

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ENTERING AN) Resolution No. 04-3500
ORDER RELATING TO AN APPLICATION BY)
CLACKAMAS COUNTY FOR AN EXCEPTION) Introduced by Michael Jordan, Chief
FROM TITLE 3 OF THE URBAN GROWTH) Operating Officer, in concurrence with
MANAGEMENT FUNCTIONAL PLAN) David Bragdon, Council President

WHEREAS, Clackamas County has filed an application for an exception from certain requirements in Title 3 (Water Quality, Flood Management and Fish and Wildlife Conservation) of the Urban Growth Management Functional Plan, pursuant to the process set forth in section 3.07.860 of Title 8 (Compliance Procedures); and

WHEREAS, the Metro Council President set the matter for public hearing before the Council and sent notification of the application to the Metropolitan Policy Advisory Committee, the Department of Land Conservation and Development ("DLCD") and persons who requested notification of such applications; and

WHEREAS, the Council held a hearing on the application on October 21, 2004, and heard testimony from Clackamas County, the Metro Planning Department and interested persons; and

WHEREAS, Title 8 requires the Council to issue an order with its decision on the application for an exception, with its conclusions and analysis, and to send the order to the county, MPAC, DLCD, and any participant at the hearing who requested a copy of the order; now, therefore,

BE IT RESOLVED:

1. That the Council adopt Order No. 04-002, with its attachments, as the Council's decision on Clackamas County's application for an exception from certain requirements in Title 3.
2. That the Council direct the Chief Operating Officer to distribute the order to the persons specified in section 3.07.860 of Title 8.

ADOPTED by the Metro Council this ____ day of _____, 2004

David Bragdon, Council President

Approved as to form:

Daniel B. Cooper, Metro Attorney

ORDER NO. 04-002

DECISION ON CLACKAMAS COUNTY'S APPLICATION FOR
AN EXCEPTION FROM TITLE 3 OF THE URBAN GROWTH
MANAGEMENT FUNCTIONAL PLAN

APPLICABLE LAW

On August 6, 2004, Clackamas County filed an application for an exception from water quality resource area performance standards in Title 3 (Water Quality, Flood Management and Fish and Wildlife Conservation) of the Urban Growth Management Functional Plan (UGMFP), pursuant to the process set forth in section 3.07.860 of Title 8 (Compliance Procedures), for certain territory in the county. Title 8 sets forth the criteria that apply to such an application. Section 3.07.860B(1) of that title says the Council may grant an exception if it finds that:

1. It is not possible to achieve the requirement due to topographic or other physical constraints or an existing development pattern;
2. This exception and likely similar exceptions will not render the objective of the requirement unachievable region-wide;
3. The exception will not reduce the ability of another city or county to comply with the requirement; and
4. The city or county has adopted other measures more appropriate for the city or county to achieve the intended result of the requirement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As required by Title 8 of the UGMFP, Metro sent notification of the application to the Metropolitan Policy Advisory Committee, the Department of Land Conservation and Development ("DLCD") and persons who requested notification of such applications. Metro set the matter for hearing on the matter before the Council and held the hearing on October 21, 2004.

At the hearing the Council heard testimony from Clackamas County, the Metro Planning Department and _____. The Council received written materials from the county and the planning department. This testimony and these materials comprise the record in this matter.

Criterion 1: It is not possible to achieve the requirement due to topographic or other physical constraints or an existing development pattern

(insert findings)

Conclusion:

Criterion 2: This exception and likely similar exceptions will not render the objective of the requirement unachievable region-wide

(insert findings)

Conclusion:

Criterion 3: The exception will not reduce the ability of another city or county to comply with the requirement

(insert findings)

Conclusion:

Criterion 4: The city or county has adopted other measures more appropriate for the city or county to achieve the intended result of the requirement

(insert findings)

Conclusion:

IT IS HEREBY ORDERED THAT:

1. The application by Clackamas County for an exception from Title 3 is approved/denied.
2. (Conditions on approval, if any.)

ENTERED this __ day of _____, 2004.

