



Date: July 16, 2018

To: Fred Wilson

From: Lauren A. Sommers

Subject: Lombard Apartments (WG 18-3, SR 18-3, ARA 18-8), City's Response to Arguments re Needed Housing Statutes and Willamette River Greenway Permit

All parties agree that the proposed development is located within the boundaries of the Willamette Greenway. The applicant has submitted a Willamette Greenway Permit application and the applicant's July 9, 2018, letter to the Hearings Official asserts that the application meets the approval criteria for a Willamette Greenway Permit and should therefore be approved. Planning staff recommends approval of the application. However, the applicant also asserts that the City cannot lawfully require a Willamette Greenway permit because this is an application for housing, the applicant is entitled to "clear and objective standards" pursuant to ORS 197.307(4) (as recently amended by Enrolled Senate Bill 1051 (2017)), and the approval criteria associated with a Willamette Greenway permit are not clear and objective. In addition, the applicant asserts that the Willamette Greenway Permit discourages needed housing through unreasonable cost and delay in violation of ORS 197.307(4)(b). The Home Builders Association of Lane County has submitted testimony supporting the applicant's assertions.

History of the Willamette River Greenway and Goal 15

The Oregon Supreme Court explained the history and requirements of the Willamette Greenway and Goal 15 in *Gunderson, LLC v. City of Portland*, 352 Or 648, 650 290 P3d 803 (2012).

In 1973, the Oregon Legislature "established the Willamette River Greenway, a corridor of protected land located along the banks of the river." *Gunderson*, 352 Or at 650.

The legislature expressed recognition of 'the need of the people of this state for existing residential, commercial and agricultural use of lands along the Willamette River' and also the need to 'permit the continuation of existing uses of lands that are included within such greenway[.] ORS 390.314(2)(b). At the same time, the legislature recognized the need 'to limit the intensification and change in the use of such lands so that such uses shall remain, to the greatest possible degree, compatible

with the preservation of the natural, scenic, historical and recreational qualities of such lands.

The legislature placed primary responsibility for the coordination of the development and maintenance of the Greenway with the State Parks and Recreation Department (department). ORS 390.314(2)(d). The legislature then charged the department, in cooperation with local governments that have greenway lands within their boundaries, to prepare a plan for the development and management of the Greenway.

In 1975, the department, in cooperation with nine counties and other local governments along the Greenway, submitted to [the Land Conservation and Development Commission] a preliminary greenway plan, a greenway goal, and policies for a completed greenway plan. On December 6, 1975, the commission adopted the Willamette River Greenway Program, consisting of an order adopting a Preliminary Willamette Greenway Plan and Statewide Planning Goal 15 (Goal 15).

Goal 15 provides that each city and county in which the Greenway is located must incorporate portions of the Willamette River Greenway Plan into its comprehensive plan, implementing ordinances and other implementing measures.

Cities and counties are also required to ‘establish provisions by ordinance for the review of intensifications, changes of use and developments to ensure their compatibility with the Willamette River Greenway.’ OAR 660-015-0005; Goal 15, Paragraph F(3). Those ordinances must include ‘[t]he review of intensification, changes of use and developments as authorized by the Comprehensive Plan and zoning ordinance to insure their compatibility with the Greenway statutes and to insure that the best possible appearance, landscaping and public access are provided.’ OAR 660-015-0005; Goal 15, Paragraph F(3)(b). The review must include findings that [to the greatest possible degree] the intensification, change of use, or development ‘will provide the maximum possible landscaped area, open space or vegetation between the activity and the river[.]’ OAR 660-015-0005; Goal 15, Paragraph F(3)(b)(1).

Gunderson, 352 Or at 650-53.

To comply with state law regulating the Willamette Greenway, the City adopted Resolution 2592 in 1976, setting the boundaries of the Willamette Greenway within the Eugene city limits. Resolution 2592 provides that “[p]rivate development within the Greenway will be reviewed to insure that adequate provision has been made for public access to and along the river, consistency

[sic] with local plans and policies, preservation of the natural vegetation fringe along the river, and the Greenway objectives set forth in Goal 15.”

The Metro Plan incorporates the requirements of Goal 15 through its Willamette River Greenway, River Corridors, and Waterways Element.

The Willamette Greenway Permit approval criteria located in the Eugene Code (EC 9.8815) implement the requirements of Goal 15, ORS 390.314 and the Metro Plan, including the following specific language required by Goal 15: “to the greatest possible degree, the intensification, change of use or development will provide the maximum possible landscaped area, open space or vegetation between the activity and the river” and “to the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means.”

Senate Bill 1051 / Clear and Objective Standards

Prior to the 2017 passage of Senate Bill 1051, ORS 197.307(4) and the Willamette Greenway laws were written to work in concert. The law is clear that housing proposed for development within the Greenway is not on “buildable land” and the pre-2017 version of ORS 197.307(4) required that local governments “adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing *on buildable land*[.]” (Emphasis added).

