanation to distinguish between the two inventory methods used by the city's consultant and clarification that the city based its significance determination on the safe harbor criteria as allowed by the rule. The department's analysis concluded that Albany applied the safe harbor inventory criteria correctly and that it based its protection measures for lakeshore areas on the terrestrial need of turtles for both nesting and hibernation sites (Attachment A, pp. 4-5).

The appellant does not provide any additional information in his appeal to challenge the information the city relied on for its findings. He only states that the city has not documented the presence of turtle habitat on the north side of West Thornton Lake. The director's report concluded that the city had documented the support function lakeshore areas provide to Western pond turtles and painted turtles based on the life history of the species. The Albany Significant Turtle Habitat ESEE Analysis references a 1999 Washington Department of Fish and Wildlife report as the source of this information. (Attachment D, pp. 3-4] The criterion for significance of lakeshore within 75 feet of ordinary high water was informed by recommendations from the city's consultant. The department found, and continues to find, that the OAR 660-23-0110(4)(a) standard for assessment of significance has been satisfied.

The appellant proposes a remedy that would amend the program the city adopted to protect significant habitat. He proposes unlimited encroachment into the identified significant habitat, provided an equal amount of area is preserved elsewhere on a property. (The appeal's description of development restrictions and additional review criteria adopted by the city to protect significant turtle habitat contains an error (Attachment C, p. 2); the 2,000 square-foot exemption to development restrictions in the habitat protection overlay does not require assessment by a consultant and mitigation is not required.) This approach would essentially eliminate the priority

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<sup>1</sup> OAR 660-025-0085(5)(f) states in relevant part: "A person who submitted objections or an appeal may address only those issues raised in the objections or the appeal submitted by that person."

<sup>2</sup> OAR 660-023-0110 (4) is quoted in subsection IV.A of this report.

of preserving land close to the lake, and require no evaluation from a biologist to determine what proposed alternative mitigation areas offer suitable conditions for the turtles' needs.

The program adopted by the city recognizes that residential development and turtles can coexist, and serves to balance the social and economic consequences identified in the ESEE analysis with the need to protect aquatic and terrestrial areas on which turtles depend for survival and reproduction. The department concluded in the director's decision that the requirements for developing a program to protect a Goal 5 significant resource, OAR 660-23-0050, were met. The city's program is different, but not necessarily more restrictive or costly for a property owner, than that proposed by the appellant. The city exempts encroachment into the significant habitat area up to 2,000 square feet or 20 percent of the overlay district within a property, whichever is less. No biological assessment or mitigation is required below this threshold. Additional encroachment is allowed but would require a biological assessment, but only require mitigation if evidence of turtle use was identified and disturbance to those areas could not be avoided.

## **VI. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS**

### **A. Recommendation**

The department recommends that the commission deny this appeal and approve the city of Albany's Periodic Review Task 2, related to Goal 5 requirements for locally significant wetlands, riparian areas and wildlife habitat.

### **B. Proposed Motion**

***Recommended Motion:*** I move that the commission deny the appeal and approve the city of Albany's Periodic Review Work Task 2 comprehensive plan and development code amendments related to Goal 5 requirements for locally significant wetlands, riparian areas and wildlife habitat, based on the information contained in the director's report and argument at the hearing.

***Alternative Motion:*** I move that the commission approve those portions of the city of Albany's Periodic Review Task 2 comprehensive plan and development code amendments related to wetland and riparian habitats and remand the portion of Task 2 related to wildlife habitat to address \_\_\_\_\_.

## **ATTACHMENTS**

- A. Director's approval order
- B. James Frank Amos objection
- C. James Frank Amos appeal
- D. Albany Comprehensive Plan – ESEE analysis for Thornton Lakes turtle habitat
- E. Albany Development Code – Significant Natural Resource Overlay Districts



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February 23, 2012

Sharon Konopa, Mayor  
City of Albany  
333 Broadalbin SW  
PO Box 490  
Albany, Oregon 97321-0144

**Re: Approval of Periodic Review Task 2; DLCDC Order 001813**

Dear Mayor Konopa:

I am pleased to inform you that the Department of Land Conservation and Development has approved the city of Albany's periodic review Task 2 regarding updates to the city's comprehensive plan and land use regulations for the identification and protection of significant Goal 5 resources. This letter constitutes the department's order approving this task pursuant to OAR 660-025-0150(1)(a).

The department received two objections to this work task in response to the local government's notice. One objection failed to cite a state statute, goal or rule that was alleged to have been violated, and we have determined that the objection is not valid (see attached report). The second objection was valid, but for the reasons explained in the attached report the objection is denied. Based on the department's analysis of Albany's work task product, the department finds that the city's submittal complies with relevant goal and rule requirements. Therefore, the department finds that, based on substantial evidence in the record, that Albany's Work Task 2 fulfills the requirements of Albany's periodic review work program and is approved.

Because the department received a valid objection to the work task submittal, this order is subject to appeal to the Land Conservation and Development Commission as provided in OAR 660-025-0150(6) and (7). Appeals of the director's decision must be filed the department's Salem office within 21 days of the date of this order. The **appeal deadline is March 15, 2012**. If no appeals are filed, this approval is deemed affirmed by the commission and this work task is deemed acknowledged.

We appreciate the efforts of the city of Albany officials and staff in completing this complex periodic review work. Please feel free to contact Ed Moore, your regional representative at (971) 239-9453 or [ed.w.moore@state.or.us](mailto:ed.w.moore@state.or.us) if you have any questions or need further assistance.

Yours truly,

Rob Hallyburton  
Planning Services Division Manager

cc: James Frank  
Diana Amos  
Greg Byrne, Community Development Director (e-mail)  
Robert Wheeldon, Linn County Planning Director (e-mail)  
DLCDC Staff (AP; EM; LF; JJ; PS (e-mail))

**DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
REPORT ON CITY OF ALBANY  
PERIODIC REVIEW TASK 2**

**DLCD Order 001813**

February 23, 2012

**I. DECISION**

For the reasons explained in this report, the Department of the Land Conservation and Development (DLCD, or “the department”) concludes that Albany’s periodic review Task 2 submittal complies with the requirements of Goal 5 and OAR chapter 660, division 23 and completes the requirements of the city’s periodic review Task 2. The task is approved.

**II. REVIEW PROCEDURES AND CRITERIA**

**A. Procedural Considerations**

Oregon Revised Statutes (ORS) 197.644(2) and (3) and Oregon Administrative Rule (OAR) 660-025-0140 through 660-025-0150 authorize the director’s review of submitted periodic review tasks. The legal provisions that govern this review and decision are the statewide planning goals and OAR chapter 660, division 25, “Periodic Review.” This report addresses Task 2 on Albany’s periodic review work program and addresses Goal 5 including compliance with OAR chapter 660, division 23 (the “Goal 5 rules”).

The department received two objections to Albany’s Task 2 submittal from the owners of one property. OAR 660-025-0140 states:

- (2) Persons who participated at the local level orally or in writing during the local process leading to the final decision may object to the local government's work task submittal. To be valid, objections must:
  - (a) Be in writing and filed with the department's Salem office no later than 21 days from the date the notice was mailed by the local government;
  - (b) Clearly identify an alleged deficiency in the work task sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the task submittal is alleged to have violated;
  - (c) Suggest specific revisions that would resolve the objection; and
  - (d) Demonstrate that the objecting party participated at the local level orally or in writing during the local process.
- (3) Objections that do not meet the requirements of section (2) of this rule will not be considered by the director or commission.

## **B. Substantive Criteria**

Albany's Task 2 is subject to the requirements of Goal 5 and the Goal 5 rules. Goal 5 and the rules require cities to inventory riparian areas, wetlands and wildlife habitat and determine which are "significant" resources. The Goal 5 rules allow cities to rely on inventories compiled by other agencies for some Goal 5 resources, and for other resources the rule allows a local jurisdiction to choose whether to conduct an inventory. For significant resource sites, a local government must develop and implement appropriate protection measures based on an analysis of the economic, social, environmental, and energy consequences that could result from a decision to allow, limit, or prohibit a conflicting use. OAR 660-023-0040(1). If a local program to protect resource sites includes development restrictions, the loss of buildable land that results from these restrictions can be accounted for when determining the amount of land need for UGB expansion. OAR 660-023-0070.

Periodic review triggers applicability of Goal 5. OAR 660-23-00250(5). The city of Albany's periodic review work program describes Task 2 as follows:

- Address all aspects of Goal 5 including compliance under statewide planning rule OAR 660-23; address the recommendations from the Citizen Advisory Committee (CAC).
- Wetlands: complete wetlands inventories; develop an ordinance to protect significant wetlands (OAR 660-23-100);
- Riparian Corridors: apply safe-harbor approach to identify the location of fish-bearing lakes and streams; develop an ordinance to protect fish-bearing lakes and streams (OAR 660-23-090).
- Wildlife Habitat: compile inventories; develop ordinance to protect wildlife habitat (OAR 660-23-110).
- State Scenic Waterways, Federal Wild and Scenic Rivers, Groundwater Resources, Approved Oregon Recreation Trails, Natural Areas/Wilderness Areas, Mineral/Aggregate Resources, Energy Sources: compile existing inventories, develop ordinances as needed.
- Historic Resources, Open Space, Scenic Views: update historic resources.
- Product(s): Amended Comprehensive Plan and Zoning Ordinances to include new/updated Goal 5 inventories, text, policies and standards.

## **III. BACKGROUND AND DESCRIPTION OF TASK SUBMITTAL**

On September 28, 2011 Albany City Council approved Ordinance 5764 amending the city's comprehensive plan and development code. Amendments to the plan include:

- The addition of inventories for Goal 5 significant riparian areas wetlands and wildlife habitat;
- Analyses of the economic, social, environmental, and energy consequences of a decision to prohibit, limit or allow uses that conflict with identified significant resources; and
- Conclusions to limit development in significant riparian, wetland and habitat resource areas as supported by the ESEE analyses.

Amendments to the city's development code included new review procedures and approval standards for development within identified significant resource sites to implement the findings and conclusions of the Goal 5 inventory and resource protection process.

Ordinance 5764 includes findings that recognize the specific requirements of Task 2, and the specific inventory, public process, and analytical steps that were completed to satisfy the process requirements of Goal 5 and the Goal 5 rules.

#### **IV. OBJECTIONS AND DEPARTMENT REVIEW**

The department received two objections to the submittal. Both state concerns that the identification of Goal 5 resources on one particular tax lot is not justified, and that the local protection strategy that places some restrictions on development of the property are excessive and remove reasonable use of the property. One objection was found to be valid, one was not.

The department has determined that the objection submitted by Frank Amos satisfies the requirement of OAR 660-025-0140(2) (see Section II.A of this report) and is valid, while the objection received from Mrs. Amos does not. Mrs. Amos' objection was not found to be valid because it did not meet the standard described in OAR 660-025-0140 (2)(b) in that it did not clearly identify what provision of goal or rule the city violated. Therefore, only the objection received from Mr. Amos is addressed in this report.

Mr. Amos challenges the city's Goal 5 protection program for wildlife habitat. He contends that the information on turtle habitat generated in the local inventory is not sufficient to identify his property as significant habitat. He refers to a description of two habitat site on Thornton Lake included in the *Albany Significant Turtle Habitat ESEE Analysis* and concludes that the site description for Sites 7 and 8 "does not represent sufficient documentation to establish the north side of West Thornton Lake as habitat for the two species of turtle in question." Mr. Amos states the city's inventory does not meet the requirements of OAR 660-23-0110(1)(a) and (b).

Mr. Amos does not recommend a change to the inventory, but does recommend a change to the city code adopted to protect resource sites identified in the inventory. He recommends that the city allow him the option of encroaching into the habitat protection area, provided he dedicates an equal amount of area to habitat protection elsewhere on his property.

OAR 660-23-0110 is specific to wildlife habitat. Although Mr. Amos sites the definition section of this rule, his concern is with how the definitions for "documented" and "wildlife habitat" were applied in the inventory process.

##### **A. Discussion**

The department recognizes that the assessment of wildlife habitat on sites 7 and 8 may not be sufficient documentation of wildlife habitat to extend Goal 5 protection to an upland portion

of Mr. Amos' property. However, the city's designation of significant wildlife habitat was not based on this information alone.

In addition to allowing a "standard" Goal 5 inventory as described in OAR 660-23-0030, the rule allows a jurisdiction a "safe harbor" option for identifying significant wildlife habitat. OAR 660-23-0110(4)(a) and (b) state:

- (4) Local governments may determine wildlife habitat significance under OAR 660-023-0040 [*sic*] or apply the safe harbor criteria in this section. Under the safe harbor, local governments may determine that "wildlife" does not include fish, and that significant wildlife habitat is only those sites where one or more of the following conditions exist:
  - (a) The habitat has been documented to perform a life support function for a wildlife species listed by the federal government as a threatened or endangered species or by the state of Oregon as a threatened, endangered, or sensitive species;
  - (b) The habitat has documented occurrences of more than incidental use by a species described in subsection (a) of this section;

In 2009 Pacific Habitat Services (PHS) conducted a wildlife habitat assessment and made recommendations to the city on compliance with OAR 660-23-0110. This work was part of a larger study entitled *City of Albany Goal 5 Significant Natural Resources Technical Report and Recommendations*. PHS conducted both a safe harbor and a standard inventory for wildlife habitat:

The standard inventory involved identification of 27 "habitat polygons" throughout the city. The polygons were selected based on the presence of tree stands of five acres or more. Evaluation of significance was based on five criteria. One criterion was based on a "wildlife habitat assessment score" that took into consideration six habitat characteristics known to support multiple species. The descriptions of sites 7 and 8 resulted from the process of developing a score for the sites and were not used to make a final determination of significance.

The safe harbor inventory was limited to the habitat needs of Northern Pacific pond turtles and painted turtles, since these are the only sensitive species documented within the Albany UGB.<sup>1</sup> For the safe harbor inventory, PHS relied on documentation from Oregon Department of Fish and Wildlife (ODFW) and the Oregon Heritage Information Center on the presence of turtles in Thornton Lake. The PHS report concluded:

Based on our review of the safe harbor criteria, Only Thornton Lake (due to the presence of painted and pond turtles) satisfied the criteria and can be designated as significant wildlife habitat through the safe harbor approach.<sup>2</sup>

<sup>1</sup> The pond turtle is listed as sensitive by both the federal government and the state. The painted turtle is listed as sensitive by the state. Both of these species are known to occur in Thornton Lake. There are no species listed as threatened or endangered.