David Bragdon, Council President

Approved as to form:

Daniel B. Cooper, Metro Attorney

STAFF REPORT

In Consideration of Resolution 04-3500 for the Purpose of Entering an Order Relating to an Application by Clackamas County for an Exception from Title 3 Water Quality Resource Area Performance Standards of the Urban Growth Management Functional Plan

Date: November 18, 2004

Prepared by Paul Ketcham

BACKGROUND

Metro received a July 22, 2004 application from Clackamas County for an exception from Title 3 Water Quality Resource Area Performance Standards of the Urban Growth Management Functional Plan.¹ The exception, pursuant to Metro Code 3.07.860, is for a portion of the Oaks Lodge Sanitary District portion of the county. The County's letter of transmittal states that the Title 3 exception is for two specific areas—Boardman wetland and Boardman Creek.² The district covers 3,579 acres and is located in unincorporated Clackamas County between the cities of Milwaukie and Gladstone. It borders the Willamette River on the west, and is bisected by McLoughlin Boulevard (Attachment 1: Map of Oak Lodge Sanitary District). For all other areas, the county is up-to-date with its compliance with Title 3.³

Metro's Title 3 Water Quality and Floodplain Protection Plan requires local jurisdictions to meet regional performance standards relating to water quality and floodplain management. The purpose of Title 3 is to protect the beneficial water uses and functions and values of resources within Water Quality and Flood Management Areas. In June 1998 Metro Council adopted Title 3 provisions as part of Metro's Code (Sections 3.07.310 to 370). Title 3 requires establishment of Water Quality Resource Areas that includes a vegetated corridor as well as the protected water feature such as streams and wetlands. The width of vegetated corridors is 50 feet from the top of bank along primary water features and may extend outward to 200 feet on adjacent steep slopes.⁴ The width of vegetated corridors is 15 feet from top of bank along secondary water features and may extend outward to 50 feet on adjacent steep slopes (Metro Code Section 3.07.340(B (2)(a))).⁵

¹ July 22, 2004 letter from Doug McClain, Clackamas County Planning Director, to Andy Cotugno, Metro Planning Director, with attachments.

² Two other surface water resources lie within the District's boundary—Forest Creek and an unnamed tributary of Kellogg Creek that are presumed to be in compliance with relevant Title 3 provisions. This issue was clarified during an October 20, 2004 meeting between Doug McClain, Clackamas County Planning Director and Dick Benner, Metro Senior Attorney.

³ February 5, 2004 Metro Urban Growth Management Functional Plan Annual Compliance Report

⁴ Primary protected water features include all perennial streams and streams draining greater than 100 acres, Title 3 wetlands, natural lakes and springs.

⁵ Secondary protected water features include intermittent streams draining 50-100 acres.

The following is a chronology of the more significant communications and actions between Metro and the county regarding Title 3 compliance.

- An April 5, 2001 letter from Ray Valone, Senior Regional Planner to Doug McClain, Planning Director for Clackamas County, indicates that the county meets standards of Title 3 within the UGB except for several water features within the Oaks Lodge Sanitary District. The letter describes that the conditions for substantial compliance are to adopt Title 3 standards or seek an exception to those requirements (Attachment 2).
- A November 29, 2002 letter from Greg Fritz, Clackamas County Senior Planner, to Ray Valone, Metro, reports on an October 28 Planning Commission public hearing regarding Zoning and Development Ordinance (ZDO) 191, the amendments proposed to bring the Boardman wetland and the Boardman Creek into compliance with Title 3. The Planning Commission decided to continue testimony on the Title 3 amendments and scheduled another hearing set for January 27, 2003. The County Board of Commissioners scheduled a hearing for March 19, 2003 (Attachment 3).
- A January 13, 2003 letter from Ray Valone, Metro, to Greg Fritts, Clackamas County, affirming its position articulated in its April 5, 2001 letter regarding substantial compliance with Title 3. The County is given the option to request an exception to Title 3 requirements according to Section 3.07.860 of the Metro Code (Attachment 4).
- A March 7, 2003 letter from Metro Council President David Bragdon to Clackamas County Commissioner Larry Sowa confirms that the county has not demonstrated substantial compliance with requirements of Title 3 and offers options to gain compliance: seek an exception to Title 3 (section 3.07.860 of the Metro Functional Plan) or seek review by Metropolitan Policy Advisory Committee and subsequent Metro Council hearing under Sections 3.07.830 and 3.07.840 of Title 8 of the Metro Functional Plan (Attachment 5).
- On March 19, 2003, the Board of County Commissioners voted against proposed amendments that would have brought the County into compliance with Title 3 for the Oaks Lodge Sanitary District.
- A May 7, 2003 letter from Andy Cotugno, Metro Planning Director, to Commissioner Sowa, requests an exception to Title 3 for the Boardman wetland and Boardman Creek (Attachment 6).
- A July 22, 2004 letter from Douglas McClain, Clackamas County Planning Director, to Andy Cotugno, Metro Planning Director, requests an exception to Title 3 following Section 3.07.860 of the Metro Code for two specific areas within the Oaks Lodge Sanitary District (Attachment 7).
- An August 24, 2004 memo from Andy Cotugno, Metro, to Metro Council and Metro Chief Operating Officer Michael Jordan outlines the process for considering an exception from Title 3 of the Urban Growth Management Functional Plan (Attachment 8).

