

**BEFORE THE LAND USE HEARINGS OFFICER  
OF CLACKAMAS COUNTY, OREGON**

Regarding an appeal by Stuart McVay of a planning ) **FINAL ORDER**  
director decision approving development within the Pecan )  
Creek HCA associated with improvements to SW Stafford ) **Z0296-23-HDB**  
Road in unincorporated Clackamas County, Oregon ) **(Stafford Road Project)**

**A. SUMMARY**

1. On May 24, 2023, Jonathan Hangartner, on behalf of Clackamas County (the “applicant”), filed an application for approval of an HCA Map Verification (Z0295-23-HMV), an HCA Development Permit (Z0296-23-HDB), and an HCA Construction Management Plan (Z0297-23-CMP) for construction of stormwater treatment facilities associated with improvements to the section of SW Stafford Road between SW Pattulo Way and S. Rosemont Road. This application is limited to review of improvements within the mapped Habitat Conservation Area (HCA) associated with Pecan Creek and a tributary to Pecan Creek along SW Stafford Road, between S, Rosemont Road and SW Childs Road.

a. Construction of the road project and associated stormwater facilities will impact portions of the HCA. The applicant will mitigate those HCA impacts by restoring 14,805 square feet of degraded condition buffer; enhancing an additional 25,952 square feet of undisturbed stream and wetland buffer; and expanding and restoring stream and wetland buffers by 15,890 square feet. The applicant proposed to plant 568 native trees and 2,845 native shrubs as outlined on the submitted Restoration Plan within HCA and Stafford Road Improvements Water Quality Resource Area (WQRA).

b. The overall road project will occur on properties known as:

- 18783 SW Stafford Road;
- 1551 SW Childs Road;
- 1600 SW Childs Road;
- 50 S Rosemont Road;
- 18600 SW Stafford Road; and
- 18691 SW Stafford Road.

Also known as:

- T2SR1E Section 21AB Tax Lot 00100;
- T2SR1E Section 21B Tax Lot 00601;
- T2SR1E Section 21B Tax Lot 00602;
- T2SR1E Section 21BA Tax Lot 00302;
- T2SR1E Section 21BA Tax Lot 00400;
- T2SR1E Section 16C Tax Lot 00602; and

- T2SR1E Section 16D Tax Lot 01200;
- T2SR1E Section 16D Tax Lot 01201; and
- T2SR1E Section 16D Tax Lot 01202.

Collectively, the “site.” The site is zoned RRF-5 (Rural Residential Farm Forest, five-acre minimum lot size) and EFU (Exclusive Farm Use).

c. Overall, and beyond the scope of the review of the HCA impacts, the project will consist of:

- i. Widening SW Stafford Road to provide 12-foot-wide vehicular lanes and six-foot-wide paved bike lanes and shoulders;
- ii. Adding turn lanes to SW Stafford Road at its major intersections with SW Childs Road and SW Johnson Road and realigning SW Childs Road and SW Johnson Road at these intersections for skew and site distance improvements;
- iii. Constructing a new roundabout at the intersection of SW Stafford Road and SW Childs Road to improve traffic flow and safety;
- iv. Constructing stormwater management improvements along the project corridor that are compliant with local, state, and federal regulations. The proposed improvements will retain the existing roadway where possible;
- v Replacement of the existing SW Childs Road culvert crossing of Pecan Creek with a larger structure that meets SLOPES V design requirements; and
- vi. Other project improvements including: new illumination, signage, retaining walls, landscaping, and riparian restoration and enhancement in wetlands and the Pecan Creek tributary per Clackamas County Water Environmental Services (WES) requirements.

2. On September 18, 2023, the planning director (the “director”) issued a written decision approving Case No. Z0295-23-HMV, Z0296-23-HDB, and Z0297-23-CMP. (Exhibit 1).

