



METRO

December 5, 2006

Doug Rux
Community Development Director
City of Tualatin
18880 SW Martinazzi Avenue
Tualatin, OR 97062-7092

RE: CITY OF TUALATIN TITLE 13 AND TUALATIN BASIN PLAN COMPLIANCE REVIEW

Dear Mr. Rux:

I have had the pleasure of working with Jim Jacks, former Special Projects Manager, on the City's efforts to comply with the Tualatin Basin Program and Metro's Title 13. Until his recent departure to take a new job, Jim served on the Tualatin Basin Natural Resources Steering Committee for many years and contributed to the formulation of the Tualatin Basin Program. He was very helpful to me in explaining the City's amendments to its plan and codes to implement portions of the Tualatin Basin Program. Although the City Council has already taken final action on the proposed code amendments, we ask that the City consider the points raised in this letter and take appropriate action in the future to address them.

Thank you for transmitting to Metro the City of Tualatin's proposed changes to its development code and comprehensive plan to comply with Title 13 of the Metro Urban Growth Management Functional Plan, Metro Code 3.07.1310 through .1370 ("UGMFP"). Tualatin is seeking to comply with Title 13 via "Option 5" (Metro Code 3.07.1330(B)(5)), by complying with the "Tualatin Basin Program." Our comments are based on our review of the City's two September 14, 2006 compliance memoranda, and September 7, 2006 draft code amendments. Please advise us if these are not the most recent versions of the review documents or if we are missing other necessary documents.

This letter serves as Metro's compliance review under Title 8 (Metro Code 3.07.820(A)). I note that compliance with Title 13 pursuant to Option 5 requires Tualatin to undertake certain non-regulatory steps, including some ongoing responsibilities, that do not require amendments to Tualatin's comprehensive plan and land use regulations. This compliance review by Metro is a review only of whether the amendments Tualatin is proposing are consistent with the UGMFP, and is not a review of whether Tualatin has complied, or will comply, with the other requirements of Option 5 and the Tualatin Basin Program.

Applicable Requirements for Compliance

There are essentially four substantive elements of Option 5 compliance that could require amendments to comprehensive plan and land use regulations. In order to comply with Title 13 under Option 5, Tualatin must:

- "[F]acilitate and encourage the use of habitat-friendly development practices, where technically feasible and appropriate, in all areas identified as Class I and II riparian habitat areas on the Metro Regionally Significant Fish and Wildlife Habitat Inventory Map." Metro Code 3.07.1330(B)(5)(d) (see also, step 2 of the Tualatin Basin Program implementation steps, applicable via Metro Code 3.07.1330(B)(5)(a), which requires Tualatin to adopt Low Impact-Development guidelines "to reduce environmental impacts of new development and removing barriers to their utilization.") In addition, Metro Code 3.07.1330(E) requires Beaverton to remove

barriers to the use of habitat-friendly development practices in all regionally significant habitats. Metro provides examples of such habitat-friendly practices in Table 3.07-13c of Title 13;

- “[A]llow for the reduction of the density and capacity requirements of Title 1 of the [UGMFP]” for all properties within Metro’s habitat inventory. Metro Code 3.07.1330(B)(5)(e) and 3.07.1330(H). Such allowance may be provided only for properties within the Metro urban growth boundary on January 1, 2002, require the protection of the habitat via a public dedication or restrictive covenant, and only allow for the density/capacity reduction in proportion to the amount of habitat permanently protected on the property;
- Provide both a simple and a detailed process for property owners to verify the location of inventoried habitat on their property. Metro Code 3.07.1330(G); and
- Adopt protection provisions consistent with Title 13 applicable to upland wildlife habitat areas within territory added to the Metro UGB in the future. Metro Code 3.07.1330(B)(5)(f). (A jurisdiction is not required to adopt such provisions at this time, it may instead choose to address this requirement at the time that new areas are brought into the UGB and concept planning and local zoning is applied.)

In addition to these substantive requirements, Tualatin must, first, also ensure that provisions it adopts provide property owners with clear and objective compliance standards, Metro Code 3.07.1330(C), and may also provide discretionary compliance standards, Metro Code 3.07.1330(D). Second, Tualatin must have made its proposed amendments available for public review at least 45 days prior to a public hearing regarding those amendments. Metro Code 3.07.1330(F).