Metro code section 3.07.860 lists the criteria that must be met before an exception to a Functional Plan requirement may be granted. The following section lists the criteria (in bold), summarizes the county's rationale for meeting them, states Metro staff's response to the county rationale, and presents staff's conclusion as to whether the respective exceptions criteria have been met or not.

a) It is not possible to achieve the requirement due to topographic or other physical constraints or an existing development pattern;

County's rationale for the exception under this criterion:

- The County cites "existing development pattern" around the Boardman wetland and along Boardman Creek as the reason it is not possible to meet Title 3 requirements for establishment of water quality resource areas along streams and wetlands.
- The County states that there is very little developable area adjacent to the wetland, and that most parcels adjacent to Boardman Creek are developed. The argument states that there is very little opportunity for development, and therefore, "no benefit from application of the Title 3 requirements to an area substantially developed."
- The County argues that Boardman wetland is protected under the standards of Section 709 of the Zoning and Development Ordinance (ZDO) providing a 25-foot buffer.
- The County recognizes that Boardman Creek is not covered by Section 709 of the ZDO (due to the county's determination that it is not a Goal 5 significant resource), but states that Section 1002.05 applies (Protection of Natural Features), requiring a vegetative buffer, but does not specify the specific protective measures applied.

Response to County's rationale:

Existing uses and conditions do not preclude implementation of Title 3. Properties may redevelop or change current status. Development status is not a criterion for establishment of water quality resource areas. Local governments within Metro's jurisdictional boundaries have established Title 3 water quality resource areas regardless of development status of lands. Region wide data shows that water quality resource areas have been established on lands developed with residential, commercial, and industrial uses (23%), park and open space lands (36%), and undeveloped, vacant lands (41%)⁶.

There are examples of lands within Metro's jurisdiction that are primarily developed to which the provisions of Title 3 apply (see Attachments 11-14). These maps show areas where Clackamas County and other jurisdictions have applied Title 3 Water

⁶ Metro's Fish and Wildlife Habitat Protection Program Economic, Social, Environmental, and Energy Analysis (ESEE) Phase II Analysis of Program Options, April 2004 draft, Table 3-7, pages 42-43).

Quality Resource Areas to primarily developed areas. The Title 3 definition of “development” (Metro Code 3.07.340(D)(3)) applies to additions or modifications to existing uses within the water quality resource area, as well as to development and redevelopment of properties.

Within the Oaks Lodge Sanitary District, Clackamas County has applied Title 3 Water Quality Resource Areas to land that is primarily developed along Forest Creek and an unnamed tributary of Kellogg Creek (Attachments 11-12). Some parcels along these streams are vacant or underdeveloped.⁷ These development patterns are similar to those found along Boardman Creek and wetland, the two water features subject to the County’s exception request.

Similarly, properties along Boardman Creek and Boardman wetland are primarily developed. There are, however, vacant or partially vacant properties along Boardman Creek and Boardman Wetland, the water features subject to the County’s exception request, that are not currently covered by Title 3 protections (see Attachments 9-10). A steep slope adjacent to the lower segment of the Boardman Creek is subject to a wider water quality resource area and is not covered by local code provisions.⁸

In addition, Boardman wetland is covered only by a 25-foot buffer and would receive a 50-foot buffer under Title 3. There are several undeveloped/underdeveloped lots on the north section of the Boardman wetland that could develop without Title 3 protections. There are 5 lots, zoned R-7 that may redevelop and/or subdivide. There are 8 lots zoned MR 1 with older single-family homes that may redevelop and/or subdivide. Remaining properties surrounding the wetland, though developed, could redevelop or be altered.⁹

The south section of Boardman wetland, although owned by the North Clackamas Park and Recreation District or included as common open space in a PUD, does not preclude implementation of Title 3. Properties may redevelop or change current status. Vegetation may be removed without protections of Title 3 requirements for maintenance, enhancement, or restoration of native vegetation.