3. On October 2, 2023, Stuart McVay (the “appellant”) filed a written appeal of the director’s decision on Z0296-23-HDB. The appellant did not appeal the two associated applications: Z0295-23-HMV and Z0297-23-CMP. Therefore, the hearings officer did not consider those applications in this appeal proceeding, and those portions of the director’s decision regarding those applications is now final.

4. County Hearings Officer Joe Turner (the “hearings officer”) held a public hearing to receive testimony and evidence regarding the appeal. County staff recommended that the hearings officer deny the appeal and approve the application

subject to conditions of approval in the director’s decision. Representatives of the applicant testified orally in support of the project. The appellant testified orally in support of the appeal. Principal contested issues in the case include the following:

a. Whether the proposed rain garden stormwater facility is an “industrial” use;

b. Whether the stormwater facility is allowed in the RRFF-5 and EFU zones;

c. Whether the stormwater facility poses a significant risk of surface or groundwater contamination;

c. Whether the stormwater facility includes a pond;

d. Whether construction of the facility will result in prohibited impacts to the vegetation within the HCA; and

j. Whether the facility will attract additional frogs to the area and whether potential noise impacts from frogs are relevant to the applicable approval criteria.

5. The hearings officer concludes the applicant sustained the burden of proof that the proposed development does or can comply with the applicable approval criteria of the ZDO subject to conditions of approval needed to ensure such compliance occurs in fact. The appellant did not rebut the substantial evidence in the record in support of the application. Therefore the hearings officer denies the appeal and upholds the planning director’s decision, based on the findings and conclusions adopted or incorporated herein and subject to the conditions of approval at the end of this final order.

## **B. HEARING AND RECORD**

1. The hearings officer received testimony at the public hearing about the appeal on October 26, 2023. All exhibits and records of testimony have been filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the statement required by ORS 197.763 and disclaimed any *ex parte* contacts, bias, or conflicts of interest. The following is a summary by the hearings officer of selected testimony offered at the public hearing.

2. County planning manager Lindsay Nesbitt summarized the director’s decision and her PowerPoint presentation, Exhibit 10.

a. She noted that the applicant proposed to improve the section of SW Stafford Road between S. Rosemont Road and SW Childs Road. Proposed improvements include widening the roadway, adding turn lanes, creating a new roundabout, and constructing a new stormwater treatment facility within the HCA associated with Pecan

Creek and an unnamed tributary. The project will cause unavoidable impacts to areas designated High and Moderate HCA. The applicant considered several alternative designs and minimized the impacts of the proposed facility to the extent possible. The proposed impacts are the minimum necessary to support the needed transportation improvements.

b. The applicant will mitigate impacts to the HCA by restoring 44,805 square feet of existing degraded HCA buffer and 25,952 square feet of existing degraded stream and wetland buffer and by planting 568 trees and 2,845 shrubs within the HCA.

3. Jonathan Hangartner appeared on behalf of the applicant and summarized his PowerPoint presentation, Exhibit 11.

a. The proposed road improvement project includes construction of a new roundabout at the intersection of Stafford and Childs Roads. The roundabout is needed to alleviate congestion and reduce crashes at this intersection. The proposed roundabout is safer than a traffic signal, which would increase the number of crashes at this intersection. The roundabout will improve the Level Of Service (“LOS”) of the intersection from LOS F to LOS B. The project will also create bicycle and pedestrian facilities within the intersection and bike lanes on both sides of Stafford Road between Pattulo Way and Rosemont Road.

b. The applicant designed the road improvements using narrower bike lanes and retaining walls to minimize impacts to the HCA.

c. The applicant will install a series of catch basins and manholes and a bioretention rain garden facility to collect, treat, and detain stormwater runoff from the roadway improvements prior to infiltrating it into the ground or releasing it to Pecan Creek.

i. Flow control sedimentation manholes will remove sediments, oil, and other floatable debris before the runoff reaches the rain garden.