Summary of Comments

We first want to commend Tualatin on its thorough efforts in complying with Title 13. The City’s proposed amendments are responsive to Metro’s expectations and will result in better protection of our region’s wildlife habitats. Despite these commendable efforts, we understand that Title 13 has many complex requirements, and so this letter includes Metro’s comments to ensure the City fully complies with all aspects of Title 13. We also include a number of suggestions to improve the clarity of the proposed amendments. This section provides only a summary of our comments, a more detailed discussion of each comment is found in the following sections.

Required for Compliance

- The City must ensure that its density waiver is voluntary, applicable to all six habitat types contained in Metro’s Regionally Significant Fish and Wildlife Habitat Inventory Map, and applicable only to properties located inside the UGB as of January 1, 2002;
- The definition of “Fish and Wildlife Habitat Area” (FWHA) (or some equivalent) must be clarified to ensure that it includes all six regionally significant habitats in Metro’s Significant Fish and Wildlife Habitat Inventory Map. The City must then demonstrate that its proposed code changes, using whatever habitat definitions it deems necessary, do in fact facilitate and encourage HFDPs and remove barriers to Low Impact Development practices;
- The City must clearly demonstrate that it has provided a “simple” verification process in addition to the detailed approach to locate boundaries of Metro’s Regionally Significant Fish and Wildlife Habitat on a property specific basis.

Suggestions

- Amend code to allow flexibility in building height, provided that the height increase results in an offsetting reduction in impervious surface or other beneficial outcome for habitat;
- Amend code to create a mechanism, if one does not already exist, to allow and encourage landowners to shift required landscaping from one part of their property to areas adjacent to a habitat area;

- Modify the City's proposed provisions prohibiting the spillage of light into FWHA to clarify that it only encourages, not prohibits, landowners to do so. One suggestion is to insert the qualifying phrase "where practical and feasible" into the City's language that otherwise prohibits the shining of light into habitat areas;
- Continue to work with CWS to ensure the timely development of effective stormwater facility design standards, including those for open drainage systems, and to make the appropriate future code changes to encourage landowners to take advantage of the new design standards;
- Amend City's code to affirmatively state its encouragement for certain HFDPs involving stream crossings and stormwater facilities (see more detailed comments below), instead of relying only on compliance with Title 3 and CWS standards to comply with Title 13.

Detailed Comments

Density Waiver

Metro Code Section 3.07.1330(B)(5)(e) requires that each city or county adopt a waiver process from the density requirements of Title 1 of the UGMFP for all properties in Metro's Regionally Significant Fish and Wildlife Habitat Inventory Map. This waiver can only apply to properties that were within the UGB before January 1, 2002.

Issue #1: The City's existing density reduction provision, through its Net Acreage definition, is not broad enough to allow density waivers for all six habitat types contained in Metro's Regionally Significant Fish and Wildlife Habitat Inventory Map, as required by Title 13.

As best can be determined, the City proposes to meet the density waiver requirement by reference to its existing language of Net Acreage, which excludes from development rights-of-way and tracts, as well as habitats protected under CWS requirements. No changes to this definition are proposed. The City explains that the current application of the Net Acreage definition already allows landowners to avoid meeting minimum density requirements and so does not penalize landowners for having protected habitats on their property. It appears, however, that the scope of the allowed density reduction under the Net Acreage definition falls short of Title 13's requirement that the density waiver apply to all regionally significant fish and wildlife habitats (e.g., Class I, II, and III riparian, and Class A, B, and C upland).

Compliance Recommendation: The City must ensure that, regardless of the methodology used to comply with the density waiver requirement of Metro Code Section 3.07.1330(B)(5)(e), the density waiver is applicable to all six regionally significant habitats (see next two issues for complete recommendation).

Issue #2: The City's proposed scheme makes the density waiver option a mandatory requirement, whereas Title 13 specifies that the waiver is intended to a voluntary option for landowners.

Issue #3: The City's proposed scheme fails to limit application of the density waiver to only properties inside the urban growth boundary on January 1, 2002.

Metro Code Section 3.07.1330(B)(5)(e) requires that each jurisdiction allow landowners to apply for a density waiver as a voluntary option to protect regionally significant habitat. Thus, the density waiver is not intended to be a mandatory density restriction in a landowner's property right. In fact, making the density waiver a mandatory requirement is a prohibition on development that clearly goes beyond the intent of Title 13 and would need to be justified by a separate Goal 5 ESEE analysis and decision.