CONCLUSION: Based on staff response, this criterion is not met.

⁷ April 5, 2001 letter with attachments from Raymond Valone, Metro Senior Regional Planner, to Douglas McClain, Clackamas County Planning Director. This letter indicates there are some vacant or underdeveloped lands located within Title 3 water quality resource areas along Forest Creek and an unnamed tributary to Kellogg Creek.

⁸ Ibid, page 1.

⁹ Ibid, page 2.

b) This exception and likely similar exceptions will not render the objective of the requirement unachievable region-wide;

County's rationale for the exception under this criterion:

- Granting the exception will have no effect on the ability to achieve objectives of Title 3 region-wide.
- The requested exception is limited, applying to a specific area with little development potential, where resources are protected but to a lesser degree than would be provided under Title 3.

Response to County's rationale:

The objective of Title 3 water quality standards is to protect the beneficial uses and functions and values of streams and wetlands and associated vegetated corridors. Wetlands and streams are part of an interlinked system, and it is important that they be treated consistently. Scientific studies show that the vegetated corridors required under Title 3 provide the minimum level of protection to water quality and beneficial uses of streams and wetlands; the county's 25 foot buffers fall short of these minimums.¹⁰

Granting the county's exception to Title 3 would allow inconsistent treatment of the region's streams and wetlands. Granting the exception would set a precedent for other exceptions for similar (mostly developed) areas around the region, resulting in cumulative adverse effects on the values and functions of the region's streams, wetlands, and other water bodies.

CONCLUSION: Based on staff response, this criterion is not met.

¹⁰ Metro, 1997. Metropolitan Service District (Metro) Title 3 Policy Analysis and Scientific Review Paper, Portland, OR. See also: Metro, 2002. Metro's Technical Report for Goal 5, Portland, OR; Metro, 2002. Local Plan Analysis: A Review of Goal 5 Protection in the Metro Region.

- c) The exception will not reduce the ability of another city or county to comply with the requirement;**

County's rationale for the exception under this criterion:

- Granting the exception will have no effect on the ability of other jurisdictions to comply with Title 3 because the area is physically isolated from other jurisdictions.

Response to County's rationale:

Streams and wetlands are part of an interlinked system and directly contribute to watershed function and health. Boardman wetland is connected to Boardman Creek, which flows into the Willamette River, and thus these water features are not physically isolated from the larger watershed. Failure to adequately protect the stream and wetland system can adversely affect water quality and overall watershed health, and therefore detract from the effectiveness of other local government Title 3 efforts. However, this possibility does not mean other local governments cannot comply with Title 3. In fact, the cities of Portland and Milwaukie currently comply with Title 3. It is not apparent that this exception would reduce the ability of local governments in the lower Willamette watershed to comply with Title 3.

CONCLUSION: Based on staff response, this criterion is met.

d) The city or county has adopted other measures more appropriate for the city or county to achieve the intended result of the requirement.

County's rationale for the exception under this criterion:

- The County's Zoning and Development Code Sections 1002 (Protection of Natural Features) and 709(Conservation Wetland District) apply to the Boardman wetland, Boardman Creek and unnamed tributaries and are adequately protected by ordinance provisions.
- The Oak Lodge Service District has accomplished and continues to work on stream enhancement projects.
- Portions of Boardman wetland have been acquired by the North Clackamas Parks and Recreation District and are thus adequately protected.

Response to County's rationale:

The County's 25-foot buffer does not achieve the intended result of Title 3 protection. The larger vegetated corridor required under Title 3 provides more shading of streams, does more to minimize erosion and help moderate pollutant and nutrient loading, and better moderates storm water flows. Several extensive reviews of scientific literature by Metro provides the basis of the widths of Title 3 vegetated corridors. These reviews show that a 50-foot vegetated corridor around streams and wetlands is on the low end of a range of widths needed to provide for adequate protection of the functions and values associated with stream and wetland riparian corridors.¹¹ Based on the scientific literature, a 25-foot buffer as provided under county ordinance does not provide adequate protection to streams and wetlands and does not achieve the purpose of Title 3 water quality standards.