<sup>2</sup> It is important to note that city and PHS reference to Thornton Lake includes both East and West Thornton Lakes.

## **B. Proposed Remedy**

Mr. Amos proposes a remedy that the city allows him the option of encroaching into the habitat protection area provided he dedicate an equal amount of area to habitat protection elsewhere on his property. This remedy does not address the alleged deficiencies in the inventory, but a response is provided, because concern over restrictions on future development is at the core of Mr. Amos's objection.

The city's program to protect the two turtle species and their habitat is supported by the *Albany Significant Turtle Habitat ESEE Analysis*. The city used information in the PHS report *City of Albany Goal 5 Significant Natural Resources Technical Report and Recommendations* to assess the environmental consequences of allowing conflicting uses in significant turtle habitat, and to inform limits that could be placed on development to balance conflicting uses with continued support of habitat functions. The PHS report describes the terrestrial habitat uses of the two turtle species that are critical to their life history including breeding, hibernation, and migration. PHS recommended that a habitat assessment be required for all development within 100 feet of the ordinary high water mark of the entire lake. The intent of recommendation was to insure continued use of Thornton Lake by pond and panted turtles and allow for avoidance and mitigation of impact to the terrestrial habitat critical to their continued reproductive success.

The Habitat Assessment Overlay District (HAOD) provisions in Article 6 differ from the PHS recommendations and provide a balance similar to that proposed by Mr. Amos. Under the adopted code provision the upland portion of the HAOD is 75 feet from ordinary high water. Development is exempt from the provisions of the HPOD for disturbance up to 2,000 square feet or 20% of the HPOD area within a property, whichever is less (Albany City Code 6.290(10)). In addition, disturbance greater than the exempt area is allowed provided:

- There are reasons why the proposed development cannot occur outside the protected area;
- The proposed disturbance is minimized; and a habitat assessment is completed by a qualified professional; and
- The applicant demonstrates that identified turtle habitat will be avoided or mitigated. (Albany City Code 6.310(A)(2) and (3)).

The department understands that the 2,000 square foot threshold exemption applies to Mr. Amos's property. If this exemption does not accommodate Mr. Amos's plans for future development, additional disturbance can be permitted using a tradeoff strategy similar to that which he proposes. A habitat assessment will be required to identify more precisely the portion of the proposed development area that is providing habitat functions. If no habitat functions are identified in the assessment, no mitigation is needed. If nesting areas or other habitat functions are identified, an avoidance and or mitigation plan is required. Mitigation can occur elsewhere on the property. In addition to the review and permit requirements specific to the HPOD, Mr. Amos has wetland and riparian protection overlays on his property. Since these were not mentioned in his objection they are not addressed in this response.

### **C. Findings**

The department finds that the city had sufficient information on which to base its inventory of significant wildlife habitat, and that its conclusions comply with OAR 660-23-0110(4). Mr. Amos' objection that the information on turtle habitat generated in the local inventory is not sufficient to identify his property as significant habitat is denied.

The department finds that the provisions related to the Habitat Overlay District in Article 6 of the Albany city code are based on an ESEE analysis, implement a decision to limit conflicting uses in significant wildlife habitat, and are consistent with OAR660-23-0040 and 0050. The department also finds that the accommodation requested in the remedy is largely provided in the city's code as adopted.

## **V. OVERALL CONCLUSIONS AND DECISION**

The city of Albany has identified locally significant wildlife habitat and developed a wildlife habitat protection program by following the steps described in the Goal 5 rules. The inventory and code provisions adopted as part of city Ordinance 5764 comply with the requirements of Goal 5 and the rules. Task 2 is approved.

## **ATTACHMENT**

October 21, 2011 letter of objection from James Frank Amos

14 El Molino Drive  
Clayton, CA 94517  
October 19, 2011

DEPT OF

OCT 21 2011

LAND CONSERVATION  
AND DEVELOPMENT

Oregon Land Conservation & Development Department  
635 Capitol ST NE, Ste. 150  
Salem, OR 97301

ATTN: Periodic Review Specialist

HAND DELIVERED

Ladies/Gentlemen:

I am taking issue with the City of Albany's Ordinance #5764, adopted 9/28/11, to address Statewide Planning Goal 5, Natural Resources Protection.

I participated in the periodic review by speaking at public hearings (e. g., Albany Planning Commission, 3/21/11; Albany City Council, 8/24/11; and a number of other occasions). I also submitted written comments on these and other occasions.

Based on my review of OAR LCDD Division 23, "Procedures and Requirements for Complying with Goal 5" and my review of Article 6, "Natural Resource Districts," as adopted by Albany City Council on 9/28/11 as Ordinance # 5764, I believe that central aspects of the wildlife habitat portions of the ordinance were not adequately documented to justify the action taken by the city. I will explain my objection by reference to OAR Division 23, and I will recommend a specific change that would resolve my objection. Please note that I recommended this change several times in my oral and written testimony before Albany's Planning Commission and City Council.

By way of background, my wife and I own property at 1030 North Albany Road, Albany. The property is a long narrow property with several hundred yards of lake frontage on the north side of West Thornton Lake; the property has very limited width. The net effect of Albany's Goal 5 regulations is to render considerably more than half of our property off limits to further development. It is important to note that the portion of the property made off limits by Albany's regulations is the portion which has by far the greatest economic value, the lake front portion.

Section 660-023-0110 (1) defines "documented" to mean that "an area is shown on a map published or issued by a state or Federal agency or by a professional with demonstrated expertise in habitat identification." With regard to the Western painted turtle and the Northwestern pond turtle, the city's creation of a 75 ft. habitat area boundary around all of East and West Thornton lakes is based on a wildlife assessment performed by Pacific Habitat in 2009.

It is my understanding that presence of the two turtle species has been documented on an undeveloped acreage on the south side of East Thornton Lake. This finding is supported on p. 3 of "Albany Significant Turtle Habitat ESEE Analysis" (ASTHEA) as follows. "Site # 8, 57 acres: south bank of East Thornton Lake contains thin line of Douglas fir trees, which provides canopy for a portion of the lake and yards, creating nesting and hiding habitat for Western painted turtles and Northwestern pond turtles."

It is my understanding that our property and the other developed residential properties on the north side of West Thornton Lake are included in Albany's 75 ft. wide turtle habitat overlay on the strength of the following statement (also on p. 3 of ASTHEA). "Site # 7 (146 acres): north of Thornton Lake is dominated Douglas fir and south slope by oaks and madrones; Himalayan blackberry dominates understory; MAY (emphasis mine) provide upland habitat for nesting turtles located in Thornton Lake."

I contend very strongly that this does not represent sufficient documentation to establish the north side of West Thornton Lake as habitat for the two species of turtles in question.

I must also mention that in the 40 years my wife and I have been married and I have visited the property with her, I have not observed either of the two species of turtles, nor has my wife. My wife grew up on the property (It has been in her family since at least the 1890s.) and has more than 60 years experience with it; she has not observed either of the two species of turtles. We are both trained scientists and wildlife lovers (though not wildlife biologists). While I understand that the "ground truth" observations of citizens and property owners does not carry the same weight as that of a wildlife biologist who specializes in the behavior of the two turtle species in question, they must be recognized as having significant value.

Further, I object to Albany's action on the basis of two more provisions of OAR Division 23, 660-023-0110. First, 660-023-0110, Wildlife Habitat, (1) (a) states "the habitat has been documented to perform a life support function for a wildlife species listed ...." This has not been documented in ASTHEA. Second, 660-023-0110, Wildlife Habitat, (1) (b) states "The habitat has documented occurrences of more than incidental use by a species described in Subsection (a) of this section." This has not been documented in ASTHEA.

I will recommend a specific change that would resolve our objections. We have suggested this change numerous times in our oral and written testimony.

We propose the following. If we want to add an addition to our small cabin in the future, or add a deck, or add landscaping, or sell to a buyer who would like to do so, we would like the flexibility to build or landscape within the 75 ft. habitat overlay area on a "give and take" basis. As an example, if we want to encroach on the 75 ft. habitat area in a 50 ft. x 50 ft. area (i. e., 2500 sq. ft.), we would be required to dedicate another area of 2500 sq. ft. to add to the 75 ft. habitat overlay area elsewhere on our property. The net result would be that the total habitat area within our property would neither be expanded nor decreased; the overlay area would merely be changed in shape.

We believe that failure to allow us an option to exercise flexibility in this way amounts to inverse condemnation, i. e., a taking of our lake frontage without compensation.

Thank you for your consideration of our proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "J F Amos". The signature is written in a cursive style with a large initial "J" and "F".

James Frank Amos

Property address: 1030 North Albany Road, Albany, OR 97321

Mailing address: 14 El Molino Drive, Clayton, CA 94517

14 El Molino Drive  
Clayton, CA 94517  
March 8, 2012

DEPT OF

MAR 12 2012

LAND CONSERVATION  
AND DEVELOPMENT

Jim Rue, Acting Director  
Oregon Department of Land Conservation and Development  
Suite 150  
635 Capitol Street NE  
Salem, OR 97301-2540

Reference: DLCD Order 001813

Dear Mr. Rue:

I received on 3/7/12 a letter dated 2/23/12 from Rob Hallyburton (RH) of your department informing me that: (1.) my objection to the City of Albany's Goal 5 rules was denied and (2.) that the objection of my wife (Diana Amos) was deemed not valid. I am appealing this decision to the Land Conservation and Development Commission.

It appears from the report provided by RH that my wife's objection was deemed not valid because she took a big picture/business person/"citizen common sense" approach and failed to cite chapter and verse of the administrative rules. In my objection I cited specific rules and proposed remedies, and it appears that my objection fell victim to the minutiae of the administrative rules process. Therefore, I will state our concerns and objections in clear and direct business language and will trust that you and the LCDC will find this approach understandable.

By way of background, my wife and I own property at 1030 North Albany Road, Albany. My wife grew up on this property, and she is the third generation of her family to own it. Her family has owned the property since the late 1800s.

The property is long and narrow, with several hundred yards of lake frontage on the north side of West Thornton Lake; the property has very limited width. The net effect of Albany's Goal 5 regulations is to render considerably more than half of our property "off limits" to further development. It is important to note that the portion of the property made off limits by Albany's regulations is the portion which has by far the greatest economic value, the lake front portion. For documentation of the effect of the overlays on our property, please see the supporting documents supplied by my wife with her objection of October 2011.

Our objective with the property is to develop a vacation cabin and use the property for part of the year. If the business climate and the real estate situation in the area improve sufficiently, we hope to live on the property full time in the future. Obviously both of

those considerations are problematic at this time, and they have become considerably more so as a result of Albany's Goal 5 rules.

The logical building site on the property is the high ground approximately midway along the lake frontage. This is the area where the pioneers who developed the area (my wife's forebears) placed their house and barn. Both have had to be demolished due to condition; we did manage to save one room from the farm house. We are presently in the process of adding another small room. Our desire is to be able to further develop the property in the future, adding other rooms, a deck, landscaping, etc; alternatively, if this scenario does not work out for us, we would like to be able to sell to another party who would in all likelihood want to make these additions.

It is our understanding that the net effect of the three overlays (wetland, riparian, and habitat) is that developing within 75 or + feet of the edge of Thornton Lake will be difficult and expensive (from the standpoint of the consultants required) if not totally impossible. Wetland and riparian regulations require at least a 75 foot setback from the ordinary high water mark (OHWM) and have little or no flexibility for varying them, even though the vegetation on our upland is not typical riparian vegetation. Habitat regulations require a 75 foot setback from OHWM and allow flexibility to "encroach" on 2000 sq ft if there is substantiation from a consultant that this is acceptable and that mitigation is performed if required. The net effect of these regulations is that any development becomes considerably more expensive and uncertain and there is a chilling effect on any development by ourselves or a potential buyer.

With respect to the turtle habitat status of our property, I made the case in my 10/19/11 objection that documentation of the presence of turtles by Albany's consultant Pacific Habitat Services (PHS) on the north side of Thornton Lake was definitely not done. On p. 4 of RH's report your staff states that "the city's designation of significant wildlife habitat was not based on this information alone." The report refers to the city's allowed use of a "safe harbor" approach and then proceeds to make exactly the points that I cited in my objection, namely that designation of significant wildlife habitat applies only to those sites where one or more of the following conditions exist: the habitat performs a life support function for a listed species, or the habitat has documented occurrences of more than incidental use by the species in question. This has not been documented for the north side of West Thornton Lake.

There was reference in RH's report to my failure to request the remedy of amending the habitat inventory. I request that this be done, to reflect the points made in the previous paragraph.

In summary, our position stated in its simplest possible terms is this. For a wildlife species whose presence is not documented on our property, and for the presence of riparian vegetation that is deemed so only because of its proximity to water in the lake nearby, how much control of our property should we be asked to cede without compensation in an inverse condemnation? We are willing to dedicate property on a one sq ft for one sq ft basis in return for any "encroachment" into the overlay areas, but this

can be done in an economically rational manner by drawing the lines on a plot map to reflect such a trade off, rather than needing to resort to expensive consultants and uncertain approval processes.

Thank you for considering our input. We await your communication as to the results of the deliberations of the LCDC.

Sincerely,

A handwritten signature in cursive script, appearing to read "J F Amos".

James Frank Amos

Page 3 of 3

Copies:

Original: US mail (overnight mail; certified return)

City of Albany, Mayor Sharon Konopa: US mail

Rep. Andy Olson: US mail

Sen. Frank Morse: US mail

**GOAL 5 ESEE ANALYSIS**  
**(Economic, Social, Environmental, & Energy)**

***THORNTON LAKES***  
***SIGNIFICANT TURTLE HABITAT***



**City of Albany**  
**Community Development Department**  
**September 28, 2011**



## **ALBANY SIGNIFICANT TURTLE HABITAT ESEE ANALYSIS**

As set out in OAR 660-023-0250(5), local governments shall develop programs to protect wildlife habitat following the standard procedures and requirements of OAR 660-023-0040 and 660-023-0050. Local governments shall coordinate with appropriate state and federal agencies when adopting programs intended to protect threatened, endangered, or sensitive species habitat areas.

