

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF CLARIFYING THAT METRO'S)
GOAL 5 FISH AND WILDLIFE HABITAT PROTECTION) RESOLUTION NO. 04-3489A
PROGRAM SHALL NOT RESTRICT CURRENTLY) Introduced by David Bragdon, Metro
ALLOWED USES OF DEVELOPED RESIDENTIAL) Council President
PROPERTY AND SHALL FOCUS HOMEOWNER-)
RELATED EFFORTS ON EDUCATION AND)
STEWARDSHIP INCENTIVE PROGRAMS)

WHEREAS, Metro is developing a regional fish and wildlife habitat protection and restoration program consistent with the state planning Goal 5 administrative rule, OAR 660-023-0000 through OAR 660-023-0250; and

WHEREAS, on October 30, 2003, and May 20, 2004, respectively, the Metro Council adopted Resolutions No. 03-3376B, For the Purpose of Endorsing Metro's Draft Goal 5 Phase 1 Economic, Social, Environmental and Energy Analysis and Directing Staff to Conduct More Specific ESEE Analysis of Multiple Fish and Wildlife Habitat Protection and Restoration Program Options, and No. 04-3440A, For the Purpose of Endorsing Metro's Draft Goal 5 Phase 2 ESEE Analysis, Making Preliminary Decisions to Allow, Limit, or Prohibit Conflicting Uses on Regionally Significant Fish and Wildlife Habitat and Directing Staff to Develop a Program to Protect and Restore Regionally Significant Fish and Wildlife Habitat; and

WHEREAS, in Resolution No. 03-3376B the Metro Council concluded that the Goal 5 program "shall not require property owners to discontinue uses or remove structures on their properties, but may affect the expansion of existing structures into regionally significant resource sites," and in Resolution No. 04-3440A the Metro Council directed that the program was to "apply only to activities that require a land use permit and not to other activities (such as existing gardens, lawn care, routine property maintenance, and actions necessary to prevent natural hazards)," but that "[v]egetation clearing over a set threshold [could] be defined as a land use activity and [could] therefore require a permit;" and

WHEREAS, the Metro Council has further considered the ESEE analysis and the extensive input and comments received from the citizens of the region regarding Resolution No. 04-3440A regarding the potential impact of the program on homeowners, as balanced against the need to protect and enhance fish and wildlife habitat; now therefore

BE IT RESOLVED:

1. Program Shall Not Restrict Currently Allowed Uses of Developed Residential Property

That the Program to Achieve Goal 5 that will be adopted by the Metro Council will not restrict the owners and residents of existing, developed residential properties from engaging in any use of their developed residential properties that they may currently undertake without having to obtain a land use decision from their local jurisdiction.

2. Focus of Program As It Applies to Homeowners Shall Be On Education and Stewardship Incentive Programs, Not on Regulatory Approaches

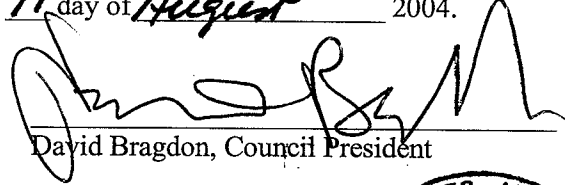
That staff is directed to develop a Program to Achieve Goal 5 that, as it pertains to residents and owners of existing, developed residential properties, shall be focused on education and incentive

programs to help the citizens of the region to become more mindful of the ecological value of fish and wildlife habitat and to become better stewards of that habitat.

3. This Resolution is Not a Final Action

The Metro Council's action in this resolution is not a final action on an ESEE analysis, a final action on whether and where to allow, limit, or prohibit conflicting uses on regionally significant habitat and impact areas, or a final action to protect regionally significant habitat through a Program to Achieve Goal 5. Pursuant to OAR 660-023-0080, when Metro takes final action to approve a Program to Achieve Goal 5 it will do so by adopting an ordinance that will include an amendment to the Urban Growth Management Functional Plan, approval of the final designation of significant fish and wildlife habitat areas, and approval of a final ESEE analysis (including final allow, limit, and prohibit decisions), and then Metro will submit such functional plan amendments to the Oregon Land Conservation and Development Commission for acknowledgement under the provisions of ORS 197.251 and ORS 197.274.

ADOPTED by the Metro Council this 19th day of August 2004.