CONCLUSION: Based on staff response, this criterion is not met.

ANALYSIS INFORMATION

1. **Known Opposition.** To date, Metro has not received public comments from individuals, interest groups, or government agencies regarding Clackamas County's exception request to Title 3.
2. **Legal Antecedents.** Policies in Metro's Regional Framework Plan and Title 3 of Metro's Urban Growth Management Functional Plan requires local jurisdictions to meet regional performance standards relating to water quality and floodplain management. The purpose of Title 3 is to protect the beneficial water uses and functions and values of resources within Water Quality and Flood Management Areas. In June 1998 Metro Council adopted Title 3 provisions as part of Metro's Code (Sections

¹¹ Metro, 1997. Metropolitan Service District (Metro) Title 3 Policy Analysis and Scientific Review Paper, Portland, OR. See also: Metro, 2002. Metro's Technical Report for Goal 5, Portland, OR, and Metro's Local Plan Analysis: A Review of Goal 5 Protection in the Metro Region, August, 2002.

3.07.310 to 370). Title 3 requires establishment of Water Quality Resource Areas that includes a vegetated corridor as well as the protected water feature such as streams and wetlands.

3. **Anticipated Effects.** Denial of the exception request will ensure consistent application of Title 3 water quality resource area requirements to support protection of the region's streams and wetlands for water quality purposes. In addition, denial of the exception will act to discourage other Title 3 exceptions for similar (mostly developed) water quality resource areas around the region. Conversely, the danger in approving such exceptions is cumulative adverse effects on the values and functions of the region's streams, wetlands, and other water bodies.
4. **Budget Impacts.** There are negligible budget impacts of this resolution.

RECOMMENDED ACTION

Metro code section 3.07.860 lists the criteria that must be met before an exception to a Functional Plan requirement may be granted. The Chief Operating Officer recommends that Metro Council deny the exception request based on staff conclusions of non-compliance with Metro Code Section 3.07.860 criteria a, b, and d.

Attachments to the Staff Report

Attachment 1: Map of Oak Lodge Sanitary District

Attachment 2: April 5, 2001 letter from Ray Valone, Senior Regional Planner to Doug McClain, Planning Director for Clackamas County

Attachment 3: November 29, 2002 letter from Greg Fritz, Clackamas County Senior Planner, to Ray Valone, Metro

Attachment 4: January 13, 2003 letter from Ray Valone, Metro, to Greg Fritts, Clackamas County

Attachment 5: March 7, 2003 letter from Metro Council President David Bragdon to Clackamas County Commissioner Larry Sowa

Attachment 6: May 7, 2003 letter from Andy Cotugno, Metro Planning Director, to Commissioner Sowa

Attachment 7: July 22, 2004 letter from Douglas McClain, Clackamas County Planning Director, to Andy Cotugno, Metro Planning Director

Attachment 8: August 24, 2004 memo from Andy Cotugno, Metro, to Metro Council and Metro Chief Operating Officer Michael Jordan

[click here to download higher quality versions of the map attachments.](#)

Attachments 9-10: Maps of Title 3 Water Quality Resource Areas and vacant lands within the Oak Lodge Sanitary District subject to the County's Exception from Title 3

Attachment 9a: Title 3 Water Quality and Flood Area Map for Boardman Wetland

Attachment 9b: Map of vacant land for Boardman Wetland

Attachment 10a: Title 3 Water Quality and Flood Area Map for Boardman Creek

Attachment 10b: Map of vacant land for Map Boardman Creek

Attachments 11-14: Maps of Title 3 Water Quality Resource Areas and vacant lands in other primarily developed areas both within and outside the Oak Lodge Sanitary District

Attachment 11a: Title 3 Water Quality and Flood Area Map for Forest Creek

Attachment 11b: Map of vacant land for Forest Creek

Attachment 12a: Title 3 Water Quality and Flood Area Map for unnamed tributary to Kellogg Creek