OAR 660-08-0005(2) defines “buildable land” as “residentially designated land within the urban growth boundary, including both vacant and developed land likely to be redeveloped, that is *suitable, available* and necessary for residential uses...[i]and is generally considered ‘suitable and available’ unless it...[i]s subject to natural resource protection measures determined under Statewide Planning Goals 5, 6, **15**, 16, 17, or 18[.]” (Emphasis added). Land located in the Greenway is subject to Goal 15 natural resource protection measures, so local governments are not required to consider it “suitable and available for residential use.” Therefore, prior to the passage of SB 1051, the application now before you was clearly not entitled to clear and objective standards. There is no indication that the legislature intended to change this when it passed SB 1051 with a revised version of ORS 197.307(4) that does not include the reference to “buildable land.”

The applicant and Home Builders urge the Hearings Official to choose between compliance with two competing state law directives. The City’s position, instead, is that no such choice is required.¹ The exception from clear and objective standards for housing within the Greenway

¹ The City has consistently maintained the position that once the City Council adopts a code provision only the Council (through a code amendment) or an authority hierarchically above it (LUBA or a court), can void or choose not to apply that code provision. Neither city staff, the

makes the most sense in light of the mandatory subjective requirements of ORS 390.314 and Goal 15. ORS 390.314(2)(a) requires that intensification and changes of use in the Greenway be limited so that “such uses remain, *to the greatest possible degree*, compatible with the preservation of the natural, scenic, historical and recreational qualities” of lands within the Greenway. In addition, Goal 15 requires that the City’s implementation provisions “insure that *the best possible* appearance, landscaping and public access are provided” within the Greenway, insure that to “*the greatest possible degree*” any “intensification, change of use or development will provide *the maximum possible* landscaped area, open space or vegetation between the activity and the river,” and insure that that to “*the greatest possible degree*” “[n]ecessary public access will be provided to and along the river by appropriate legal means.” See OAR 660-015-0005; Goal 15, Paragraph F(3). It is not possible to draft clear and objective approval criteria that also require an applicant to comply with phrases like “the best possible,” “the greatest possible degree,” and “the maximum possible,” as required by Goal 15. The City cannot comply with the requirements of ORS 390.314 and Goal 15 and also be limited to the application of clear and objective standards for proposed housing developments within the Greenway.

In this situation, ORS 390.314 and Goal 15 must take precedence over ORS 197.307. ORS 174.020(2) provides that when a general statutory provision and a particular statutory provision are inconsistent, the particular intent controls. Goal 15 and ORS 390.314 speak to a specific concern – preservation of the Willamette River Greenway, while ORS 197.307(4) appears to apply to all lands and all housing in the state. Within the Greenway, as the more particular statutory provision, the requirements of ORS 390.314 (and by extension Goal 15) must take precedence over the requirement for clear and objective standards for housing.

By statute, the legislature has specifically authorized the adoption of the statewide planning goals and has required cities to comply with them. The legislature recognized that the “promotion of coordinated statewide land conservation and development requires the creation of a statewide planning agency to prescribe planning goals and objectives to be applied by...cities... throughout the state.” ORS 197.005(4). The legislature considers compliance with the statewide planning goals, including Goal 15, to be mandatory. See ORS 197.015(8) (“Goals’ means the mandatory statewide planning standards adopted by the [Land Conservation and Development Commission] pursuant to ORS chapters 195, 196 and 197.”). Cities are required by statute to exercise their planning and zoning responsibilities in accordance with the goals. ORS 197.175(1). The legislature has been very clear that the City’s comprehensive plan and land use regulations *must* comply with the goals. ORS 197.250.

planning commission, nor the hearings official have the legal authority to choose to ignore or override land use approval criteria adopted by the City Council.

Conclusion

The applicant has submitted a Willamette Greenway Permit application and staff is recommending approval of the application on its merits.² However, regardless of the Hearings Official's determination on the merits of the application, the Hearings Official cannot, as applicant urges, rely on ORS 197.307(4) to ignore or refuse to apply the approval criteria of EC 9.8815. EC 9.8815 is necessary for compliance with ORS 390.314, Goal 15, and the Metro Plan. ORS 174.020(2), as well as the various statutes requiring compliance with the statewide land use planning goals noted in this memo, support the conclusion that the City's obligations to comply with the requirements of Goal 15 within the boundaries of the Willamette River Greenway must take precedence over a housing developer's right to clear and objective standards within the Greenway. The criteria in EC 9.8815 are applicable to this application.

² To the extent that the Home Builders are arguing that the Court of Appeals decision in *Recovery House VI v. City of Eugene*, 150 Or App 382, 946 P2d 342 (1997) prohibits the City from considering the Willamette Greenway application on the merits, that argument misstates the court's holding. As LUBA has recognized, the decision in *Recovery House* simply provides that where an applicant files a permit application under protest, the applicant preserves the right to challenge, at LUBA, the local government's decision that a permit application was required. The *Recovery House* decision does not prevent a local government from considering the merits of an application filed under protest. *GPAI, LLC v. City of Corvallis*, ___ Or LUBA ___, (LUBA No 2016-013, June 15, 2016) (slip op at 3).