The Goal 5 ESEE (economic, social, environmental, energy) analysis involves evaluating the tradeoffs associated with different levels of natural resource protection. As required by the Goal 5 rule, the evaluation process involves identifying the consequences of allowing, limiting or prohibiting conflicting uses in areas containing significant natural resources. Specifically, the rule requires the following steps:

1. Identify conflicting uses – A conflicting use is “any current or potentially allowed land use or other activity reasonably and customarily subject to land use regulations that could adversely affect a significant Goal 5 resource.” [OAR 660-23-010(1)]
2. Determine impact area – The impact area represents the extent to which land uses or activities in areas adjacent to natural resources could negatively impact those resources. The impact area identifies the geographic limits within which to conduct the ESEE analysis.
3. Analyze the ESEE consequences – The ESEE analysis considers the consequences of a decision to either fully protect natural resources; fully allow conflicting uses; or limit the conflicting uses. The analysis looks at the consequences of these options for both development and natural resources.
4. Develop a program – The results of the ESEE analysis are used to generate recommendations or an “ESEE decision.” The ESEE decision sets the direction for how and under what circumstances the local program will protect significant natural resources.

## **SIGNIFICANT HABITAT & IMPACT AREA**

In 2009, Pacific Habitat Services used both the safe harbor and standard inventory methods to determine Albany’s significant wildlife habitat sites. Under the safe harbor method, a habitat site was determined significant when at least one of the following criteria was satisfied:

- The habitat has been documented to perform a life support function for a wildlife species listed by the federal government as a threatened or endangered species or by the state of Oregon as a threatened, endangered, or sensitive species;
- The habitat has documented occurrences of more than incidental use by a species described in (first bullet);
- The habitat has been documented as a sensitive bird nesting, roosting, or watering resource site for osprey or great blue herons pursuant to the Oregon Forest Practices Act and Rules;
- The habitat has been documented to be essential to achieving policies or population objectives specified in a wildlife species management plan adopted by the Oregon Fish and Wildlife Commission pursuant to ORS Chapter 496; or
- The area is identified and mapped by Oregon Department of Fish and Wildlife as habitat for a wildlife species of concern and/or as a habitat of concern.

Using the standard inventory method, the City compiled a list of all locations with stands of trees greater than or equal to 5 acres in size. Several patches of tree groves close together were combined, resulting in 27 habitat inventory sites within the City’s urban growth boundary (UGB). Pacific Habitat Services conducted a wildlife habitat assessment of each site to assess the quality, availability and diversity of water, food, and cover. Habitat was considered significant under the standard inventory method if it:

- Is a forested stand that is greater or equal to 5 acres and receives a wildlife habitat assessment score of 80 points or more;
- Provides habitat for a wildlife species listed by the Federal government as a threatened or endangered species or by the State of Oregon as threatened, endangered, or sensitive-critical species;
- Provides a documented rookery for great blue herons or a bald eagle nest;
- Is documented to be essential to achieving policies or population objectives specified in a wildlife species management plan adopted by the Oregon Fish and Wildlife Commission; or
- Is identified and mapped by the Oregon Fish and Wildlife Department as habitat for a wildlife species of concern and/or as habitat of concern.

A review of the safe harbor habitat significance criteria and the habitat assessments of sites 5 acres or larger, the results both determined that Thornton Lakes was the only significant wildlife habitat due to the documented presence of two species listed as “sensitive-critical” by the State of Oregon: the Western Pond Turtle (*Actinemys marmorata marmorata*) and Northwestern Painted Turtle (*Chrysemys picta*). The pond turtle is also a federal species of concern. It has been directly observed in Thornton Lakes (Oregon Natural Heritage Information Center 2009 and Oregon Department of Fish and Wildlife staff, ODFW). The painted turtle has been documented in Thornton Lakes by ODFW staff.

Property owners adjacent to Thornton Lakes have spotted both the painted turtle and pond turtle in the lakes and on properties around both lakes. Turtles have been known to nest in yards several hundred feet away from the water.

#### IMPACT AREA

Under the Goal 5 rule, “[l]ocal governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified natural resource” (OAR 660-23-040(3)).

The impact area is based on the **habitat needs** for the sensitive-critical turtle species and the extent that they are available around Thornton Lakes as documented by Pacific Habitat in 2009.

The **pond turtle** habitat consists mainly of streams, ponds, lakes, and some wetlands. Though much of their lives are spent in water, they need terrestrial habitats for nesting. They also may disperse via overland routes, and often overwinter on land. Pond turtles are commonly observed basking on fallen logs, rocks, floating vegetation, or even mud or sand banks, provided escape cover is nearby. Basking is necessary to maintain basic metabolic processes. Nesting takes place from May to mid-July, at which time the female excavates a cavity in upland soils with sparse vegetation cover.

Historically, the upland areas most suitable for nesting contain little canopy cover, such as white oak and conifers savannah, prairie, or pastureland. By contrast, overwintering turtles may use upland sites up to 0.3 mile from water, typically burrowing into deep leaf or needle litter in woodlands with up to 90% canopy cover (WDFW, 1999).

- *Special needs identified in the Oregon Conservation Strategy:* Marshes, streams, rivers, ponds, and lakes; sparsely vegetated ground nearby for digging nests. Basking structures such as logs.
- *Limiting factors identified in the Oregon Conservation Strategy:* loss of aquatic and nesting habitats (due to conversion and invasive species and long period for young in nests).

The **painted turtle** is mainly aquatic, spending much of its life time in slow moving waters with a soft, muddy bottom and submerged logs. During the winter, painted turtles are rarely observed as they are usually hibernating at the bottoms of streams, lakes, ponds, or some wetlands. Similar to the pond turtle, the painted

turtle is commonly observed on logs basking in the sun. During mid to late summer mating occurs. Nesting occurs usually on drier land with soils composed of sand, silt, and clay. Painted turtle nest near aquatic habitat, usually within 50 meters.<sup>1</sup> Typically, the nesting sites are open, sunny, and sparsely vegetated areas similar to the pond turtle nesting sites (WDFW, 1999).

- *Special needs identified in the Oregon Conservation Strategy:* Marshy ponds, small lakes, slow-moving water with both deep and shallow areas, quiet off-channel portions of rivers; prefer muddy bottoms with aquatic vegetation; need open ground for nesting; need logs or vegetation for hiding and basking.
- *Limiting factors identified in the Oregon Conservation Strategy:* loss of aquatic and nesting habitats due to conversion and invasive species.

The Pacific Habitat wildlife assessments made the following findings for the two habitat sites including and adjacent to Thornton Lakes:

- Site #8, 57 acres: Includes Thornton Lakes and vegetation on south bank of East Thornton Lake, including a thin line of Douglas fir trees, which provide canopy for a portion of the lake and yards, creating both nesting and hiding habitat for Western painted turtles and Northwestern pond turtles.
- Site #7, 146 acres: North of Thornton Lakes is dominated by Douglas fir and south slope by oaks and madrones; Himalayan blackberry dominates understory; may provide upland habitat for nesting turtles located in Thornton Lake.

Thornton Lakes associated vegetation provide critical turtle habitat. As an aquatic species, the lakes provide water and food. The trees and vegetation provide basking structures and the sunny banks provide nesting habitat. The vegetation around the lakes varies in its habitat value depending on the quantity, proximity to the lakes, connectedness, and proximity to migrating obstacles.

Thornton Lakes are considered a single resource for this ESEE analysis. The lakes are commonly referred to as East Thornton Lake and West Thornton Lake, with the dividing line being the North Albany Road bridge. The lakes connect under the bridge and adjacent land contains similar uses and residential zoning.

Much of the land adjacent to the lake is developed with large-lot single-family residential development. Many of the lakefront dwellings are located within 75 feet from the ordinary high water mark. Most of the riparian trees and wetlands are also within 75 feet from ordinary high water (OHW). The lack of connected vegetated corridors and cover, and increased conflicts with human activity (structures, vehicle traffic) beyond 75 feet from OHW poses an obstacle to turtle nesting and migration.

The **impact area** for the resource (sensitive/significant habitat for two listed turtle species) is defined as the area between the ordinary high water mark of Thornton Lakes to 75 feet from the ordinary high water mark of the lakes or the upland edge of an adjacent wetland. It is shown on the map below as the area within the green lines. (Note: A riparian corridor overlay district extends 50 feet from the lakes but this district is not shown.)

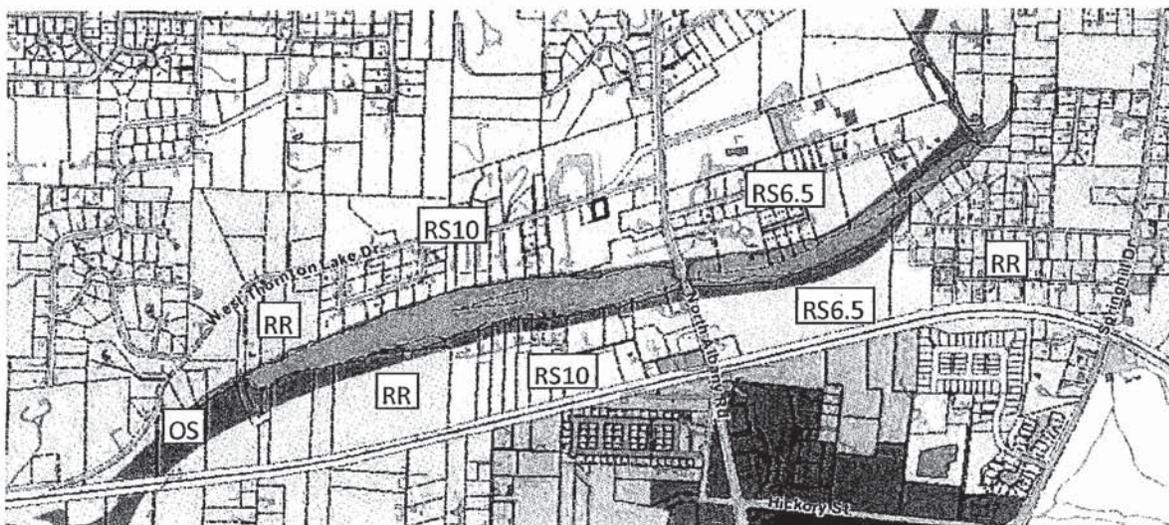
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<sup>1</sup> Conservation Assessment for the Western Painted Turtle in Oregon, Version 1.1, September, 2009, page 13.



### IDENTIFY CONFLICTING USES

To identify conflicting uses, local governments shall examine land uses outright or conditionally within zones applied to the resource site and impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site [OAR 660-23-040(2)].



Thornton Lakes and most of its banks are zoned Open Space, but properties abutting the lakes are zoned residential, the RS-6.5, RS-10, and RR zoning districts. Descriptions of the zones and allowed uses follow.

The RR, RESIDENTIAL RESERVE DISTRICT is intended to recognize areas which, because of topography, level of services, or other natural or development factors are best served by a large lot designation. This district is applied on an interim basis until urban services become available. The minimum lot size is five acres, thereby limiting land divisions and uses. When both water and sewer are available, the properties adjacent to Thornton Lakes will be zoned RS-10. Properties zoned RR around the Lakes include: the west end of West Thornton Lake on both the north and the south banks and property abutting East Thornton Lake on the east end. The properties

on the west end of the lakes are not fully developed, and range in size from less than one acre to 13.6 acres. The properties on the east end of the lake are considered fully developed with large lot single-family because they are unlikely to be rezoned in the near future because City sewer service is nowhere nearby.

The RS-10, Residential Single Family District is intended primarily for a lower density single-family residential environment. The average minimum lot size is 10,000 square feet and allows up to 4 units per acre. This zoning district is applied on land north and south of West Thornton Lake just between North Albany Road and the RR zoning to the east.

The RS-6.5, Residential Single Family District is intended primarily for low-density urban single-family residential development. The average minimum lot size is 6,500 square feet and allows up to 6 units per acre. This zone is applied to the north and south sides of East Thornton Lake.

The OS, Open Space District is intended for the establishment, continuation, and preservation of agricultural uses, park and recreation areas, wildlife habitats, wetlands, natural areas, and other uses that do not involve the construction of structures other than minor facilities that might be required to conduct the principal use. The uses allowed outright in the OS zone include: one single-family dwelling on an existing legal lot, residential accessory buildings, agricultural uses, plant nurseries and greenhouses, parks and outdoor recreational facilities, roads and utilities. No land divisions are permitted within the zone, unless to remove the OS portion of a split-zoned property. The boundaries of the OS zone include most of the Lakes and generally follows the waterline on the north side and extends south from Thornton Lakes an average of 75 feet. Most of the land within the OS zone is within the 100-year floodplain.

The Riparian Corridor Overlay District (PROPOSED): The City's riparian corridor overlay district will extend 50 feet upland from the ordinary high water mark of Thornton Lakes or 50 feet from the outer edge of any significant wetlands within the riparian resource. The district standards will prohibit new structures and impervious surfaces, with a few exceptions. Water-related and water-dependent uses, roads, driveways, bridges, culverts, and pedestrian and bike paths will be allowed if they are designed, constructed and maintained to minimize intrusion into the riparian area and when no other locations outside the Riparian corridor exists to access buildable areas of property. Removal of riparian vegetation will be controlled.

North Albany Road crosses over the mid-section of Thornton Lakes, dividing the east and west lakes. Currently the road is two lanes and bike lines within a right of-way that is 70 and 80 feet. It is one of two arterial streets linking North Albany with Highway 20 and the remaining portion of the city south of the Willamette River. The road and the bridge across Thornton Lake is the route used by roughly 75 percent of North Albany residents and currently averages 10,000 trips a day. Albany's Transportation System Plan (TSP) anticipates traffic volumes that will exceed 12,000 average daily trips. In order to adequately serve the needs of residents and the community, the road needs to provide bike, pedestrian, and vehicular access that links residents with schools, commercial services, and employment.