Attachment 12b: Map of vacant land for unnamed tributary to Kellogg Creek

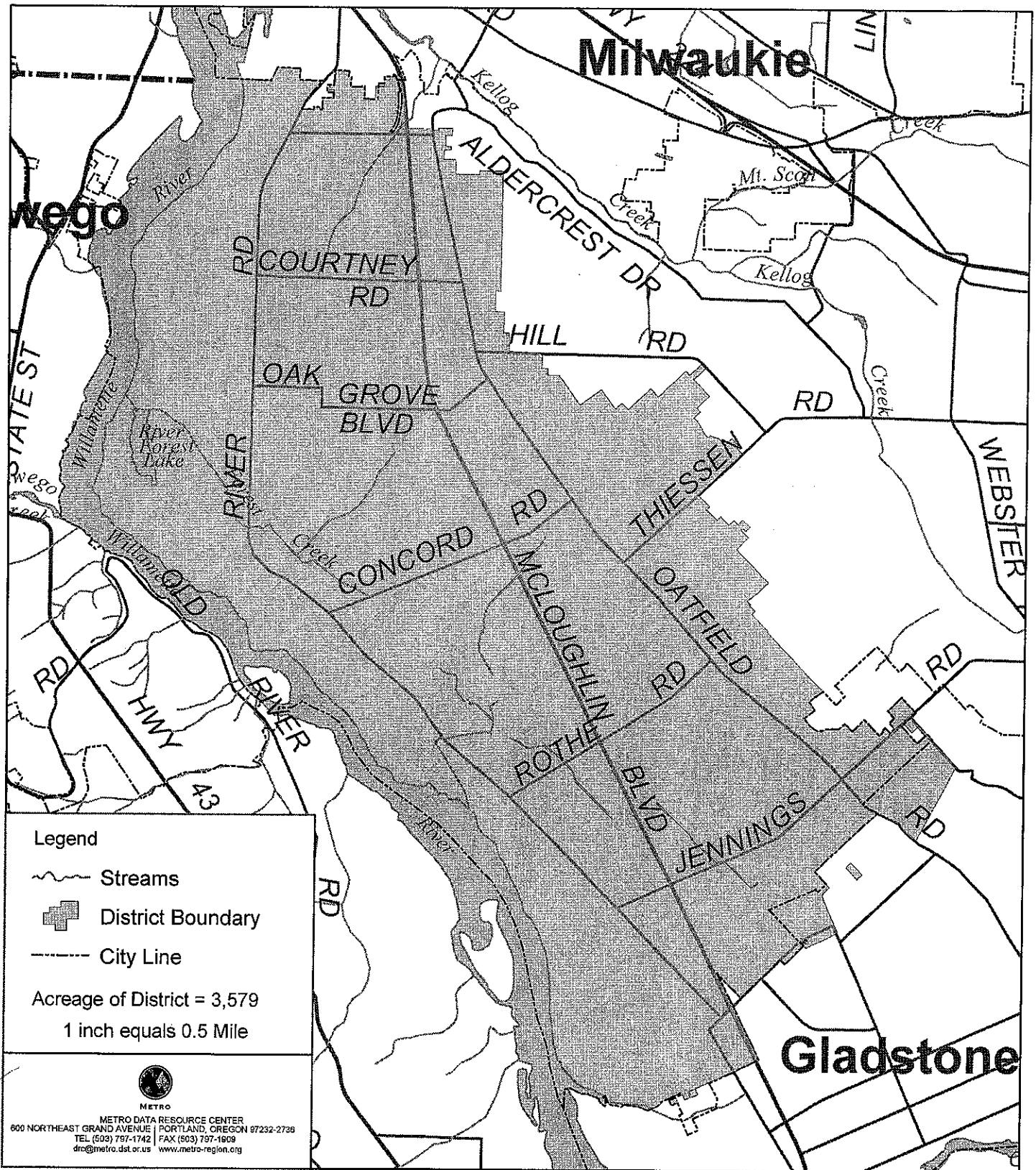
Attachment 13a: Title 3 Water Quality and Flood Area Map for Blue Lake and Fairview Lake

Attachment 13b: Map of vacant land for Blue Lake and Fairview Lake

Attachment 14a: Title 3 Water Quality and Flood Area Map for Fairview Creek

Attachment 14b: Map of vacant land for Fairview Creek

Oak Lodge Sanitary District





METRO

Resolution No.: 04-3500
Attachment 2

April 5, 2001

Douglas M. McClain
Planning Director
Clackamas County DTD
Sunnybrook Service Center
9101 SE Sunnybrook Blvd.
Clackamas, OR 97015

Dear Doug:

Metro staff has made a final determination on the County's submittals and the follow-up discussions regarding compliance with Title 3 of the Functional Plan. We are treating the area within the UGB and the area outside the UGB but within the Metro jurisdictional boundary differently for this determination.

