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MEMORANDUM

TO: Andrea Christenson, Natural Resources Planner
Denny Egner, Assistant Planning Director, Long Range

FROM: Evan P. Boone, Deputy City Attorney

SUBJECT: Classification of amendments to the Sensitive Lands Overlay Districts on the Comprehensive Plan Map and Zoning Map to remove a 2.3-acre Resource Conservation (RC) District designation from 18 properties– “Legislative” or “Quasi-Judicial” Land Use Decision?

DATE: April 10, 2012

Question: Is the removal of RC Overlay District designation of TG-17 from portions of 18 lots, pursuant to LOC 50.16.020 and 50.16.025 a “legislative” or “quasi-judicial” action?



Answer: Based the very specific provision of LOC 50.16.025, the legislative procedure is to be used.

Discussion:

The City is considering amendment of the Comprehensive Plan map and Zoning Map to remove an RC Overlay District which was established to protect TG-17. The RC Overlay District consists of 2.3 acre, and comprises a portion of 18 lots:

General "Legislative v. Quasi-Judicial" Determination

I have considered the legislative v. quasi-judicial classification of a text amendment three times before:

1999 (MC Zone): The City amended one zone (MC) to restrict the size of retail uses to under 35,000 sq. ft., in order to comply with a Comprehensive Plan policy that was previously adopted but not implemented in the Code. I concluded that the amendment should be classified as a "quasi-judicial." CAO Memorandum, Jan. 6, 1999.

2009 (IP Overlay): The City created an overlay zone in the IP zone, that expanded the number of uses permitted within the overlay area, by adding uses also found in the GC zone. CAO Memorandum, April 13, 2009.

2009 (HC, MC, IP - amendment to limit the size of certain uses to comply with Metro's Title 4. I concluded that the amendment should be classified as "legislative". CAO Memorandum, August 11, 2011.

Those determinations were made under LOC 50.75.005:

Section 50.75.005 Legislative Decisions Defined.

1. A "Legislative Decision" is an amendment to the policies, procedures, standards, criteria or Map designations of the Comprehensive Plan, and this Community Development Code, **unless such amendment applies to a small number of identified properties only or is required to effect a particular development permit application.**
2. An amendment to the policies, procedures, standards, criteria or Map designations of the Comprehensive Plan, or this Community Development Code which is **not a "legislative decision" as defined in subsection (1) of this section shall be considered "quasi-judicial" and shall be processed as a major development.**

As explained in my prior memoranda, I applied the "Legislative v. Quasi-Judicial" determination factors under the principles stated in Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287 Or. 591, 601 P.2d 769 (1979). I summarize those factors and would apply them as follows in this case, if LOC 50.75.005 were applicable:

- *Development Permit Application: is the amendment required to effect a particular development permit application?*

None of the text amendments were to enable a specific development proposal.

- *Does the Process, Once Started, Require Reaching a Decision?*

MC Zone:	Yes (Needed to Carry Out Comp Plan Policy)
IP zone:	No (Policy question whether to extent GC uses into overlay area of IP Zone)
IP, MC, and HC:	Yes (Needed to comply with Metro Code)
RC Removal (TG-17)	Yes (Needed to comply with LOC 50.16.020)

- *Does this Involve the Application of Facts to Preexisting Criteria?*

MC Zone:	Yes (Compliance with Comp Plan Policy)
IP Zone:	No (Application was to enlarge area for uses, not to bring uses in area into compliance with criteria).
IP, MC, and HC:	Yes (Needed to comply with Metro Code)
RC Removal (TG-17)	Yes (LOC 50.16.020 and -.025)

- *Small Number of Identifiable Properties?*

MC Zone:	13 parcels (100% of zone)
IP Zone:	24 parcels / 25.3 acres (19.7% of zone)
IP, MC, and HC:	112 parcels / 184 acres (100% of zone)
RC Removal (TG-17)	Portions of 18 parcels / 2.3 acres (100% of the RC Overlay Zone for that tree grove, but there are countless other RC Overlay Districts.)

If I were applying LOC 50.75.005 and, by its incorporation of the general “legislative v. quasi-judicial” factors found in Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287 Or. 591, 601 P.2d 769 (1979), I would conclude that removal of an RP Overlay District would be “quasi-judicial” because of the relatively small number of parcels involved, the small acreage affected, that the application is being examined against specific criteria, and that a decision is required to be made.