ii. The rain garden will treat stormwater by directing runoff through vegetation and engineered soil media that will remove pollutants from the runoff. The rain garden will attenuate peak flows using an above ground storage basin which aids in streamflow moderation. According to the WES Stormwater Standards, rain gardens are ideal for residential and small commercial sites, within parking lots, and along roadways. The facility will not cause groundwater contamination, as the rain garden is designed to remove pollutants before the water reaches native soil or surface streams.

iii. The rain garden is unlikely to increase frog breeding habitat, as the rain garden is designed to fully drain between rainfall events. Rain gardens are not designed to have standing water once drained. Full drainage typically occurs within several hours. There will be no ponded or standing water that could support frog breeding.

d. The applicant will restore the impacted HCA by planting native trees and shrubs meeting or exceeding County and WES standards. The project will result in higher quality habitat than currently exists. The project will also replace an existing culvert with a fish passage improve to improve fish habitat within Pecan Creek and its tributary.

e. Any information that County staff provided to Mr. McVay regarding the design of the road improvements and potential impacts to his property was based on preliminary designs for the project that were subject to change. Road projects often take several years to design and develop and designs often change through that process.

4. Appellant Stuart McVay argued that the project will impact his property.

a. The proposed stormwater facility is a “commercial treatment plant” that is not permitted in the RFFF-5 zone. The proposed facility will “destroy the aesthetics” of his property. The surface pond is likely to attract frogs that generate significant noise, which will prevent him from using the outdoor areas of his property. The applicant should be required to utilize an underground stormwater facility that will be less visible and not attract frogs. In the alternative, the applicant could relocate the stormwater facilities to a different location that would not impact his property.

b. Construction of a prior roundabout damaged a neighbor’s well, impacting the water quality. This facility is likely to impact the water quality in his well. The County’s watershed pollution website notes that roadways generate significant pollution and this project will dump that runoff onto his property.

c. The applicant should be required to retain more trees. He contacted the County prior to purchasing his property and planting trees. At that time County staff told him that planned improvements to Stafford Road would not impact his property or his trees. The current design will have a significant impact on his

5. Mark Fitkin and Josh Chamberlin, on behalf of the appellant, submitted written testimony in response to the appeal. (Exhibits 9 and 8).

6. At the conclusion of the hearing the hearings officer held the record for open one week, until November 2, 2023, solely to allow the applicant to submit a final argument as required by ORS 197.797(6)(e). Pursuant to the applicant’s request, the record in this case on October 31, 2023.

### **C. DISCUSSION**

1. ZDO 1305.02.D.2 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning

director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The applicant must carry the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence.

2. The hearings officer finds, based on the application, the findings in the Staff Report, and the applicant's oral and written testimony (Exhibits 11 and 12), that the proposed stormwater facility complies with all applicable approval criteria. The appellant and other opponents failed to rebut that evidence.

a. The proposed stormwater facility is not an "industrial" or "commercial" facility. As discussed in Exhibit 12, "The proposed stormwater management facility treats pollutants that are generated by vehicles using the roadway, which is not within an industrial area and does not serve industrial traffic." As noted in Section 6.5.2 of the WES Stormwater Standards, "Rain gardens are ideal for residential and small commercial sites, within parking lots, and along roadways." (Emphasis added).

b. The proposed stormwater facility is a permitted use in the RRFF-5 and EFU zones as an accessory use associated with the Stafford Road improvement project. Reconstruction or modification of public roads and highways is listed as a permitted use in these zones. See ZDO Tables 316-1 and 401-1.

c. The proposed roadway improvements and stormwater facility will not pose a risk of surface or groundwater contamination. To the contrary, the proposed facility is likely to improve water quality, as it will collect and treat stormwater runoff from Stafford Road that currently discharges directly into Pecan Creek and its tributary without treatment. "Typical pollutants generated by vehicle use of the roadway include oils, heavy metals, sediment and debris, and artificial organic compounds such as PFAS and 6-PPD." (Exhibit 12). The proposed stormwater facility will filter runoff from the roadway, removing most, if not all, of these contaminants before the water reaches the stream. "Rain gardens treat stormwater through sedimentation of particles in ponded water, filtration, and phytoremediation through contact with vegetation, and biodegradation and adsorption of pollutants through contact with soil organisms and chemical soil processes." Section 6.5.2 of the WES Stormwater Standards. In addition, the applicant will install flow control sedimentation manholes along the roadway that will remove sediments, oil, and other floatable debris before the runoff reaches the rain garden.