INSIDE THE UGB

Based on the information submitted, the County meets the standards of Title 3 within the UGB except for several water features within the Oak Lodge Sanitary District area. In previous submittals and discussions, I have addressed the 'Boardman Swamp' wetland separately and demonstrated that the current County regulations do not substantially comply with Title 3.

Oak Lodge Sanitary District Area

The existing buffer requirement for streams and wetlands within the district is twenty-five feet. There are three stream segments and associated wetlands identified on the Title 3 maps as subject to that Title's regulations.

The tributary of Johnson Creek, Forest Creek and an unnamed creek (Attachments 1 - 7) have several underdeveloped and vacant properties adjacent to them. These properties could be further developed without Title 3 protection of the streams. A segment of the lower part of the unnamed creek has adjacent steep slopes and thus is subject to a wider vegetated corridor (Attachment 5).

Many of the properties adjacent to these streams are developed to the maximum allowed under the existing zoning. Existing uses and conditions, however, do not preclude implementation of Title 3. Properties may redevelop or change current status. Additional protection under Title 3 not only applies to 'development' as defined in the Functional Plan, but would also take effect upon additions or modifications to existing uses within the corridor (Metro Code 3.07.340(D)(3)).

The sections of the streams that are piped are not subject to Title 3 regulations, and can be removed from the Title 3 map based on evidence that you submit to us. In addition, the County may request that areas be deleted from the Title 3 map (see Metro Code 3.07.820(B)(3)).

'Boardman Swamp'

The current required buffer for this wetland is twenty-five feet. According to County staff analysis and the map of this wetland (Greg Fritts letter of October 6, 2000), the north section of the wetland borders several lots of undeveloped/underdeveloped land. There are five lots, zoned R-7, that contain single family residences, four older ones, that may redevelop and/or subdivide. There are eight lots, zoned MR 1, that contain older single family residents on them that may redevelop and/or subdivide. These properties need to be protected under Title 3. The remaining properties surrounding the wetland, though currently developed to the maximum under existing zoning, may redevelop or be added to or altered, resulting in adherence to the wetland protection provisions in place at the time.

According to the Fritts' letter, the perimeter of the south section of the wetland that is within the County either cannot be developed (owned by the park district) or is part of a PUD common space. Existing uses and conditions, however, do not preclude implementation of Title 3, which would extend protection of water quality through larger vegetated corridors. Properties may redevelop or change current status. Additional protection under Title 3 not only applies to 'development' as defined in the Functional Plan, but would also take effect upon additions or modifications to existing uses within the corridor.

In addition, while the park district may not allow new construction, the definition of 'development' under Title 3 includes any structure or other activity that results in the removal of more than ten percent of the vegetation on a lot. Title 3 also requires other protections within the vegetated corridor such as maintenance, enhancement or restoration of native cover, if disturbed, and prohibition of uncontained hazardous waste (Metro Code 3.07.340(B)(2d-e)).

Conditions for Substantial Compliance

Once the County has adopted Title 3 standards for the Oak Lodge Sanitary District including the Boardman Swamp wetland, Metro will deem the County in substantial compliance to Title 3's water quality and floodplain protection policies for the area inside the Metro UGB. If the County chooses not to follow Metro requirements, the County would need to request an exception to the requirements.

OUTSIDE THE UGB

Title 3 applies to areas outside the UGB but within the Metro jurisdictional boundary. The two applicable County areas are Stafford and Damascus.

Stafford

The Stafford area is comprised of the triangular section of land south of Lake Oswego, west of West Linn and north of Metro's boundary. This area is part of the Surface Water Management District of Clackamas County (SWMCC). Currently, County code sections 704

or 1002 govern the buffer requirements for streams and wetlands in this area. This protection includes 25-foot buffers for wetlands and a variable buffer for those streams identified as regulated streams by the County. As previously agreed, SWMCC will adopt regulations to implement Title 3 after the City of Rivergrove adopts similar regulations. At this time, the City of Rivergrove has placed the final proposed Title 3 ordinance on hold pending the outcome of Measure 7. For this reason, we request that SWMCC implement the Title 3 regulations in this area regardless of the City's actions.