The North Albany Road Bridge currently lacks sidewalks and is too narrow to accommodate widening the road on either side of the bridge to provide a center left turn lane. The bridge deck is also several feet below the 100 year flood elevation. The lack of pedestrian facilities poses a safety risk for pedestrians crossing the bridge. The lack of a left turn lane on either side of the bridge has resulted in an increasing number of rear-end crashes. Widening the bridge to provide those facilities and raising the bridge deck above the 100 year flood elevation is scheduled in the TSP. It is hopeful that the existing right-of-way can accommodate most of the needed improvements to this minor arterial street.

Utilities – water, sewer and stormdrain. City water and sewer lines run in the North Albany road right-of-way. Several utility improvement projects are planned in this right-of-way.

- **Water Improvements:** The Broadway Reservoir Transmission Main Project, Phase II *waterline project* will add a second feed/drain line to the Broadway Reservoir. Broadway Reservoir serves all of Albany,

except for the higher elevations in North Albany. This project will ensure continued compliance with water quality requirements of Statewide Planning Goal 6 and also provide the needed capacity to meet peak demands and fight fires. This project is in the Capital Improvement Program and in updated studies that support the city's Water Facility Plan.

- The existing *waterline* in the North Albany Road right-of-way also serves all of Albany, except for the higher elevations in North Albany. It is suspended under the bridge. When North Albany Road is improved, the City will need to evaluate whether the waterline location needs to be changed. This could have impacts on the Thornton Lakes area. This project is not currently shown in any adopted plan.
- **Sewer Improvements:** Two projects are identified in the Thornton Lakes impact area: 1) A new sewer line across the west end of Thornton Lake is identified as a required improvement in the adopted 1998 Wastewater Facility Plan. It is currently identified at 8-inches in diameter. The line is necessary to serve undeveloped properties or properties with failing septic systems south and west of West Thornton Lake. The lines will also extend northwest of the lake up Edgewood Drive. 2) The existing sewer line runs within the North Albany Road right of way through the flow path of water between West and East Thornton Lake. It serves all of North Albany north of the North Albany Road bridge crossing. In the future, the City will need to evaluate whether or not the line needs to be relocated due to its location in the floodway and risk of failure during a flood. Secondly, is there a benefit to relocating the line such that it doesn't affect the ability of water to flow freely between the lakes; and if so, is it physically possible. This project is not currently identified in a facility plan.
- **Stormwater Improvements:** Stormwater improvements will be required in order to support the North Albany Road improvement project. If the road is raised out of the floodplain, storm drain improvements will be required to make sure that floodplain conditions are not negatively impacted. These improvements are not identified in a specific plan. Other allowances for stormwater quality improvements should also be considered. The improvements serve persons using the road and the neighboring properties impacted by the floodplain.

#### SUMMARY OF CONFLICTING USES PERMITTED WITHIN THE IMPACT AREA

The primary permitted use in the RR, RS-10 and RS-6.5 zones is single-family detached dwellings (up to 6 units per acre) and associated accessory buildings and uses. Other uses allowed outright are residential care homes (child or adult), duplexes on corner lots, and crop production. Attached dwellings are permitted through planned or cluster developments. Conditional uses permitted in these zones include community facilities, educational and religious institutions, indoor and outdoor recreation, day care facilities, residential care facilities, and utilities. Office and commercial uses are permitted in planned developments.

The OS district is intended to protect natural resources, but still allows the following conflicting uses on existing legal lots: one single-family dwelling, agricultural uses, plant nurseries and greenhouses, parks and outdoor recreational facilities, roads and utilities. Activities associated with existing uses may occur within the impact area.

All permitted uses in the adjacent zoning districts could conflict with the turtle habitat.

Widening the North Albany Road bridge to provide sidewalks, bike lanes, and a turning lane; and raising the bridge deck above the 100-year flood elevation may result in an impact on the turtle habitat. Necessary utility improvements may also impact turtle habitat.

#### LIKELIHOOD OF PERMITTED CONFLICTING USES IN IMPACT AREA

The impact area is 75 feet from the ordinary high water mark or wetland edge upland around all of Thornton Lakes. The banks slope up away from the Lakes, and in many areas fairly steeply at 25 percent or more, and are subject to the City's hillside overlay regulations. (The City requires a geologic and soils report with

development when slopes are at least 12 percent.) The costs to develop in sloped areas are often much higher and more structurally challenging.

The riparian corridor overlay district will restrict most new uses within the district due to limits on impervious surfaces within the district. The riparian restrictions realistically leave a 50-foot depth for development within the turtle habitat impact area that is available for development of conflicting uses. This area is not deep enough for most uses, except for new residences, accessory structures, and related residential activities.

Most of the lots abutting the Lakes are much deeper and have land outside the impact area that could be developed. The presence of steep slopes on many lots will limit the types of conflicting uses that could reasonably be constructed, and will likely cause those uses to develop outside of the impact area.

The land around the lakes is designated residential and is not needed for commercial activities. Educational, institutional, assisted living, commercial and office developments usually require a large site with room for buildings and parking lots. Land within the impact area would be more expensive to develop due to slopes and riparian vegetation.

Due to the presence of steep slopes, already developed land, restrictions on new development in the riparian corridor district and the OS zone, and the presence of Thornton Lakes at the center of impact area, it is *highly unlikely* that non-residential and park-like uses that require larger building footprints and parking lots would locate within the impact area. Therefore, the following conflicting uses are not included in the analysis as specified in 660-23-0040(2): educational, institutional, assisted living, indoor recreation, religious institutions, commercial and office developments.

The North Albany Road bridge widening project is a planned and necessary improvement. The road project would include addressing storm drainage. The water and sewer lines running through the right-of-way will need improvements, and may need to be relocated in the future.

In summary, the following conflicting uses are possible within the turtle impact area: single-family dwellings, accessory structures, residential care homes, daycare homes, duplexes, parks, outdoor recreational uses, and North Albany Road and bridge improvements, and utility improvements.

#### ACTIVITIES ASSOCIATED WITH CONFLICTING USES

The permitted and conditional uses have **common impacts** on the wildlife habitat. The degree and intensity of development and activities will vary by zone and development type, and even construction protocols. The primary conflicting activities resulting from the permitted uses are new impervious surfaces, vegetation removal, excavation and grading, and introduction of non-native vegetation and animals.

- **Vegetation Removal and Impervious Surfaces.** Tree canopies and associated understory vegetation, downed logs and snags create shade and local microclimate that provide quality wildlife habitat. Removal of vegetative cover reduces habitat for native wildlife by removing food, nesting opportunities, cover, and perching and roosting locations. Removal of vegetation can fragment riparian and upland wildlife movement corridors, isolate remaining vegetation patches, and limit wildlife access to water. These impacts create hazards or barriers to wildlife migration and movement, making wildlife populations more vulnerable to predation and extirpation.

Certain native species such as the Oregon white oak/Pacific madrone require specific soil, water and sun exposure to survive and are slow growing, taking many years to become established. These unique vegetated sites exist along the south side of the lakes and provide important habitat. Removal not only reduces habitat functions, but also would contribute to the decline in these unique vegetation types and potentially extirpation within the city.

Riparian vegetation removal and new impervious surfaces will be prohibited, only allowing them when there are no feasible alternatives. The presence of steep slopes around much of Thornton Lakes will also limit impervious surfaces.

- **Landscaping with non-native and/or invasive vegetation.** The removal of native vegetation and establishment of lawns and cultivated landscapes can reduce food, cover and nesting opportunities for the sensitive turtles. Some non-native plants used in landscaping are invasive and can out-compete native plants. Non-native landscapes may also require irrigation or may be treated with chemical fertilizers and pesticides, which can run-off into local waterways and wetlands, or may be ingested by the turtles and other wildlife.

Within the riparian corridor, existing non-native vegetation would be allowed to remain and be maintained. New non-native vegetation will be restricted and removal of non-native and invasive vegetation will be encouraged. Landscaping within the remaining 50-foot impact area could impact turtle habitat.

- **Grading, excavation, filling and soil compaction.** Grading activities and soil compaction can accelerate soil loss and erosion. These activities can reduce the capacity of soil to support vegetation by disturbing the soil structure and decreasing soil fertility, microorganisms, seeds and rootstocks. Stormwater infiltration can be reduced by grading, excavating, filling and soil compaction, which can reduce groundwater recharge and water levels and flows. Adverse impact to the quality of Thornton Lakes will adversely impact the turtles and other aquatic species. Grading and excavating can also disturb turtle nesting sites.
- **Barriers to wildlife movement.** Barriers to wildlife movement can include buildings, roads, fences and other manmade features. These barriers fragment connectivity between wildlife habitats and reduce the ability of the significant turtles to find food, mates, and nesting sites. Barriers such as roads may create hazards resulting in turtle mortality.
- **Others.** Turtles need undisturbed areas for nesting and basking. Human activities that create noise and light can disrupt the competition, communication, mating and predation habits of wildlife. It takes a couple of years for turtles to grow large enough that other animals can't eat them. Other wildlife and domestic pets can kill or injure turtles or compete for limited space. Domestic pet waste, litter and garbage can also degrade turtle habitat including the water quality of the Lake and upland soils.

## ESEE ANALYSIS

Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation. It should enable the reader to gain a clear understanding of the conflicts and the consequences to be expected. OAR 660-23-040 (4):

In evaluating the consequences of *allowing* conflicting uses it is assumed that the impact area/resource site would be subject to development allowed in the base zoning districts. It is also assumed that mitigation for impacts on natural resources would not be required.

In evaluating the consequences of *limiting* conflicting uses it is assumed that rules would be established to limit the impacts of allowable development within the impact area and to significant turtle habitat. Mitigation may also be required.

In evaluating the consequences of *prohibiting* conflicting uses it is assumed that rules would be established that preclude uses that would impact significant turtle habitat.

The ESEE analysis will be combining similar conflicting uses in two categories: low-density residential and parks/recreation as follows:

- Low-density residential will include single-family dwellings, accessory structures, residential care homes, daycare homes, and duplexes.
- Parks will include parks and outdoor recreational uses.

## ECONOMIC

Economic consequences of the different uses are generally the same, but vary in the intensity of impacts to wildlife habitat, job creation, and cost to develop the land, and land values. While related to Goal 9, Economic Development, the property within the impact area is designated residential in the Albany Comprehensive Plan. This land is not included in the Goal 9 buildable lands inventory for future commercial, industrial or mixed use development. Roads, driveways, and utilities would also be required to service new development, but it is unlikely these would extend much into the impact area due to slopes and availability of land outside the impact area.

<b>Conflicting Use</b>	<b>Allow</b>	<b>Limit</b>	<b>Prohibit</b>
<b>Low Density Residential</b>	<p>Construction jobs for new housing and expansions to existing housing. (+)</p> <p>Lakefront lots have higher assessed values. (+)</p> <p>No restrictions on house size or configuration. (+)</p> <p>May remove or degrade vegetation/habitat that benefit existing residential land values (-)</p> <p>Development costs lower if can clear lot and no mitigation. (-)</p>	<p>May reduce construction jobs. (-)</p> <p>Lakefront lots have higher assessed values. (+)</p> <p>May limit house size and configuration. (-)</p> <p>Maintain most vegetation/habitat that benefit existing residential land values (+)</p> <p>Development costs may be higher to avoid habitat or for mitigation. (-)</p>	<p>Reduced construction jobs. (-)</p> <p>Reduced assessed values. (-)</p> <p>House size limited to existing. (-)</p> <p>Intact vegetation/habitat that benefit existing residential land values (+)</p> <p>Would provide open space and buffer between uses. (+)</p>

<b>Conflicting Use</b>	<b>Allow</b>	<b>Limit</b>	<b>Prohibit</b>
<b>Parks/Recreation</b>	New jobs. (+) Maintenance costs to maintain grass and landscaping. (-) Parks and outdoor recreation may generate tourism revenue. (+) Properties adjacent to parks have higher values. (+)	New jobs. (+) Reduced maintenance costs if keep and use native vegetation. (+) Parks and outdoor recreation may generate tourism revenue. (+) Properties adjacent to parks have higher values. (+)	No new jobs. (-) No landscape maintenance costs. (+) No tourism revenue. (-) Properties adjacent to open space have higher values. (+)
<b>North Albany Road Bridge Widening or Replacement</b>	Maintaining and improving road capacity supports future allowed development. (+) North Albany Road improvements & widening ensures residents have direct access to jobs, schools, and commercial centers. (+)	Maintaining and improving road capacity with mitigation supports future allowed development. (+) North Albany Road improvements & widening with mitigation ensures residents have direct access to jobs, schools, and commercial centers. (+)	Prohibiting improvements and increased capacity limits future development. (-) Prohibiting North Albany Road improvements & widening limits access to jobs, schools, and commercial centers. (-)
<b>Public Utilities</b>	Maintaining and improving capacity of the water and sewer lines supports existing and future development. (+)	Maintaining and improving capacity of the water and sewer lines with mitigation supports existing and future development. (+)	Prohibiting improvements and increased capacity limits future development. (-)

## SOCIAL

This section examines the social consequences of allowing, limiting or prohibiting conflicting uses for Thornton Lakes. The social analysis focuses on the following topics:

- Health, safety and welfare
- Recreational, educational, and cultural opportunities
- Housing opportunities
- Open space and buffering between uses
- Scenic and natural amenities

The following statewide planning goals that relate to social consequences for development in the impact area primarily are Goal 5, Natural Resource Protection; Goal 8, Recreation; and Goal 10, Housing. The Lake is zoned Open Space in order to protect the natural area, wildlife habitats, wetlands, and recreation areas. The land around the lake is designated residential and is included in Albany's residential buildable land inventory. A majority of the properties abutting the lake are developed with single-family housing and are desirable places to live.

In general, existing residents enjoy the scenic values of the lakes and access to them for recreation. Vegetation and trees provide lasting health benefits.