i. Soils in this area have limited infiltration capacity. Therefore, little, if any, stormwater runoff will reach the groundwater aquifer. There is a layer of drain rock and an underdrain below the engineered growing media that will collect treated water that passes through the growing media and discharge it to the creek before it can infiltrate into the soil. Any water that does infiltrate into the soil receive treatment in the rain garden and will be further treated as it percolates through the underlying soils.

d. The applicant is not proposing a surface pond. The proposed raingarden is designed as a “flow-through” facility that will not hold standing water for long periods of time. The facility is designed to completely drain between rainfall events, typically within six to eight hours.

e. The proposed development will enhance the existing habitat associated with Pecan Creek and its tributary. The applicant must remove some existing trees and other vegetation on the site in order to construct the facility. However, the majority of the existing HCA is currently in a degraded condition, planted in lawn which provides minimal habitat value. The applicant will replant the disturbed area with a variety of trees, shrubs, and groundcover species. The restored HCA will provide a more diverse habitat with multiple layers of that will support a wide range of amphibians, birds, and other fauna.

f. The proposed stormwater facility is unlikely to provide additional frog breeding habitat as the facility will not provide a source of standing water necessary for frog eggs and tadpoles to develop. As discussed above, the rain garden does not include a pond or standing water. The facility will dry out between rain storms.

i. The proposed plantings will result in higher quality riparian habitat associated with the on-site streams, which may attract additional frogs to the area. However, frogs, and associated noise, can be expected in areas near existing streams. Noise impacts from wildlife are not relevant to the applicable approval criteria for the proposed development.

g. The applicant cannot utilize an underground stormwater facility.

i. The proposed rain garden stormwater facility is necessary to comply with WES and NMFS stormwater treatment requirements. As noted in Exhibit 12, “[u]nderground facilities use mechanical filtration for treatment, which do not perform as well at pollutant removal as above ground vegetated facilities. Vegetated facilities are required by NMFS.... This requirement is in place because above ground vegetated facilities provide better treatment performance, promote infiltration to remove excess runoff from streams, provide ecological benefits due to the plantings, and are easier to monitor and maintain.”

ii. In addition, given the topography of the area, it is not feasible to design an underground facility that will discharge treated runoff into the on-site streams.

## **D. CONCLUSION**

Based on the above findings and discussion, the hearings officer concludes that the proposed development does or can comply with the applicable approval criteria for the proposed development, provided the applicant complies with conditions of approval warranted to ensure that the proposed development in fact complies with those standards.

The appellant failed to rebut that proof with at least equally probative substantial evidence. Therefore the application should be approved subject to the conditions of approval adopted by the director.

### **E. DECISION**

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby approves ZO296-23-HDB<sup>1</sup> (Stafford Road Project), subject to the following conditions:

#### **Conditions of Approval**

The conditions listed are necessary to ensure that approval criteria for this land use permit are satisfied.

1. **General Conditions:**

A) Approval of this land use permit is based on the submitted written narrative and plans received May 24, 2023 and September 14, 2023. No work shall occur under this permit beyond that specified in this decision. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of approval described herein.

2. **Construction Management Plan Conditions:**

A) Pursuant to Subsection 706.08, the proposed Construction Management Plan (CMP) shall meet the following standards, as outlined on the submitted Stafford Road Improvements Construction Management Plan Exhibit 1, prepared by Consor:

- i. Erosion prevention and sediment control (EPSC) measures shall be required and shall comply with the standards of Clackamas Water Environment Services (WES).
- ii. Trees in the HCA shall not be used as anchors for stabilizing construction equipment.
- iii. Native soils disturbed during development shall be conserved on the subject property.
- iv. Development shall not commence until the EPSC measures and fencing required pursuant to Subsections 706.08(A) and (B) are in place.