David Bragdon, Council President

Approved as to Form:


Dan Cooper, Metro Attorney



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2. Focus of Program As It Applies to Homeowners Shall Be On Education and Stewardship Incentive Programs, Not on Regulatory Approaches

That staff is directed to develop a Program to Achieve Goal 5 that, as it pertains to residents and owners of existing, developed residential properties, shall be focused on education and incentive

programs to help the citizens of the region to become more mindful of the ecological value of fish and wildlife habitat and to become better stewards of that habitat.

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ADOPTED by the Metro Council this ___ day of _____ 2004.

David Bragdon, Council President

Approved as to Form:

Dan Cooper, Metro Attorney

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STAFF REPORT

RESOLUTION NO. 04-3489 FOR THE PURPOSE OF CLARIFYING THAT METRO'S GOAL 5 FISH AND WILDLIFE HABITAT PROTECTION PROGRAM SHALL NOT RESTRICT CURRENTLY ALLOWED USES OF DEVELOPED RESIDENTIAL PROPERTY AND SHALL FOCUS HOMEOWNER-RELATED EFFORTS ON EDUCATION AND STEWARDSHIP INCENTIVE PROGRAMS.

Date: August 12, 2004

Prepared by: Chris Deffebach and Malu Wilkinson

CONTEXT AND BACKGROUND

The region's 2040 Growth Concept and other policies call for protection of natural areas while managing housing and employment growth. In 1998 the Metro Council adopted Title 3 of the Urban Growth Management Functional Plan to protect water quality and for flood management. Title 3 also included a commitment to develop a regional fish and wildlife habitat protection plan. As defined in a Vision Statement that was developed in cooperation with local governments at MPAC in 2000, the overall goal of the protection program is: "...to conserve, protect and restore a continuous ecologically viable streamside corridor... that is integrated with the surrounding urban landscape." The Vision Statement also refers to the importance that "...stream and river corridors maintain connections with adjacent upland habitats, form an interconnected mosaic of urban forest and other fish and wildlife habitat..." Metro is currently developing this program, following the 3-step process established by the State Land Use Planning Goal 5 administrative rule (OAR 660-023).

In the first step, Metro identified regionally significant fish and wildlife habitat using the best available science, computer mapping, and fieldwork. In 2002, after review by independent committees, local governments and residents, Metro Council adopted the draft inventory of regionally significant fish and wildlife habitat lands. The inventory includes about 80,000 acres of habitat land inside Metro's jurisdictional boundary as well as approximately 16,000 acres of impact area. Residential land makes up a significant portion of the habitat inventory and impact areas (31 percent), and 58 percent of that residential land is developed (not including parks). Impact areas include lands on which conflicting uses affect the habitat; 43 percent of the impact areas are on developed residential land.

The second step of the process is to evaluate the Economic, Social, Environmental and Energy (ESEE) consequences of a decision to allow, limit or prohibit conflicting uses on these regionally significant habitat lands and on impact areas adjacent to the habitat areas. The impact areas add about 16,000 acres to the inventory. Metro conducted the ESEE analysis in two phases. The first phase was to evaluate the ESEE consequences at a regional level. This work was completed and endorsed by the Metro Council on October 30, 2003 (Resolution #03-3376B, For the Purpose of Endorsing Metro's Draft Goal 5 Phase 1 Economic, Social, Environmental and Energy Analysis and Directing Staff to Conduct More Specific ESEE Analysis of Multiple Fish and Wildlife Habitat Protection and Restoration Program Options). The second phase evaluated the ESEE consequences of possible protection and restoration options that include a mix of

regulatory and non-regulatory components. The Metro Council endorsed the findings and applied a preliminary decision on where conflicting uses within the fish and wildlife habitat areas and impact areas should be allowed, limited, or prohibited, as required in the Goal 5 administrative rule on May 20, 2004 (Resolution #04-3440A, For the Purpose of Endorsing Metro's Draft Goal 5 Phase 2 ESEE Analysis, Making Preliminary Decisions to Allow, Limit, or Prohibit Conflicting Uses on Regionally Significant Fish and Wildlife Habitat and Directing Staff to Develop a Program to Protect and Restore Regionally Significant Fish and Wildlife Habitat).

The third and final step of the process is to develop a program that implements the habitat protection plan by ordinance through Metro's Urban Growth Management Functional Plan. After acknowledgment by the State Land Conservation and Development Commission, cities and counties within the Metro jurisdiction will be required to amend their comprehensive plans to be in compliance with the regional habitat protection program.