<b>Conflicting Use</b>	<b>Allow</b>	<b>Limit</b>	<b>Prohibit</b>
<b>Low Density Residential</b>	<p>Would create housing opportunities adjacent to Lakes. (+)</p> <p>Would reduce health benefits to people associated with wildlife, vegetation, and open space. (-)</p> <p>Would reduce visual amenities and neighborhood character provided by wildlife habitat and open space. (-)</p> <p>Could increase access to and use of lakes, resulting in disturbance to existing uses/users. (-)</p>	<p>Would maintain most housing opportunities adjacent to lakes. (+)</p> <p>Would maintain health benefits to people associated with wildlife, vegetation, and open space. (+)</p> <p>Would maintain most visual amenities and neighborhood character provided by wildlife habitat and open space. (+)</p> <p>Could increase access to and use of lakes, resulting in disturbance to existing uses/users. (-)</p>	<p>Would reduce housing opportunities adjacent to Lakes. (-)</p> <p>Would maintain health benefits to people associated with wildlife, vegetation, and open space. (+)</p> <p>Would preserve visual amenities and neighborhood character provided by wildlife habitat and open space. (+)</p> <p>Maintain existing use of lake, reducing disturbance to neighbors. (+)</p>
<b>Parks/Recreation</b>	<p>Would provide recreational amenities and places for picnics, trails, and gathering areas. (+)</p> <p>Could create educational opportunities associated with wildlife. (+)</p> <p>Would provide health benefits to people associated with recreation, parks, and open space. (+)</p> <p>Could increase access to and use of lakes, resulting in disturbance to existing uses/users. (-)</p>	<p>Would provide recreational amenities and places for picnics, trails, and gathering areas. (+)</p> <p>Could create educational opportunities associated with wildlife. (+)</p> <p>Would provide health benefits to people associated with recreation, parks, and open space. (+)</p> <p>Could increase access to and use of lakes, resulting in disturbance to existing uses/users. (-)</p>	<p>May reduce recreational amenities and places for picnics, trails, and gathering areas. (-)</p> <p>Could create educational opportunities associated with wildlife. (+)</p> <p>May reduce health benefits to people associated with recreation. (-)</p> <p>Maintain existing use of lake, reducing disturbance to neighbors. (+)</p>
<b>North Albany Road Bridge Widening, to include sidewalks, bike lanes and a left-turn lane</b>	<p>Would improve the safety of this arterial street. (+)</p> <p>Would support more walking and biking to destinations, improving health and may improve neighborhood desirability. (+)</p>	<p>Would improve the safety of this arterial street. (+)</p> <p>Would support more walking and biking to destinations, improving health and may improve neighborhood desirability. (+)</p>	<p>May make the road more dangerous and may increase the number of accidents. (-)</p> <p>Lack of sidewalks may discourage walking to for fitness and may impact neighborhood desirability. (-)</p>
<b>Public Utilities: water, sewer and stormdrain line improvements and a second water line</b>	<p>Upgrading and protecting water and sewer lines will ensure safe and clean drinking water and safe removal of sewage. (+)</p> <p>New waterline would provide needed capacity to meet peak demands and fight fires. (+)</p> <p>Storm drain improvements</p>	<p>Upgrading and protecting water and sewer lines will ensure safe and clean drinking water and safe removal of sewage. (+)</p> <p>New waterline would provide needed capacity to meet peak demands and fight fires. (+)</p>	<p>Inability to make necessary upgrades to the water and sewer lines may put these utilities at risk. (-)</p> <p>Lack of second line may result in inability to meet peak demands and fight fires. (-)</p>

	related to North Albany Rd would improve the roadway and would reduce runoff on neighboring properties impacted by the floodplain. (+)	Storm drain improvements related to North Albany Rd would improve the roadway and reduce runoff on neighboring properties impacted by floodplain. (+)	Lack of storm drain improvements may negatively impact floodplain conditions. (-)
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ENVIRONMENT

While this analysis is specific to protecting wildlife habitat for the Northwestern Pond Turtle and Western Painted turtle, habitat provides many other environmental functions and benefits including the following:

- **Wildlife habitat**– Native trees and vegetation, including snags and downed logs, provide food, shelter, breeding and nesting opportunities, and migration corridors. Vegetation creates a buffer between human activities and wildlife.
- **Cooling and Air Quality**–Trees and native vegetation provide shade to cool the air and nearby water, which is important for the listed turtles as well as other fish and aquatic wildlife. Vegetation also retains soil moisture. Vegetation also captures carbon dioxide and other pollutants in the air, improving air quality.
- **Bank stabilization and control of sediments, nutrients and pollutants** – Trees, vegetation, roots and leaf litter intercept precipitation, hold soils, banks and steep slopes in place, slow stormwater runoff, take up nutrients, and filter sediments and pollutants found in surface water, protecting the water quality in the lakes.

Almost all of the statewide planning goals affect the environment in some way. The goals that are most applicable within the impact area are: Goal 5, Natural Resource Protection; Goal 6, Air and Water Quality; Goal 10, Housing; and Goal 14, Urbanization.

Conflicting Use	Allow	Limit	Prohibit
<b>Low Density Residential</b>	<p>May reduce wildlife habitat and create obstacles to migration, nesting and basking. (-)</p> <p>May introduce invasive and non-native vegetation that impact habitat. (-)</p> <p>Would increased use of chemicals and pesticides applied to lawn and landscaping that could impact wildlife and adjacent riparian areas. (-)</p> <p>Limits opportunities for wildlife habitat enhancement. (-)</p> <p>Impervious surfaces and/or vegetation removal would reduce environmental functions and benefits provided by vegetation (clean air, etc.). (-)</p> <p>Could increase access to and use of lakes, resulting in increased disturbance to habitat. (-)</p>	<p>Would maintain most wildlife habitat and avoid obstacles to migration, nesting and basking. (+)</p> <p>Would prohibit new invasive and non-native plant species and may result in removal of invasive or non-native vegetation. (+)</p> <p>Would reduce the use of chemicals and pesticides. (+)</p> <p>Would provide opportunities for wildlife habitat enhancement. (+)</p> <p>Would maintain most environmental functions and benefits associated with vegetation and pervious surfaces. (+)</p> <p>Could increase access to and use of lakes, resulting in increased disturbance to</p>	<p>Would maintain most wildlife habitat and avoid obstacles to migration, nesting and basking. (+)</p> <p>No new invasive and non-native vegetation, but may reduce removal of non-native and invasive vegetation. (+-)</p> <p>No use of chemicals and pesticides. (+)</p> <p>May reduce opportunities for wildlife habitat enhancement. (-)</p> <p>Would maintain environmental functions and benefits associated with vegetation and pervious surfaces. (+)</p> <p>Would limit access to and use of lakes, resulting in</p>

		habitat. (-)	fewer disturbances to habitat. (+)
<b>Parks/Recreation</b>	<p>May reduce wildlife habitat and create obstacles to migration, nesting and basking. (-)</p> <p>May introduce invasive and non-native vegetation that impact habitat. (-)</p> <p>Would increase use of chemicals and pesticides applied to lawn and landscaping that could impact wildlife and adjacent riparian areas. (-)</p> <p>May limit opportunities for wildlife habitat enhancement. (-)</p> <p>Impervious surfaces and/or vegetation removal would reduce environmental functions and benefits provided by vegetation (clean air, etc.). (-)</p> <p>Could increase access to and use of lakes, resulting in increased disturbance to habitat. (-)</p>	<p>Would maintain most wildlife habitat and avoid obstacles to migration, nesting and basking. (+)</p> <p>Would prohibit new invasive and non-native plant species and may result in removal of invasive or non-native vegetation. (+)</p> <p>Would reduce the use of chemicals and pesticides. (+)</p> <p>Would provide opportunities for wildlife habitat enhancement. (+)</p> <p>Would maintain most environmental functions and benefits associated with vegetation and pervious surfaces. (+)</p> <p>Could increase access to and use of lakes, resulting in increased disturbance to habitat. (-)</p>	<p>Would maintain most wildlife habitat and avoid obstacles to migration, nesting and basking. (+)</p> <p>No new invasive and non-native vegetation, but may reduce removal of non-native and invasive vegetation. (+-)</p> <p>No use of chemicals and pesticides. (+)</p> <p>May reduce opportunities for wildlife habitat enhancement. (-)</p> <p>Would maintain environmental functions and benefits associated with vegetation and pervious surfaces. (+)</p> <p>Would limit access to and use of lakes, resulting in fewer disturbances to habitat. (+)</p>
<b>North Albany Road Bridge Widening, to include sidewalks, bike lanes and a left-turn lane</b>	<p>May negatively impact existing habitat and wetlands. (-)</p> <p>Wider bridge may provide shade for wildlife and help cool water. (+)</p>	<p>Impacts to existing habitat and wetlands would be mitigated. (+)</p> <p>Wider bridge may provide shade for wildlife and help cool water. (+)</p>	<p>Limited impact to existing habitat and wetlands. (-)</p>
<b>Public Utilities: water, sewer and stormdrain line improvements, possible relocation, and a second water line</b>	<p>Improving and possibly relocating sewer line may improve water flow between E. and W. Thornton Lakes and would ensure functionality of system to avoid environmental problems related to sewage. (+)</p> <p>Stormwater quality improvements would improve the water quality of the lake, habitat and wetlands on adjacent properties. (+)</p>	<p>Improving and possibly relocating sewer line with mitigation may improve water flow between E. and W. Thornton Lakes and adjacent habitat, and would ensure functionality of system to avoid environmental problems related to sewage. (+)</p> <p>Stormwater quality improvements with mitigation would improve the water quality of the lake, habitat and wetlands on adjacent properties. (+)</p>	<p>Not improving sewer line may result in loss of function or failure of line, which would create environmental problems related to sewage.</p> <p>Lack of stormwater quality improvements may reduce the water quality of the lake, habitat and wetlands on adjacent properties. (-)</p>

## ENERGY

The energy section of the analysis will focus on the impacts conflicting uses have on energy consumption, energy conservation, and the efficient use of urban land.

- **Heating and Cooling.** Energy demand for heating and cooling structures can be high, but can be affected by site design, building form, and presence of trees, vegetation or water bodies. The orientation of buildings and use of vegetation to maximize solar heating in the winter and shading in the summer reduce both heating and cooling needs.
- **Transportation.** Energy used for transportation relate primarily to travel distances and mode of transportation used. The availability of jobs near housing reduces commuter miles, reliance on automobiles, and energy consumption.
- **Urbanization.** Efficient site design, e.g., clustered housing, reduces the overall demand for infrastructure facilities due to shorter lines, less pavement, and more efficient stormwater and wastewater treatment. Efficient site design can also allow development to avoid vegetation removal, although in some instances additional energy may be needed to avoid the resource. Trees and vegetation help capture carbon dioxide, a contributing factor to global warming. Trees also reflect and absorb solar radiation before it heats the ground, buildings, or pavement. Trees planted to the south or west of a building can significantly reduce air conditioning costs by blocking the sun during summer.

The following statewide planning goals relate to energy: Goal 13, Energy; Goal 14, Urbanization; Goal 11, Public Facilities; and Goal 12, Transportation.

Conflicting Use	Allow	Limit	Prohibit
<b>Low Density Residential</b>	<p>Would require energy for land preparation and construction of more infrastructure to reach development in impact area. (-)</p> <p>May increase energy consumption for heating and cooling buildings, and maintaining non-native landscaping. (-)</p> <p>May reduce heating and cooling benefits of native habitat. (-)</p> <p>Could reduce transportation energy demand by providing residential close to education and employment centers (North Albany Village). (+)</p>	<p>Energy demand from development would be shifted away from impact area, which may result in more energy efficiencies from clustered infrastructure and less pavement. (+)</p> <p>Maintaining vegetation may reduce energy consumption for heating and cooling, and reduced maintenance of native landscaping. (+)</p> <p>Would maintain heating and cooling benefits of native habitat. (+)</p> <p>Could reduce transportation energy demand by providing residential close to employment and services (North Albany Village and schools). (+)</p>	<p>Energy demand from development would be shifted away from impact area, which may result in more energy efficiencies from clustered infrastructure and less pavement. (+)</p> <p>Would maintain heating and cooling benefits of native habitat. (+)</p> <p>Could reduce transportation energy demand since residential would locate away from Lakes closer to employment and services. (-)</p>
<b>Parks/Recreation</b>	<p>May increase energy consumption for heating and cooling buildings, and maintaining non-native landscaping. (-)</p> <p>May reduce heating and cooling benefits of native habitat. (-)</p> <p>Could reduce transportation energy demand by providing parks and recreation close to residents and employment</p>	<p>Maintaining vegetation may reduce energy consumption for heating and cooling, and reduced maintenance of native landscaping. (+)</p> <p>Would maintain heating and cooling benefits of native habitat. (+)</p> <p>Could reduce transportation energy demand by providing parks and recreation close to</p>	<p>Would maintain heating and cooling benefits of native habitat. (+)</p> <p>May increase transportation energy demand if parks and recreation are farther away from existing residential and employment. (-)</p>

	centers (North Albany Village). (+)	residents and employment. (+)	
<b>North Albany Road Bridge Widening, to include sidewalks, bike lanes and a left-turn lane</b>	<p>Would support efficient transportation system and connections, and may reduce need to find other routes that may increase vehicle miles traveled and energy consumption. (+)</p> <p>Would support more walking and biking to destinations to reduce vehicle miles traveled and energy consumption. (+)</p>	<p>Would support efficient transportation system and connections, and may reduce need to find other routes that may increase vehicle miles traveled and energy consumption. (+)</p> <p>Would support more walking and biking to destinations to reduce vehicle miles traveled and energy consumption. (+)</p>	<p>May cause residents to find new routes that may increase vehicle miles traveled and energy consumption. (-)</p> <p>Would not support walking and biking to destinations to reduce vehicle miles traveled and energy consumption. (-)</p>
<b>Public Utilities: water, sewer and stormdrain line improvements, possible relocation, and a second water line</b>	Would support existing and planned efficient utility distribution system. (+)	Would support existing and planned efficient utility distribution system. (+)	Relocating utilities outside natural areas would increase energy consumption to construct and reduce efficiencies in operation. (-)

#### PROGRAM OPTIONS TO ACHIEVE GOAL 5

Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site [OAR 660-23-040 (5)]:

(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be *prohibited*.

