



Oregon

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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 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.¹ 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.²

¹ 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.

² 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 painted 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 OAR 660-23-0040 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