Cities and counties in the region currently have varying levels of protection for fish and wildlife habitat. As a result, similar quality streams or upland areas in different parts of the region currently receive inconsistent treatment. In addition, one ecological watershed can cross several different political jurisdictions – each with different approaches to habitat protection. The regional habitat protection program will establish a more consistent minimum level of habitat protection across the region.

In addition, in January 2002, Metro entered into an intergovernmental agreement with local governments and special districts in the Tualatin Basin setting forth a cooperative planning process to address regional fish and wildlife habitat within the basin. The Tualatin Basin recommendation will be forwarded to the Metro Council for final approval as part of the regional habitat protection plan.

1. PROGRAM SHALL NOT RESTRICT CURRENTLY ALLOWED USES OF DEVELOPED RESIDENTIAL PROPERTY

Metro's ESEE analysis considered the impacts of potential regulations to protect habitat on existing homeowners. An extensive discussion of the impacts of regulations on property owners is included in Phase I of the ESEE analysis. The property owners most affected by a decision to limit or prohibit conflicting uses are single-family residential. Eighteen percent of the land in Metro's habitat inventory and impact areas is on developed residential land, which translates to a substantial number of property owners and residents since many homes are on smaller lots. This percentage is based on Metro's definition of developed land for purposes of determining buildable lands, which excludes from the developed lands inventory portions of properties over half an acre in size that are undeveloped. Therefore, the implication under this resolution is that habitat on these lands that are now considered vacant would not receive regulatory protection until application for a land use permit.¹

Real property is one of the largest economic investments many people make and regulations affecting property are an important and sensitive social issue. For residential land in particular, a regulatory program could impact personal financial security or the expectation to maintain,

¹ However, local jurisdictions may have existing tree protection or vegetation removal regulations that would apply.

develop or redevelop land within the existing regulatory framework. Regulations that result in reductions to property value may affect people's ability to draw on the equity in their homes to fund retirement, education, and other activities. Thus, limiting or prohibiting conflicting uses, if it results in reduced property values, can have a negative social impact. On the other hand, local studies (Lutzenhiser and Netusil 2001, Bolitzer and Netusil 2000) have shown that proximity to some types of natural areas actually increase property values, thus preservation of these habitats could positively impact nearby property owners.

Minimizing the impact on property owners was one of the five social criteria used to evaluate the regulatory program options in Metro's Phase II ESEE Analysis. Property ownership and land use regulations are sensitive issues central to habitat protection. Landowners may be concerned about impacts to property rights, takings issues, and the distribution of the burden of protecting habitat. Other landowners may be supportive of protection programs despite being personally affected for several reasons including an appreciation of habitat and the wish to see it remain in addition to the increased property values that can result from trees and proximity to water.

In response to these factors, after Phase I of the ESEE analysis, the Metro Council resolved, in Resolution No. 3376B adopted on October 30, 2003, to "not require property owners to discontinue uses or remove structures on their properties," but allowed that the program "may affect the expansion of existing structures." Then, upon completion of Phase II of the ESEE analysis, the Council further resolved, in Resolution No. 04-3440A adopted on May 20, 2004, to direct staff to develop a program that applied "only to activities that require a land use permit and not to other activities (such as existing gardens, lawn care, routine property maintenance, and actions necessary to prevent natural hazards)," but allowed that "[v]egetation clearing over a set threshold [could] be defined as a land use activity and [could] therefore require a permit."

Based on the above mentioned points in the ESEE analysis and public comments to date, it has become evident that a clarification is necessary to address citizen concerns regarding the effect the program will have on existing, developed residential properties. If approved, this resolution will mean that the regulatory program would not have an effect on the residents and owners of existing residences unless they seek to engage in an activity for which a land use permit is required by their local jurisdiction. For example, Metro's regional Fish and Wildlife Habitat Protection Program, as implemented by local jurisdictions, would not include any additional restrictions on the rights of such owners or residents to plant and care for existing gardens, prune trees and shrubs, build fences and arbors, install playground equipment for children, take care of their yards and lawns, maintain and repair buildings and structures, or to take any actions necessary to prevent natural hazards, such as the pruning or removal of trees or shrubs that present a hazard to human life or property. However, the program might have an impact when such residents sought to redevelop their property, or if they sought to expand the developed area of their property. For example, a resident could build a deck or install a hot tub without further regulation if such a project would not currently require a land use permit from their local jurisdiction.