In addition, Metro Code Sections 3.07.1330(B)(5)(e) and 3.07.1330(H)(1)(a) state that the density waiver applies only to properties that were located inside the UGB on January 1, 2002. The City has not included this limitation in its proposed code changes.

Compliance Recommendation: The City must provide a density waiver option that is voluntary and applies to all six of Metro's regionally significant habitats. We recommend the City add language to its Net Acreage definition that states, in effect:

"A landowner of property with regionally significant habitat, as shown on Metro's Regionally Significant Fish and Wildlife Habitat Inventory Map [the City should incorporate Metro's Inventory Map by reference], and which is habitat not already excluded under this definition, may request a density waiver to protect such habitat, provided that the habitat has been verified by local process as regionally significant. This density waiver option applies only to properties located within the UGB before January 1, 2002."

As an alternative to integrating the density waiver into the Net Acreage definition, the City could add an entirely separate code section that specifies how landowners can obtain a density waiver.

Definition of Fish and Wildlife Habitat Area

Issue: *The City's proposed definition of "Fish and Wildlife Habitat Area" does not clearly demonstrate that it includes all six regionally significant habitat areas in Metro's Inventory Map.*

Tualatin proposes to add to its code a new habitat category called "Fish and Wildlife Habitat Area" (FWHA). This term is defined as "an area in the Natural Resources Protection Overlay District, Other Natural Areas identified in Figure 3-4 of the Parks and Recreation Master Plan, or in the Clean Water Services Vegetated Corridor." The City then applies Title 13's required HFDPs and Low Impact Development practices to properties that contain FWHA. It is not clear, however, whether the proposed definition of FWHA includes all of the six regionally significant habitat areas in Metro's Regionally Significant Fish and Wildlife Habitat Inventory Map, as required by Title 13, because the definition refers to habitat maps and resources that are different from Metro's Habitat Inventory Map. Our best estimate is that the definition includes most, but not all, the habitats in Metro's Regionally Significant Fish and Wildlife Habitat Inventory. Thus, in order to better determine compliance with requirements of Title 13 and the Tualatin Basin Program, Metro needs to know the exact extent of overlap between FWHA and Metro's Regionally Significant Fish and Wildlife Habitat Inventory Map.

Compliance Recommendation: The City must ensure that its definition of FWHA (or some other equivalent habitat category) includes all six classes of Metro's regionally significant fish and wildlife habitats.

Verification Process

Metro Code Section 3.07.1330(G) requires that each jurisdiction provide landowners a "reasonable, timely, and equitable process" to verify the specific location of "habitat areas" (i.e., all six habitat types on the RSFWH Inventory Map or functional equivalent). This is called the "simple" verification process and requires only a minimal expenditure of time and money in cases where the habitat boundary is uncontested or easily resolved. Metro Section 3.07.1340(D) also requires a detailed map verification process for Habitat Conservation Areas ("HCA"), which include Class I and II riparian habitats and Class A and B upland habitats. This detailed process requires expert opinion and more technical supporting data in cases where the habitat boundary is complex or controversial.

Issue: *The City has not clearly demonstrated that it has provided a detailed verification process and a simple verification process for identifying the boundaries of regionally significant fish and wildlife habitat.*

Because the City has not adopted Metro's Regionally Significant Fish and Wildlife Habitat Inventory Map, and because it is unclear how the City's proposed FWHA relates to the Inventory Map (as discussed

above), Metro is unable to determine whether the City has a verification process that complies with Metro Code Sections 3.07.1330(G) and 3.07.1340(D). Although our review indicates that most of the six regionally significant habitats are likely included in the City's definition of FWHA, and that the City appears to have an existing verification process for many of the habitats included in FWHA, we still are not certain that all of Title 13's verification requirements are being met.

It should be noted that Title 13 does allow jurisdictions to rely on existing local habitat maps and verification processes, but compliance is dependent on Metro making a finding that these existing local provisions "substantially comply" with Title 13's requirements. This City appears to be taking this alternative approach. However, the City has not clearly demonstrated how its existing habitat maps include all the acreage that comprises regionally significant fish and wildlife habitat.