(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a *limited* way that protects the resource site to a desired extent.

*Note: A program to limit a conflicting use can be designed to allow some flexibility with certain restrictions to protect turtle habitat to the maximum extent possible. Design standards and mitigation may also be required to lessen the impact on the turtle habitat.*

(c) A local government may decide that the conflicting use should *be allowed* fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.

*Note: A decision to allow the conflicting use does not necessarily eliminate regulation of the resource. Development in significant habitat areas may be subject to state and federal government regulations.*

## ESEE ANALYSIS SUMMARY –PROGRAM DECISION

**Allowing** new residential and recreation uses would likely result in new impervious surfaces, loss of habitat, and the introduction of non-native species in the impact area. Allowing these uses may reduce turtle habitat and migrating corridors to the point that the turtle populations decline or disappear. These uses may also impact the water quality of Thornton Lakes. Increased use of the lakes by new conflicting uses would reduce the social benefits enjoyed by current lakefront property owners. The economic benefits from construction and property values would be minimal given the small size of the impact area and the opportunities for equivalent development outside the impact area. Energy consumption would be required in allowing uses within the impact area and there may be reduced efficiencies in infrastructure and pavement.

Allowing improvements to North Albany Road, an existing arterial street and bridge would have more positive economic, social, environmental and energy benefits than not allowing improvements. The road improvements are needed to improve the safety and functionality of the road system and the improvements would be contained to the existing location (right-of-way, although more right-of-way may be needed on the north side).

Allowing improvements to the existing public utilities would also have more positive economic, social, environmental, and energy benefits than not allowing these improvements – primarily because the utilities exist and are designed and located in the North Albany Road right of way because it is efficient location for serving the community and for limiting impacts to the environment and habitat.

**Prohibiting** residential and recreational uses within the impact area would preserve existing turtle habitat, but there may be limited opportunities for habitat enhancement that might be required with development or happen with development, such as removal of invasive or non-native species. Most of the land within the impact area is zoned for residential use and is in residential use. Prohibiting uses and activities within the impact area on existing properties would restrict normal use of residential property and may adversely affect property values and investment values.

Prohibiting residential and recreational uses appears to have overall positive environmental impacts, but there may be no incentive to enhance the habitat within the impact area or remove non-native vegetation.

Prohibiting improvements to North Albany Road and bridge, and to Albany's water, sewer and stormdrain services would have more negative economic, social and energy consequences than allowing them or limiting them (allowing with mitigation).

**Limiting** conflicting uses would allow for land development, but limit disturbance to the turtle habitat. There would be minimal economic and social consequences with this option because development would still be permitted. The standards would limit impacts to the environment, to Thornton Lake and native vegetation in particular, which would maintain the social benefits of living near the lake. Energy consumption would be required in allowing uses within the impact area, but they would be less than under the allowed option because there may be more energy savings from reduced vegetation removal, impervious surfaces and infrastructure within the impact area.

Limiting conflicting uses would result in the most positive consequences of the three decision options. A limit decision will also avoid many of the negative consequences attributed to either allowing or prohibiting all conflicting uses. Through the application of site design and development standards to conflicting uses, the impacts on turtle habitat can be avoided, while a relatively high level of economic, social, environmental and energy benefits can be achieved from both allowing the use and protecting and possibly enhancing the turtle habitat.

The impact area is small enough that limiting development within it will not affect the Goal 10 buildable lands inventory. Most of the properties adjacent to Thornton Lakes have enough land to locate new development away from the impact area.

DECISION: The analysis concludes that a **limited protection program** designed to limit conflicting uses through development standards and mitigation would offer the most benefit to the turtles and to the community, and would strike a balance between conflicting uses and planning goals.

#### GOAL 5 LIMITED PROTECTION PROGRAM

The recommendation is to protect sensitive turtle habitat through a program that places limits on uses that are allowed in the impact area. The limited protection program would offer a clear and objective path and an alternative path for uses as outlined in the table below.

The proposed development standards within the Habitat Assessment Overlay District are located in Article 6, Natural Resource Districts.

Recommended Implementation Measures	Reason for Recommendation
<u>Establish a habitat assessment overlay district:</u> The recommendation is 75 feet from the ordinary high water mark of Thornton Lakes.	Many of the properties around the lake have houses within 75-feet of the lake. The 75-foot boundary is justified because the significant turtle habitat is Thornton Lakes and habitat in the near vicinity.
<u>Vegetation Management:</u> Prohibit removal of native vegetation within the habitat assessment district.	Native vegetation provides critical life sustaining habitat for turtles. This limit does not impact existing development and is not likely to restrict the potential for new development allowed in the zone.
<u>Development within the Impact Area:</u> Up to 2,000 square feet, or 20% of the overlay district area within a property, whichever is less, can be impacted by normal residential activities, such as construction of home additions, decks, patios, sheds, gardens, landscaping, etc. Development activities will be reviewed at the time of application for building permits. If cumulative development impacts exceed the limit described above, a turtle Habitat Assessment will be required.	Many of the lots are already developed and restricting normal use of backyards would not be reasonable. Turtles only utilize a portion of the undeveloped area surrounding the lakes. The 20% or 2,000 square feet provides a clear and objective standard, as required by the OAR. An applicant can chose to enter into a discretionary review process if they want to disturb more.
<u>Public Utilities Improvements:</u> Exempt from a land use review. Projects would be reviewed at the time of public works permits (Erosion Prevention and Sediment Control, and Site Improvements).	The standards to limit impacts to the habitat and wetlands will be adopted into the Engineering standards.
When a habitat assessment is required, AND the habitat assessment finds evidence of turtle habitat on the property, the following standards apply: (a) impacts to turtle habitat will be avoided; or	The turtles are sensitive-critical species. The clear and objective path is to avoid the turtle habitat. The discretionary path allows for

Recommended Implementation Measures	Reason for Recommendation
(b) Oregon Department of Fish and Wildlife has reviewed the proposed development and any necessary mitigation or habitat restoration plans to offset any impacts of the development.	mitigation of impacts.
Emphasize incentive-based approaches, such as reduction in some development requirements (e.g., setbacks, buffers, lot sizes, off-street parking), to focus development away from the lakes and to restore turtle habitat.	Effective, yet minimizes impact on residential property owners.
Emphasize voluntary protection and enhancement efforts. Many residents are interested; we just need more turtle-specific information to share with them.	Effective, yet minimizes impact on property owners. Makes the best use of the growing knowledge base of habitat needs.

When a turtle habitat assessment is required, the applicant will be required to hire a qualified biologist to conduct a habitat assessment. The habitat assessment will determine whether the proposed development will have a long-term loss of one or more habitat requirements of the species, including, but not limited to, overall habitat size within the impact area, degradation of water quality, and reduction in vegetation density or diversity. When development cannot avoid negative impacts to turtle habitat, mitigation will be required in accordance with ODFW's recommendations.

#### RECOMMENDED LIMITED PROTECTION PROGRAM EFFECTS ON STATEWIDE PLANNING GOALS

**Goal 5, Natural, Cultural and Historic Resources** is largely procedural in nature: it requires that certain steps be followed before making a decision regarding the level of protection, if any, which should be afforded to a significant Goal 5 resource site. It sets forth a *process* for resolving conflicts between natural resource preservation and urban development. The ESEE analysis is a process to evaluate the Goal 5 program protection for the listed turtles. The limited protection option would minimize conflicts of conflicting uses through standards and mitigation and may result in enhanced wildlife habitat, wetlands and riparian corridors.

**Goal 6, Air and Water Quality**, requires local comprehensive plans and implementing measures to be consistent with state and federal regulations on matters such as air quality, stream quality, and groundwater pollution. Regulations that maintain vegetated corridors along riparian corridors, streams, and wetlands protect water quality. The limited protection option would maintain water quality of Thornton Lake, which provides essential turtle habitat. This option may result in enhanced air and water quality (and turtle habitat) if native vegetation and trees are maintained and enhanced.

**Goal 8, Recreational Needs**, requires Albany to plan for the park and recreational needs of the community. This Goal is related to the Goal 14 requirement to provide land to meet the "livability" needs of a community. Planning for, developing, and maintaining Albany's system of parks, open space, and trails is related to the level of protection provided to the turtle habitat and to Thornton Lakes wildlife in general. The largest site adjacent to Thornton Lakes, 27 acres located on the south side of East Thornton Lake currently zoned RS-6.5, was recently purchased by the City to be preserved as a natural area, a place to discover plants and animals that are disappearing from the Willamette Valley. The limited protection option would allow parks and recreational uses that maintain native vegetation within the impact area.

**Goal 9, Economic Development**, requires Albany to provide sufficient and suitable land within its UGB to meet long-term needs for industrial, commercial, office and mixed use development. The property within the impact area is designated residential in the Albany Comprehensive Plan. This land is not included in the Goal 9 buildable lands inventory for future commercial, industrial or mixed use development. The limited protection

option would discourage commercial and office uses in the impact area due to the potential impacts to the turtle habitat and migration corridors.

**Goal 10, Housing,** requires Albany to provide for the housing needs of citizens including encouraging the availability of adequate numbers of needed housing units at a range of prices and allow for flexibility of housing location, type and density. The limited protection option would maintain the residential development potential and buildable land supply. The land around Thornton Lakes is zoned low-density residential and is a needed housing type. The impact of the limited protection decision on the residential buildable land supply would be very minimal because according to the city's Housing Needs Analysis, there is plenty of low-density land available for housing needs.

**Goal 11, Public Facilities and Services,** requires jurisdictions to develop public facilities plans to coordinate the type, location and delivery of public facilities and services in a manner that best supports existing and proposed land uses within the urban growth boundary. The City's main water and sewer lines are currently located within the North Albany Road right of way. A second water line (Broadway Reservoir Transmission Main Project, Phase II) is in the city's facility plans and in the CIP, and would be located in the North Albany Road right-of-way. A second sewer line is needed to serve undeveloped property and failing septic systems. It is planned to be located at the west end of West Thornton Lake in order to minimize impacts to habitat. The limited protection program would incorporate standards into the City's engineering standards in order to reduce impacts to the turtle habitat and migration corridors and within significant wetlands and the riparian corridor while supporting maintenance and expansion of the city's public utilities outlined in the city's facility plans.

**Goal 12, Transportation,** requires the city to develop a transportation plan that avoids traffic congestion, reduces vehicle miles, and considers all modes of transportation and accessibility to these modes. Development around Thornton Lakes is close to schools and employment, reducing travel distances. The Thornton Lakes area straddles North Albany Road, a minor arterial in North Albany. Albany's Transportation System Plan shows widening the road to add sidewalks and a left-turn for the stretch of North Albany Road that runs over Thornton Lakes. This project is funded in the CIP. The limited protection program would incorporate standards into the City's engineering standards in order to reduce impacts to the turtle habitat and migration corridors and within significant wetlands and the riparian corridor while supporting expansion of North Albany Road and the city's Transportation System Plan.

**Goal 13, Energy Conservation.** The intent of Goal 13 is that land use and development be managed and controlled to maximize the conservation of all forms of energy – to support the efficiencies of the transportation and infrastructure systems, for example. The limited protection option may result in new development being clustered together outside the impact area and/or minimizing intrusion into the impact area.

**Goal 14, Urbanization.** The intent of Goal 14 is to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities. The limited protection option would allow residential development around Thornton Lakes, which is located on the south end of North Albany, right off a major arterial, close to services and jobs in North Albany Village and easy access to Highway 20. Development around Thornton Lakes is close to schools and employment, reducing travel distances.

In conclusion, the proposed turtle habitat protection program will have little impact on the state's planning goals.

## SIGNIFICANT NATURAL RESOURCE OVERLAY DISTRICTS

6.260 **Overview.** The Significant Natural Resource Overlay districts include Riparian Corridors (/RC) and Significant Wetlands (/SW) and fish-bearing waterways throughout the city, and a Habitat Assessment area (/HA) designated specifically for turtle habitat in and around Thornton Lakes in North Albany.

- Purpose and Intent (6.270)
- Land to which these Regulations Apply (6.280)
- Exempt Activities (6.290)
- Activities Subject to Natural Resource Impact Review (6.300)
- Natural Resource Impact Review Standards (6.310)
- Mitigation Standards (6.400)
- Local Mitigation Plans (6.410)
- Albany Native Plant List (6.420)
- District Boundary Corrections and Refinements (6.430)
- District Amendments (6.440)
- Adjustments and Variances (6.450)
- Compliance with State and Federal Regulations (6.460)
- Violations (6.470)

Per OAR 660-023-0040, two studies were conducted that analyze the Economic, Social, Environmental, and Energy (ESEE) consequences of allowing, limiting, or prohibiting conflicting uses within the three resource areas. The protection programs for the three significant resources are informed by these two ESEE Analyses.

6.270 **Purpose and Intent.** The intent of these supplemental Significant Natural Resource Overlay Districts is to protect significant natural resources within the City of Albany as designated under Statewide Planning Goal 5 and the provisions of the Goal 5 administrative rule (OAR 660, Division 23), while ensuring reasonable economic use of property.

More specifically, the purpose and intent of each Significant Natural Resource Overlay district is as follows:

A. **Riparian Corridor Overlay District** (/RC): To protect and enhance Albany's riparian areas, thereby protecting and restoring the hydrologic, ecological, and land conservation functions these areas provide. Significant riparian corridors support valuable fish and wildlife habitat; improve water quality by regulating stream temperatures, trapping sediment, and stabilizing streambanks; and reduce the effects of flooding.

A healthy riparian corridor is comprised of a multi-storied forest of native species of trees, shrubs, and ground cover. Many riparian corridors in Albany have the potential to be restored to higher function and value.

B. **Significant Wetland Overlay District** (/SW): To protect and enhance the integrity, function and value of Albany's significant wetlands and fish-bearing waterways. Wetlands and waterways provide hydrologic and ecologic functions; and reduce adverse effects of flooding. The vast majority of significant wetlands are in riparian areas. There are a small number of isolated significant wetlands. The higher quality isolated wetlands will be regulated locally (as identified in the Citywide ESEE Analysis); and the lower quality isolated wetlands will not be regulated locally, but must comply with state and federal wetland regulations.