2. FOCUS ON PROGRAM AS IT APPLIES TO HOMEOWNERS SHALL BE ON EDUCATION AND STEWARDSHIP INCENTIVE PROGRAMS

Although this resolution clarifies that the program will not affect homeowners' use of their existing developed residential properties unless they decide to redevelop their properties, we know that activities on such properties short of such redevelopment can still have a significant impact on fish and wildlife habitat. For example, gardening and landscape practices can have significant effects on fish and wildlife such as the introduction of non-native plants and runoff from pesticides, herbicides, and fertilizers. Non-regulatory tools are therefore the key component of a strategy to protect fish and wildlife habitat on such properties. Incentives, education, and acquisition strategies are popular among landowners and can be used in conjunction with regulations and where regulations do not apply. Habitat protection and restoration activities on existing, developed residential properties will be focused on education and stewardship incentive programs unless the property owner applies for a local land use permit, at which time the regulatory protection for habitat would apply.

Moreover, many landowners would like to manage their land in a way that benefits fish and wildlife habitat. However, frequently people do not know if certain activities are detrimental (using herbicides and pesticides), if there are alternatives (natural gardening), what to do to improve habitat (plant native plants, remove invasive species like ivy), and how to connect to agencies and organizations that provide grants and/or volunteers to help improve habitat. A program would be developed to focus efforts to increase people's awareness of the connections between their activities and the health of streams and rivers, similar to fish stencil programs on stormwater drains. Landowners in regionally significant habitat areas would be targeted to raise awareness of how individual activities impact fish and wildlife habitat. Education activities are most effective when used in conjunction with a stewardship certification program, grant programs, and regulatory programs and these are also being considered as part of the non-regulatory toolbox.

Stewardship recognition programs publicly acknowledge landowners, businesses and other entities for conserving open space, protecting or restoring habitat areas, making financial contributions or carrying out good stewardship practices in general. Public agencies and nonprofit organizations can administer the programs, and the recognition could take the form of media publicity, awards ceremonies, or plaques and certificates. These programs, while not widely applied in the Metro region, have much potential for encouraging conservation behavior when combined with other programs. Staff is currently working to develop these components of a habitat protection program concurrently with a regulatory program.

ANALYSIS/INFORMATION

1. Known Opposition

No known opposition. Substantial public comment has been received to date expressing concern about the impact of a regional Fish and Wildlife Habitat Protection Program on existing residential development. Conversely, we have also consistently received public comments from

citizens seeking greater fish and wildlife habitat protection, although we have not received, and are not aware of, any specific opposition to this resolution.

2. Legal Antecedents

In Resolution No. 03-3376B the Metro Council concluded that the Goal 5 program “shall not require property owners to discontinue uses or remove structures on their properties, but may affect the expansion of existing structures into regionally significant resource sites,” and in Resolution No. 04-3440A the Metro Council directed that the program was to “apply only to activities that require a land use permit and not to other activities (such as existing gardens, lawn care, routine property maintenance, and actions necessary to prevent natural hazards),” but that “[v]egetation clearing over a set threshold [could] be defined as a land use activity and [could] therefore require a permit.” This resolution would further clarify these previous statements.

3. Anticipated Effects

Existing residential properties that could be subdivided and developed in the future may contain habitat areas. Some jurisdictions do not currently have mechanisms to prevent tree removal through tree protection ordinances or other measures. Metro’s regulatory program may contain mitigation measures or penalties if habitat is removed on existing residential lots in preparation for a change in use (e.g., subdivision, change in use). Such measures would be necessary to prevent the situation where a landowner attempted to avoid fish and wildlife habitat protection requirements by, first, clearing land identified as habitat under the guise of engaging in a use that does not require a land use permit, and then, second, later sought a land use permit but claimed that there was no longer any habitat left to be protected.

This resolution steps up Metro’s commitment to provide non-regulatory tools targeted towards owners and residents in existing residential areas to protect and restore habitat.

4. Budget Impacts

Implementing the policy stated in this resolution could have substantial budgetary impacts depending on the types of non-regulatory programs pursued. Metro’s Phase II ESEE Analysis included a preliminary description of possible non-regulatory programs focused on education and stewardship incentives. These tools were considered to be of low to medium cost depending on the level of commitment and program scope. Metro currently operates similar programs that could be enhanced to save on establishment costs.

RECOMMENDED ACTION

Thirteen percent of Metro’s habitat inventory and over half of the impact areas (58 percent) is land that includes existing residential development. The Metro Council has repeatedly stated that the fish and wildlife habitat protection program will not affect existing uses in residential

areas. This resolution clarifies the intent of the Metro Council that currently allowed uses on existing residential land would not be restricted, and education and incentive programs would support habitat protection and restoration activities in these areas.

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