Compliance Recommendation: The City must clearly demonstrate that it is providing both a "simple" and more detailed verification process to identify the boundaries of regionally significant fish and wildlife habitat. Enclosed is draft code language from the City of Tigard providing a "simple" as well as detailed verification process. Metro recommends that Tualatin adopt similar provisions. Alternatively, Tualatin can comply by adopting the basic and detailed verification processes contained in Metro's Model Ordinance.

Suggestions on HFDP and LID

Title 13 requires cities and counties to "facilitate and encourage" the use of habitat-friendly development practices ("HFDP") (Metro Code 3.07.1330(B)(5)(d)), and to "remove barriers" to the use of these HFDPs (Metro Code 3.07.1330(E)). Metro provides examples of such habitat-friendly practices in Table 3.07-13c of Title 13. In addition, step 2 of the Tualatin Basin Program implementation requires Tualatin to adopt Low Impact-Development ("LID") guidelines to reduce the environmental impacts of new development and to remove barriers to the use of these LIDs.

With this in mind, the below comments do not raise "compliance" issues per se, but are intended to pose questions or make suggestions to improve the likely effectiveness of the proposed credit program.

Flexibility for Building Height: No code changes are proposed by the City to provide increased flexibility for building height. The City's rationale is that since the presumable intent would be to protect habitat by reducing development (i.e., reducing building height), that it seems counterproductive to allow increased height as a way to protect wildlife habitats. This rationale misses the intent of this HFDP which is to allow increased height in exchange for, for example, a decreased building footprint, thereby reducing impervious surface. This basic rationale is provided in the Tualatin Basin Implementation Report as well.

Recommendation: We recommend that the City amend its code to allow flexibility in building height, provided that the height increase results in an offsetting reduction in impervious surface or other beneficial outcome for habitat.

Locating landscaping adjacent to habitat areas: No code changes are proposed by the City to encourage this HFDP. While the City's current landscaping standards may allow for this practice, it does not appear that there is any explicit encouragement to do so.

Recommendation: We recommend that the City amend its code to create a mechanism, if one does not already exist, to allow and encourage landowners to shift required landscaping from one part of their property to areas adjacent to a habitat area.

Re-direct outdoor lighting away from habitat areas: Metro's intent with this HFDP is for localities to encourage landowners to avoid shining their outdoor lights, which can disturb wildlife, into habitat areas. The City, however, is proposing to prohibit the shining of light into FWHA. This prohibition is a restriction of land use that goes beyond Title 13's intent to use only non-regulatory measures to encourage HFDPs.

Recommendation: We recommend that the City modify its proposed provisions prohibiting the spillage of light into FWHA to say that it only encourages landowners to do so. One suggestion is to insert the qualifying phrase "where practical and feasible" into the City's language that currently prohibits the shining of light into habitat areas.

Use of multi-functional open drainage systems: The City addresses this HFDP by delaying action until CWS and the City develop new design standards for open drainage systems and similar stormwater facilities. While Metro recognizes the benefit of deferring to CWSs expertise to develop a comprehensive stormwater design manual that can be used by jurisdictions throughout the Tualatin Basin, we do expect the City to take future action to amend its code to incorporate the CWS standards that will encouraging these HFDPs.

Recommendation: We encourage the City to continue to work with CWS to ensure the timely development of effective stormwater facility design standards, including those for open drainage systems, and to make the appropriate future code changes to encourage landowners to take advantage of the design standards.

Stream crossings and detention ponds: We also note that for a number of HFDPs — such as minimizing stream crossings, encouraging perpendicular crossings, using habitat sensitive bridge and culvert designs, use of detention ponds, and allowance of narrow road widths through stream corridors — the City does not propose any code changes. Instead, the City states that its code is silent on such practices, but does not prohibit them, and mostly relies on its adoption of Metro's Title 3 and CWS requirements to meet Title 13's "encourage and facilitate" requirement.

Recommendation: We recommend that the City amend its code to affirmatively support these HFDPs. Doing so would leave no doubt that the City is encouraging and facilitating these HFDPs.

Please do not hesitate to contact me if you having any questions regarding our comments.

Sincerely,



Paul Ketcham
Principal Regional Planner

Cc: Councillor Carl Hosticka, District 3
Michael Jordan, Chief Operating Officer
Christina Deffebach, Long Range Planning Manager
Paul Garrahan, Metro Attorney
Amanda Punton, DLCD Natural Resource Specialist
Steve Kelley, Senior Planner, Washington County

Enclosure