C. **Habitat Assessment Overlay District** (/HA): To protect habitat for northwestern pond and western painted turtles in and around Thornton Lakes by reviewing and limiting the impacts

of development activities on their habitat. This was the only area in Albany where there is a documented presence of a species listed by either the federal government or the State of Oregon. The State lists the species as "sensitive, critical." The overlay identifies an area of high likelihood of turtle nesting, foraging, or migration routes. The overlay district regulations provide a limited level of protection (as identified in the Thornton Lakes ESEE Analysis). Voluntary methods of turtle habitat protection and enhancement are encouraged and essential.

**6.280 Lands to Which These Regulations Apply.** The procedures and requirements of this section apply only to property that is within a Significant Natural Resource Overlay District.

**A. Riparian Corridor Overlay District (/RC):** The Riparian Corridor Overlay District extends 50 feet upland from the Ordinary High Water mark, measured horizontally.

If the Riparian Corridor Overlay District area includes all or portions of a significant wetland, the district extends upland 50 feet, measured horizontally from the edge of the significant wetland. Fish-bearing waterways, and the significant wetlands associated with such waterways, are included in the Significant Wetland Overlay District.

(1) The Riparian Corridor boundary applies to the following Albany water resources (and in-stream lakes):

- Calapooia River
- Burkhart Creek
- Cathey Creek
- Cox Creek
- Crocker Creek
- Horseshoe Creek
- Oak Creek
- Periwinkle Creek
- Thornton Lakes
- Truax Creek

(2) The Willamette River Riparian Corridor is located within the Willamette River Greenway District boundary. All development on properties within the Willamette River Greenway District is subject to the regulations beginning in Section 6.500, but is not subject to the riparian corridor overlay regulations.

**B. Significant Wetland Overlay District (/SW):** The Significant Wetland Overlay District is comprised of fish-bearing waterways below the Ordinary High Water Mark, the wetlands associated with riparian corridors, and higher quality isolated significant wetlands, in the City's Local Wetland Inventory (LWI), and as amended through wetland delineations approved by the Oregon Department of State Lands (DSL) and the U.S. Army Corps of Engineers (ACE), if applicable. Notice to, and potentially permits from, DSL and ACE are still required for potential impact to all wetlands ~~including those not locally-regulated by DSL or ACE.~~

**C. Habitat Assessment Overlay District (/HA):** This overlay district extends 75 feet from the Ordinary High Water mark upland from East and West Thornton Lakes.

**6.290 Exempt Activities.** The following activities are exempt from Natural Resource Impact Review as would otherwise be required within the Significant Natural Resource Overlay Districts. Many of these exemptions are provided in recognition of the Albany ESEE analyses and pre-existing uses. Land use reviews as required by other sections of this Code and compliance with other local (floodplain, fill, encroachment, etc.), state, and federal regulations is still required. As a result, these activities should still be conducted in a manner that minimizes impact to Albany's significant natural resources.

- (1) ~~Temporary~~ Emergency procedures necessary for the immediate safety or protection of life or property, including removing hazardous trees and stream bank stabilization.
- (2) Removal of refuse or any fill that is in violation of local, state or federal regulations or in-channel erosion or flood control measures approved by City of Albany Public Works, DSL, ACE and any other applicable state or federal regulatory agency. Removal or placement of material in waters of the State must be consistent with State of Oregon Removal-Fill regulations (ORS 196.795-990) and the ACE fill regulations.
- (3) City construction of public infrastructure, such as transportation, stormwater, sewer, and water utilities. This exemption requires unimproved but disturbed areas to be replanted with native vegetation.
- (4) Private construction of public infrastructure. The location and construction of public transportation and utility facilities and structures as identified in a City-adopted master plan. This exemption requires that unimproved but disturbed areas are replanted with native vegetation.
- (5) The use of pre-existing right-of-way or easements for public infrastructure, franchise utilities, and railroads. Planting and maintaining native vegetation is encouraged.
- (6) Implementation of erosion prevention or flood control measures provided the measures have received any required approvals and permits from local, state or federal regulatory agencies with jurisdiction over the proposed activity.
- (7) ~~Continuance of~~ Farming practices such as grazing, plowing, planting, cultivating and harvesting, that either existed ~~or occurred~~ on the property prior to the date of adoption of these provisions ~~and~~ do not include new or expanded structures, roads, or other facilities involving grading, excavation, fill, native vegetation removal, or new drainage measures.
- (8) Maintenance of existing structures, impervious surfaces, and landscaped areas as described below:
  - (a) Ongoing maintenance of pre-existing landscaped areas, including perimeter mowing, as long as natural vegetation is not disturbed and there is no excavation, filling or reduction of natural resource area. Use of integrated pest management methods is encouraged.
  - (b) Ongoing maintenance of existing development, such as repair, replacement, and use of existing buildings, roads, paths, utilities, bridges, culverts, fences, flood control structures, drainageways or facilities, detention facilities, water quality facilities, and other structures and impervious surfaces, provided that such practices avoid sedimentation and other discharges into streams, lakes, or wetlands and do not add impervious surface or remove additional vegetation.
- (9) Removal of live vegetation for the following purposes:
  - (a) Restoration and enhancement projects that have received required approvals from the appropriate local, state, or federal agency.
  - (b) Removal of non-native and invasive plants, including noxious weeds if consistent with local, state, and federal regulations, and replanted with species on the City's native plant list.
  - (c) Planting native vegetation on the City's native plant list.

(d) Felling of trees planted as Christmas trees or orchard trees.

- (10) Residential development activities, such as construction of home additions, decks, patios, sheds, gardens, landscaping, etc., that impact no more than 2,000 square feet (cumulatively), or 20% of the Habitat Assessment Overlay District area within a property, whichever is less. Development activities will be reviewed at the time of application for building permits when applicable.

Regardless of the exemption to the local Natural Resource Impact Review requirements, protection of the turtle species is regulated by the State of Oregon.

This exemption only applies to the Habitat Assessment Overlay District. If the proposed activity is also located within other Significant Natural Resource Overlay Districts the requirements of those Districts still apply.

**6.300 Activities Subject to Natural Resource Impact Review.** A Natural Resource Impact Review will be required for proposed development activities in the Significant Natural Resource Overlay Districts that are not specifically exempted from review. The review will take place concurrent with any land use application or building permit. In instances when neither is required, the Natural Resource Impact Review will be conducted independently through either a Type I or I-L process as designated below. The standards for reviewing proposed development activities in the Significant Natural Resource Overlay Districts are found in Section 6.310.

**A. Activities subject to review include:**

- (1) Land divisions;
- (2) New structures, or exterior expansion of the footprint of any structure or driveways (Type I);
- (3) Increases in impervious surfaces (Type I-L);
- (4) Site modifications, including grading, excavation, fill or native vegetation removal (Type I-L);
- (5) Private construction of public and privately owned transportation facilities and utilities not exempt through 6.290(4) (Type I-L); and
- (6) Activities within the Habitat Assessment Overlay District not exempt under ADC 6.290 (Type I)

**B. When a proposed use or activity requires a Natural Resource Impact Review, in addition to what is required for any concurrent land use applications or building permits, the applicant shall submit a scaled site plan to the City that that shows:**

- (1) Topographic contours at two-foot intervals;
- (2) Ordinary high water (OHW) mark of all lakes, streams, or other waterways;
- (3) Location of Riparian Corridor and Habitat Assessment Overlay Districts based on OHW;
- (4) Location of Significant Wetland Overlay District based on the LWI or DSL-approved delineation or determination;
- (5) The 100-year flood boundary and elevation;
- (6) Existing vegetative cover and species composition;
- (7) Existing and proposed site improvements;

- (8) How the requirements of the applicable review standards in ADC 6.310 will be met; and
- (9) A mitigation plan if required per ADC 6.400-6.410.

#### 6.310 Natural Resource Impact Review Standards

- A. General Requirements for Significant Natural Resource Overlay Districts. A proposed activity will not be approved unless all of the following are true:
- (1) The proposed activity is allowed under the requirements of the base zone.
  - (2) There are no other reasonably feasible options or locations outside the Significant Natural Resource Overlay Districts for the proposed activity on the subject parcel.
  - (3) The proposed activity is designed, located and constructed to minimize excavation, grading, structures, impervious surfaces, loss of native vegetation, erosion, and adverse hydrological impacts on water resources. All activities are located as far from the water resources, and use as little of the surface area of the Significant Natural Resource Overlay Districts, to the extent reasonably feasible.
  - (4) Any proposed impacts to significant natural resources will be mitigated per the standards in Sections 6.400 and 6.410.
  - (5) Any applicable local, state, and federal permits are secured.
  - (6) The additional requirements of ADC 6.310 (B) will be met.
- B. Additional Requirements, Limitations, and Exceptions for Specific Activities in Riparian Corridor and Significant Wetland Overlay Districts. In addition to the general requirements listed above, the following requirements, limitations, and exceptions apply to development activities within the Significant Natural Resource Overlay Districts.
- (1) Land Divisions. In addition to the regulations in Article 11, land partially situated in one of the City's natural resource districts can be divided only if there is sufficient land outside of any Significant Natural Resource Overlay District to establish a development site area and/or separate a developed area from the natural resource areas. Applicants may also elect to follow the Cluster Development standards for land divisions in Article 11.
  - (2) Structures and Land Altering Activities. The placement of structures and other impervious surfaces, as well as grading, excavation, placement of fill, and vegetation removal, are prohibited. Exceptions may be made for the purposes identified in items a-f of this Section, provided they are necessary to accommodate an approved activity and comply with any stated requirements for the activity or use.
    - (a) Water-Related and Water-Dependent Uses. Development of water-related and water-dependent uses.
    - (b) Permanent Alteration Within the Riparian Corridor. Disturbance or development within the Riparian Corridor Overlay District shall be allowed under the following circumstances:
      - (i) The resource is characterized as 'marginal' or 'degraded' using the standards found in 6.410(5).
      - (ii) Demonstration that equal or better protection will be ensured through riparian corridor restoration and enhancement within the remaining overlay district area per the mitigation requirements in Sections 6.400 and 6.410. If

the site is encumbered by easements or rights-of-way that would preclude onsite restoration or enhancement, an "in-lieu of payment" may be made to the City in the amount equal to the cost of onsite mitigation.

Residentially zoned lots that were created prior to [INSERT DATE], 2011, that are less than 20,000 square feet and can't be further subdivided are allowed to encroach up to 25 feet into the Riparian Corridor Overlay District without the requirement for restoration or enhancement of the remaining 25 feet. The mitigation requirements in Section 6.400 still apply.

- (iii) In no case shall the site improvements be any closer than 25 feet from the Ordinary High Water mark or upland edge of the wetland, unless the improvements are otherwise allowed or exempted per this Section of the Code.
- (c) **Vegetation Removal.** Removal of live vegetation that is not exempt under 6.290(9) is only allowed to accommodate an approved use or development activity under this section of the Code.
- (d) **Private Construction of Public Non-Master Planned Transportation Facilities and Privately Owned Transportation Facilities.** The location and construction of public non-master planned and/or private transportation facilities and structures, such as driveways, local streets, bridges, bridge crossing support structures, culverts, and pedestrian and bike paths. In addition to other City standards, the following standards shall apply to privately constructed transportation facilities and structures:
  - (i) The facility is designed to be the minimum width necessary to allow for safe passage of vehicles, bicycles and/or pedestrians, and to meet minimum width requirements.
  - (ii) Where reasonably feasible, crossings of significant natural resources shall be aligned to minimize impact area.
  - (iii) The number of crossings is the minimum amount necessary to afford safe and efficient access.
  - (iv) The number of crossings is minimized where reasonably feasible through use and creation of shared access for abutting lots and access through easements for adjacent lots.
  - (v) Crossing structures have a natural bottom or other design that meets ODFW fish passage requirements.
- (e) **Private Construction of Public Non-Master Planned Utilities and Privately Owned Utilities.** In addition to other City standards, the following standards shall apply to permitted crossing, trenching, or boring for the purpose of developing a corridor for public non-master planned utilities and private utilities, within or crossing parcels in Significant Natural Resource Overlay Districts, as well as any above-ground utility structures.

In addition to other City standards, the following standards shall apply to privately constructed utility projects:

- (i) Boring under the waterway, directional drilling, or aerial crossing is preferable to trenching. If trenching is the only feasible alternative, it shall be conducted in a dry or dewatered area with stream flow diverted around the construction area to prevent turbidity.

- (ii) Common trenches for private utilities, to the extent allowed by the building code, shall be required where reasonably feasible in order to minimize disturbance of the protected resource.
  - (iii) Topsoil and sod shall be conserved during trench construction or maintenance, and replaced on top of the trench. Side-casting and storage of excavated material prior to replacement on top of trench is permitted. Any side-cast material not placed back on top of the trench shall be removed and may not be stored in the Significant Natural Resource overlay district after the construction or maintenance work is completed.
  - (iv) Hydraulic impacts on protected resources are minimized.
  - (v) Where reasonably feasible, crossings of significant natural resources shall be aligned to minimize impact area.
  - (vi) Above-ground utilities that cause ground disturbance in the Significant Natural Resource Overlay District and are not within an existing right-of-way or easement, and are not shown in an approved master plan, will only be allowed in limited circumstances, and if they meet the general requirements in 6.310(A).
- (f) Adjustment or Variance. Development associated with an approved adjustment or variance.
- (3) Activities within Habitat Assessment Overlay District. A wildlife habitat assessment is required if proposed development exceeds the minimum thresholds in 6.290(11). If the wildlife habitat assessment finds evidence of habitat for either the northwestern pond turtle or the western painted turtle within the overlay district, the following standards apply:
- (a) New development, expansion of existing development, landscaping and other ground disturbances shall be located outside of the designated turtle habitat areas as determined by the habitat assessment; or
  - (b) If impacts are approved, the development/use has been proposed in a manner that will minimize the impact of the development on wildlife habitat. The Oregon Department of Fish and Wildlife (ODFW) will review and approve a mitigation plan for the proposed development. Local mitigation is not required in addition to that required by ODFW or other state and federal agencies.