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<sup>1</sup> The appellant did not appeal the two associated applications, Z0295-23-HMV and Z0297-23-CMP. Therefore, the hearings officer has no jurisdiction to review those applications and the portions of the director's decision approving these applications are final.



- v. Compliance with the Construction Management Plan shall be maintained until the development is complete.

3. **Map Verification Conditions:**

- A) Approval Period: The approval of this HCA Map Verification shall be valid for four (4) years from the date of the final written decision. If the County’s final written decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four-year period, the approval shall be implemented, or the approval will become void.
  - i. “Implemented” has the meaning set forth in Subsection 706.06(D)(1) and (2), except that under Subsection 706.06(D)(2), if the approval did not contemplate a specific development proposal, “implemented” means at least one County development permit shall be obtained and maintained.
  - ii. If this approved HCA Map Verification is not implemented within the initial approval period established by Subsection 706.06(D), a two- year time extension may be approved pursuant to Section 1310.
- B) Pursuant to Subsection 706.09(A)(A), the HCA Boundary is established as mapped on the Metro Nature in Neighborhoods Title 13 Maps for T2S R1E Section 16 and T2S R1E Section 31.

4. **Development Permit (Subsection 706.10[B]) Conditions:**

- A) Any development that is approved within the HCA through this decision shall not result in the removal of the developed area(s) from the HCA and shall not change the applicable HCA category(ies).
- B) Approval Period: The approval of this HCA Development Permit shall be valid for four (4) years from the date of the final written decision. If the County’s final written decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four-year period, the approval shall be implemented, or the approval will become void.
  - i. “Implemented” means all major development permits shall be obtained and maintained, or if no major development permits are required to complete the development contemplated by the approved HCA Development Permit, “implemented” means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained. A “major development permit” is:

- a) A building or manufactured dwelling placement permit for a new primary structure that was part of the HCA Development Permit approval; or
  - b) A permit issued by the County Engineering Division for parking lot or road improvements that were part of the HCA Development Permit approval.
- ii. If this approved HCA Development Permit is not implemented within the initial approval period established by Subsection 706.06(D), a two-year time extension may be approved pursuant to Section 1310.
- C) Mitigation Standards: The mitigation standards for the development within the HCA that is proposed pursuant to Subsection 706.10(B) shall be as outlined on the submitted Stafford Road Improvements Restoration Plan within HCA / Exhibit 2, Stafford Road Improvements Water Quality Resource Area / Exhibit 3, Planting Schedule dated March 2023, Planting Details dated March 2023, Planting Notes dated March 2023, and Landscape Plans plans set dated March 2023, all prepared by Consor. The mitigation standards are also subject to the Section 4.0 Mitigation, Restoration & Enhancement section of the Sensitive Area Natural Resource Assessment, prepared by MB&G.
- i. All vegetation shall be planted within the project area, either within the HCA or in an area contiguous to the HCA, provided, however, that if the vegetation is planted in an area contiguous to the HCA, such area shall be protected from development by a restrictive covenant, conservation easement, or public dedication;

DATED this 14 day of November 2023.



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Joe Turner, Esq., AICP  
Clackamas County Land Use Hearings Officer

### **APPEAL RIGHTS**

ZDO 1307.14.D(6) provides that the Land Use Hearings Officer’s decision is the County’s final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules adopted by LUBA describe when and how an appeal must be filed with LUBA. Presently, ORS 197.830(9) requires that any appeal to LUBA “shall be filed not later than 21 days after the date the decision

sought to be reviewed becomes final.” ZDO 1307.17.I(1) provides that this decision will be “final” for purposes of a LUBA appeal as of the date of mailing of this final order (which date appears on the last page herein).