Specific “Legislative v. Quasi-Judicial” Determination for Sensitive Lands Overlay District

However, I am not applying the general “legislative v. quasi-judicial” standards found in LOC 50.75.005. Removals of Sensitive Lands Overlay Districts are to be reviewed pursuant to LOC 50.16.025 and, by reference, 50.16.020, and there is a very specific test for “legislative v. quasi-judicial”:

LOC 50.16.025 Removing an Overlay District Designation.

1. In order to remove an overlay District designation the review body shall find that one of the following criteria is met:

...

b. There was a mistake in the analysis of quality or quantity in the original designation of the resource and a re-application of the ESEE analysis demonstrates that the designation no longer meets the criteria; or

...

...

3. A removal application pursuant to subsection (1)(a) or (1)(b) above shall be processed in the same manners as a designation application pursuant to LOC 50.16.020.

...

50.16.020 Criteria for Designating Property within an Overlay District.

1. Goal 5 Analysis Required. In order to include an individual property, a portion of a property, or a group of properties within an RP or RC Overlay District, the reviewing body shall find that the resource on the site or sites has been ranked and evaluated through an Economic, Social, Environmental, and Energy (ESEE) Process Analysis in compliance with Statewide Land Use Planning Goal 5 and merits a Resource Protection (RP) and/or Resource Conservation (RC) designation.

2. Procedure. An RP or RC designation may be imposed, modified or removed pursuant to either a City or area-wide Goal 5 analysis or a Goal 5 analysis of a single property or small number of individual properties. **A group of properties shall be processed as a legislative Comprehensive Plan Map and Zoning Map amendment pursuant to LOC Chapter 50.75.005 (1), and a single property shall be processed as a quasi-judicial Comprehensive Plan Map and Zoning Map amendment pursuant to LOC 50.75.005 (2).**

3. Addition of Resources.

...

b. Criteria. The reviewing authority shall adopt a Comprehensive Plan Map and Zoning Map Amendment to add the resource to the Sensitive Lands Atlas, and designate the RP District or RC District, as applicable, if the reviewing authority finds that the proposed resources are "significant resources," by meeting the requirements of either subsection (5) [stream or wetland] or subsection (6) [tree grove], and if an ESEE analysis shows that the resources are required to be protected.

4. Methodologies. The methodologies for determining whether or not the criteria for designation of a resource has been met shall be the following:

a. Lake Oswego ESEE Analysis Methodology to be Utilized. The City shall determine:

i. Tree Grove: The Wildlife Habitat Assessment Score (HAS); or

...

6. Applicability of RC Overlay District: The Resource Conservation (RC) Overlay District shall protect significant tree groves. A tree grove may be placed within an RC District if the tree grove has:

a. A HAS ranking of at least 35; or

b. A "high" ranking for scenic values in the study; or

c. Is associated with a stream corridor or wetland that has an RP ranking.

Under LOC 50.16.020(2), the designation or removal of a Sensitive Lands Overlay District is:

Single Property: quasi-judicial
Group of Properties: legislative

Because the code is very specific in this instance in how the procedure for designation or removal of overlay districts is to be considered, rather than incorporating the principles found in Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., I conclude that the removal of an RC Overlay District from two or properties is to be under the “legislative” procedure. This affects the manner of notice and the public hearing procedure.

I do not find, however, that the procedural classification of LOC 50.16.020(2) supplants the specific criteria for considering a Sensitive Lands Overlay District. Generally, a legislative decision is a policy choice, and the criteria to be applied are set forth in LOC 50.75.010. In this instance, however, the criteria for consideration of removal of a Sensitive Lands Overlay District is specific (LOC 50.16.025), and one need not use the “general” legislative criteria.

LOC 50.75.010 Criteria for a Legislative Decision.

A legislative decision is *generally* a policy decision which is up to the discretion of the City Council, but shall:

1. Comply with any applicable state law;
2. Comply with any applicable Statewide Planning Goal or Administrative Rule adopted pursuant to ORS Chapter 197; and
3. In the case of a legislative amendment to this Community Development Code, comply with any applicable provision of the Lake Oswego Comprehensive Plan.

Compared to:

LOC 50.16.025 Removing an Overlay District Designation.

1. **In order to remove an overlay District designation** the review body **shall find that one of the following criteria is met:**
 - a. As a result of natural occurrences or evolution the resource has been degraded to the extent that the subject property no longer meets the criteria for designation found in Section 50.16.020 (4) or (5) and a re-application of the ESEE analysis demonstrates that the designation is no longer justified; or
 - b. There was a mistake in the analysis of quality or quantity in the original designation of the resource and a re-application of the ESEE analysis demonstrates that the designation no longer meets the criteria; or**
 - c. There was a mistake in the location of the original designation of the resource, such that no portion of the resource was on the subject property.

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