6.400 Mitigation Standards. Mitigation is a way of compensating for adverse impacts to the functions and values of natural resources caused by development. In many cases, mitigation may result in resource area restoration or enhancement.

If a State or Federal agency has jurisdiction regarding development impacts within the Riparian Corridor and Significant Wetland Overlay districts, and they require mitigation for those impacts, the City will not impose additional mitigation requirements over the same area. Those portions of development impacts not mitigated through a State or Federal agency will be subject to local mitigation requirements. Mitigation for impacts to turtle habitat in the Habitat Assessment Overlay District will be solely managed by ODFW.

The need for mitigation, restoration, or enhancement will be determined during the Natural Resource Impact Review process. The Director may allow some degree of flexibility to the standards based on the specific location and level of impact.

- (1) When Mitigation is Required: Mitigation will be required under the following circumstances:

- (a) Removal of one or more native tree greater than 25 inches in circumference, which requires replacement per section (2)(b).
- (b) Disturbance of more than 2,000 square feet of vegetated surface area. This level of impact will require a mitigation plan per 6.420.
- (c) When a request is made to develop or impact the Riparian Corridor Overlay District area per 6.310(B)(2)(b), a mitigation plan will be required for enhancement of the remaining area per 6.420.

(2) **Local Mitigation Standards:**

- (a) On-site enhancement is required, ~~in all instances where~~ when the 50-foot area of the Riparian Corridor Overlay District is impacted per 6.310(B)(2)(b), unless the activity is otherwise exempted per this section of the Code.
- (b) For other mitigation options, on-site mitigation shall occur within the relevant Significant Resource Overlay District as close to the impact area as reasonably feasible, taking into consideration the existing natural and human-made features of the site.

If on-site mitigation is not reasonably feasible, off-site mitigation shall be permitted in other locations inside the city in the following priority order:

- (i) Within the impacted Significant Resource Overlay District in the same drainage system; or
- (ii) Outside the impacted Significant Resource Overlay District, but within 100 feet of a Significant Resource Overlay District in the same drainage system; or
- (iii) Outside the same drainage system, but within a Significant Resource Overlay District.
- (c) Tree replacement requires planting a minimum 1½-inch caliper healthy and well-branched native deciduous tree or a 5-6 foot tall native evergreen tree for each tree removed. The replanted tree shall be of a species that will eventually equal or exceed the removed tree in size if appropriate for the new location.
- (d) Mitigation for impacts shall require a mitigation area ratio of 1:1; however if the quality of the resource is enhanced or restored per 6.410(5) the ratio may be lowered with Director approval.
- (e) Planting densities and species composition shall be consistent with native wetland and riparian-area plant communities currently or historically found in the drainage basin. Use of a reference site as guidance for developing a revegetation plan is recommended.
- (f) Any mitigation requirements resulting from a proposed land division, shall require a mitigation plan concurrent with the land division process.

6.410 **Local Mitigation Plan.** When a local mitigation plan for impact to a significant natural resource is proposed or required as part of a development application, the applicant shall submit a mitigation plan prepared by a qualified professional with demonstrated experience in developing mitigation plans for the specific impacted resource.

- (1) The mitigation plan shall document the location of the impact, the existing conditions of the resource prior to impact, presence of invasive species, the location of the proposed mitigation area, a detailed planting plan of the proposed mitigation area with species and density, and a narrative describing how the resource will be replaced, and how debris and invasive species will be removed.
- (2) The mitigation plan shall comply with all applicable State and Federal regulations, in addition to the City's standards. The City may approve a development but shall not issue a

building permit until all required State and Federal permit approvals have been granted and copies of those approvals have been submitted to the City.

- (3) The applicant or property owner of a development subject to an approved mitigation plan shall provide assurance of completion in the form of a surety or performance bond, cash, negotiable security deposit, letter of credit, or other guarantees approved by the City Attorney—that is equal to 120% of the value of the improvements installed pursuant to the plan for a 2-year period. The assurance shall be in place before the issuance of development permits to ensure the success of mitigation improvements and the survival of the plants. The assurance will be released by the City upon receiving satisfactory proof that the mitigation measures have been successfully implemented per (4) below. If mitigation improvements fail during the 2-year period, the assurance shall either be forfeited and used by the City to correct the problem pursuant to the approved mitigation plan, or the bond period may be extended for a 2½-year period with Director's approval to allow for another replanting strategy. When the City of Albany, or another unit of government, is the applicant, it must adhere to the standards in this section, but an assurance is not required.
- (4) A report on the survival and health of planted vegetation, and the status of invasive species, shall be performed by a qualified professional at the expense of the applicant, and will be provided to the Community Development Department between 18 and 24 months from the initial planting that describes the health of all vegetation and shows pictures of the vegetation. The City may arrange an on-site inspection to verify information contained in the report. If the survival rate for tree and shrub species is below 80%, a replanting strategy shall be prepared, approved, and executed within 6 months of the report, with a subsequent report on survival provided to the Department between 12 and 18 months from the time of the second planting. At this point, if the survival rate is still below 80%, the bond described in (3) will either be forfeited or extended for a 2½-year period with Director's approval. If at the end of the extension period, the survival rate is still less than 80%, the bond will be forfeited.
- (5) The following table summarizes the quality levels, mitigation requirements and expected condition of the significant wetlands and riparian corridor areas after successful completion of the mitigation plan; ODFW will solely determine the requirements for mitigation of significant wildlife habitat:

Existing Resource Quality	Mitigation Requirements/ Expected Future Resource Quality
<u>Waterways &amp; Significant Wetlands</u> (riparian and isolated)	
<i>Good Quality</i> : Little enhancement potential per the Local Wetland Inventory assessment or other wetland assessment by a qualified professional. City staff will verify existing condition.	Preserve or enhance per approved mitigation plan; Invasive species are removed and are not persisting.
<i>Marginal Quality</i> : Moderate enhancement potential per the Local Wetland Inventory assessment or other wetland assessment by a qualified professional. City staff will verify existing condition.	Restore to Good Quality per approved mitigation plan; Invasive species are removed and are not persisting.
<i>Degraded Quality</i> : High enhancement potential per the Local Wetland Inventory assessment or other wetland assessment by a qualified professional; Farmed or otherwise converted.	Enhance to at least Marginal Quality; A smaller ratio of 1.0 (impact area) to 0.5 (mitigation area) may be allowed for restoration to Good Quality.

City staff will verify existing condition.	
<b><u>Riparian Corridor Overlay</u></b>	
<b>Good Quality:</b> Combination of native trees, shrubs, and groundcover are at least 80% of the overlay area, and there will be more than 50% tree canopy coverage at maturity.	Preserve or enhance per approved mitigation plan; Invasive species are removed and are not persisting.
<b>Marginal Quality:</b> Combination of native trees, shrubs, and groundcover are at least 80% of the overlay area, and there will be 25%-50% tree canopy coverage at maturity.	Restore to Good Quality with an approved plan (mature overlay area coverage will be estimated); Invasive species are removed and are not persisting;
<b>Degraded Quality:</b> Less vegetation and canopy coverage than Marginal Quality, and/or greater than 10% coverage of any non-native species.	Enhance to at least Marginal Quality with an approved plan (mature overlay area coverage will be estimated); A smaller ratio of 1.0 (impact area) to 0.5 (mitigation area) may be allowed for restoration to Good Quality.

- 6.420 **Native Plant List.** The City shall maintain a native plant list, which includes plants that were historically found in the area at the time of European contact. Any modifications to the list will be processed administratively as a Type I process. If a modification is requested, the Director will determine if the modification is warranted based on consultation with knowledgeable people with backgrounds in botany or landscape architecture, as well as scientific documents.
- 6.430 **District Boundary Corrections and Refinements.** The boundaries for the Significant Natural Overlay Districts are approximate.

The boundaries of the Significant Wetland Overlay District are based on the locations of the significant wetlands identified in the City's Local Wetland Inventory, as reflected in Plate 6 of the Comprehensive Plan. The Riparian Corridor Overlay and Habitat Assessment Overlay Districts were estimated by measuring from the edge of the water, which is based on an aerial photograph.

District boundary corrections and refinements will be processed administratively. District corrections will be made to correct map errors, such as when the map does not properly reflect the Local Wetland Inventory data. A district boundary refinement is an adjustment made, based on professional analyses, to refine the boundary of the Significant Natural Resource Overlay Districts. District refinements must be made in accordance with the provisions in this code to determine the location and extent of the following:

- **Riparian Corridor Overlay Districts** as measured from the Ordinary High Water (OHW) mark of rivers, lakes, and streams, and from the upland edge of adjacent significant wetlands. If a DSL-approved wetland delineation or determination results in a change to the boundary of the significant wetland adjacent to the riparian corridor, the Riparian Corridor Overlay Boundary will be adjusted accordingly.
- **Habitat Assessment Overlay Districts** as measured from the OHW mark of East and West Thornton Lakes. If an ODFW-approved habitat assessment results in a change to the boundary of the habitat area, the habitat assessment overlay boundary will be adjusted accordingly.
- **Ordinary High Water Mark:** Changes to the Riparian Corridor or Habitat Assessment Overlay boundaries must be based on the location of the OHW that includes supporting information submitted by a qualified professional hydrologist or professional land surveyor.

- **Significant Wetlands Overlay District** by delineations of significant wetlands that are approved by the Oregon Department of State Lands (DSL) or by onsite wetland determinations by DSL when delineations are not needed for other purposes. DSL-approved delineations or determinations shall be required when development is proposed within 30 feet of the overlay district and will supersede the LWI mapping.

6.440 **District Amendments.** To amend the resource inventories or the program to protect significant natural resources on land within any of the Significant Natural Resource Overlay Districts requires Comprehensive Plan and Development Code amendments per the requirements in Article 2. In all instances the amendments must be based on new—a site-specific information development proposal. The proposed amendments are reviewed by the Oregon Department of Land Conservation and Development (DLCDD), with consultation from other State agencies such as ODFW or DSL.

6.450 **Adjustments and Variances.** The City may grant adjustments or variances to the standards in the Significant Natural Resource Districts in order to avoid rendering a property not buildable through application of this ordinance. Requests that cannot meet the provisions and review criteria for Adjustments will be processed as a Variance. Adjustment applications will be processed through the Type I land use process using the criteria in Section 6.450(2) below. Variance applications will be processed through the Type II process using the criteria in Section 2.690. The proposed activity or use must be allowed within the base zoning district in order to be considered for an adjustment or variance.

- (1) **General Standard.** In evaluating any Adjustment or Variance request, the decision maker may require the applicant to incorporate design options to reduce the impact on the protected resource. These may include, without limitation, multi-story construction, alternate siting of structures, limiting the length of impervious driveway and other surfaces, and maximizing the use of native landscape materials.
- (2) **Adjustments.** In order for the Director to approve an adjustment application, the applicant shall demonstrate that all the following criteria are fully satisfied:
  - (a) It is an existing legal lot and there is insufficient space outside the resource area to construct a use permitted in the underlying zoning district.
  - (b) The development site area, including all structures and impervious surfaces, encroaches on the resource area a total of 3,000 square feet or less.
  - (c) The adjustment is the minimum necessary to allow a permitted use or achieve the minimum buildable area outlined above, while at the same time minimizing disturbance to the significant natural resources. The Director may require adjustments to site development standards to enable avoidance of the resource.
  - (d) The encroachment does not result in a new structure or impervious surface being located closer than 25 feet from the Ordinary High Water mark. Bridges are an exception to this requirement.
- (3) **Variances.** For any existing lot or parcel whose hardship cannot be alleviated with an Adjustment application, the property owner may apply for a Variance per Section 2.690.

6.460 **Compliance with State and Federal Regulations.** Activities wholly or partially within the Significant Natural Resource Overlay District(s) are subject to all applicable federal and state regulations. The following regulations commonly apply within the resource areas. (Note: other regulations not listed may also apply; it is the property owner's responsibility to adhere to all applicable State and Federal regulations):

- (1) Oregon Department of State Lands permit requirements under the Removal-Fill Law.

- (2) U.S. Army Corps of Engineers permit for fill activities as required under Section 404 of the Clean Water Act.
- (3) Department of Environmental Quality permit requirements for stormwater under the Clean Water Act and state water quality regulations.
- (4) Oregon Department of Fish and Wildlife regulations may apply to development activities that could impact one of the sensitive, threatened, critical, or endangered species indigenous to the region.
- (5) The federal Endangered Species Act prohibits any action that causes a "taking" of any listed species of endangered fish or wildlife.
- (6) The federal Migratory Bird Treaty Act prohibits taking, harming or moving any migratory bird, nest, or egg.

**6.470 Violations.** Activities within Significant Natural Resource Overlay Districts not authorized under this Article are unlawful. The City shall seek compliance with the requirements of this Article and the resolution of violations through the procedures below. These procedures are not exclusive; may be exercised singly, simultaneously, or cumulatively; may be combined with any other remedies authorized under law; and may be exercised in any order.

- (1) Voluntary cooperation to resolve violations is the preferred enforcement procedure when appropriate to the circumstances. Violations causing ongoing degradation of natural resources or repeated violations by the same individual, firm or corporation are not appropriate for voluntary enforcement procedures.
- (2) Natural resource restoration shall be required for violations that result in unauthorized construction, grading, excavation, placement of fill material, or removal of native vegetation in a Significant Natural Resource Overlay District. The purpose of the restoration requirements shall be to mitigate impacts to vegetation, soils and hydrology and may include vegetation planting, fill removal, backfilling of excavated areas, restoration of ground surface contours, restoration of hydrological processes or other actions. Restoration recommendations shall be solicited from the Oregon Department of Fish and Wildlife and the Linn or Benton County Soil and Water Conservation Districts.
- (3) Violations involving placement of fill material, excavation, grading or alteration of material within a stream or in a wetland shall be reported to the Oregon Department of State Lands and the U.S. Army Corps of Engineers, in addition to any local actions taken per this Section of the Code.
- (4) Failure of an individual, firm, or corporation to remedy a documented violation may be processed in accordance with the Enforcement provision in Article 1.
- (5) Criminal or civil sanctions.