Damascus

For purposes of this interpretation, the Damascus area is considered to be the unincorporated portion of the County east of the UGB, south of Multnomah County, and west and north of Metro's jurisdictional boundary. Based on the information submitted to us, we have determined that the streams in this area are adequately protected at the present time. The lack of protection for the few remaining steep-sloped areas is considered minor in nature for the purposes of compliance with Title 3's vegetated corridor performance standards. Metro's conclusion is based on the amount of protection currently provided under County code, the limitations to development due to rural zoning, and the fact that there are very limited development opportunities along these steeped-sloped segments.


Conditions for Substantial Compliance

Substantial compliance with Title 3 for the areas outside the UGB is conditioned on the County taking the following actions:

- Stafford – The existing County regulations do not protect all water features, including those identified on the Title 3 map and not identified by the County, to Title 3 standards. The County or SWMCC, therefore, need to adopt Title 3 regulations, or regulations that are in substantial compliance to Title 3.
- Damascus - Upon future adoption by Metro of Goal 5-related regulations and implementation of them by the County, extend full Title 3 stream and wetland protections to all mapped water features.

If you have any questions or would like to discuss our comments, please call me at 503-797-1808.

Sincerely,



Ray Valone
Senior Regional Planner
Growth Management Services

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Enclosures

cc: Greg Fritts
Andy Cotugno
Ken Helm
Mary Weber

DEPARTMENT C
TRANSPORTATION AND DEVELOPMENT

Sunnybrook Service Center

NOVEMBER 29, 2002

Ray Valone
Senior Regional Planner
METRO Growth Management Services Department
600 NE GRAND
PORTLAND, OR 97232 2736

**RE: CLACKAMAS COUNTY TITLE 3 COMPLIANCE ZDO AMENDMENTS,
PLANNING COMMISSION MEETING**

The Planning Commission, at its October 28 public hearing, considered ZDO 191, the amendments regarding Title 3 compliance for the Boardman Swamp/wetland, and Boardman Creek. There were 45 people in the audience. The commission took extensive testimony in opposition to the amendments. The testimony generally was that the creek was already heavily impacted by various characteristics of urban development, and therefore increasing the buffer from the present 25 feet to 50 or more feet would not serve any beneficial purpose.

There was also testimony that the Boardman wetland should not be protected as a wetland because it is man-made.

After the public testimony closed, the Planning Commission deliberated about the testimony. From those deliberations came questions for Metro, in the form of a motion adopted unanimously by the PC. The questions they want Metro to answer before the next meeting are:

1. Reaffirmation of the Boardman Wetland as a Goal 5 delineated wetland and Title 3 resource.

Note: The PC is interested in what information Metro used to map Title 3 resources. I will also provide information on the County Goal 5 analysis of this wetland.

2. The potential impacts on downstream resources of development in the area.

Note: This is in reference to the few parcels along Boardman Creek east of River Road that have the most development potential. Lots west of this area are predominantly developed at the maximum density allowed, or have topographical and other constraints limiting redevelopment potential. The issue is what will really be achieved by increasing the buffer in this area.

3. Facts and evidence supporting the reasons for changing the buffers from 25 feet to 50+ feet.

Note: This relates to the science justifying the increased buffer widths, with again, a special concern about the benefits of wider buffers in a highly developed urban area.

4. Justification as to why this stream needs to be protected under Title 3 and the inadequacy of the 25 foot to meet the objectives of Title 3.

Note: This is most related to the 'substantial compliance' issue. The Planning Commission is looking for a clear definition of substantial compliance, and the Metro staff reasons for deeming the county does not meet this definition if the Boardman Swamp and creek are not given more protection than they have through existing regulations.

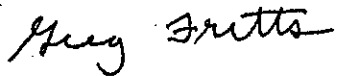
The Planning Commission motion also included a request to Mr. Fritts "to communicate to Metro the importance of a Metro representative attending the next PC meeting, and the seriousness of this request and the need to have justification for Metro's position".

A legal issue was raised in correspondence from a Planning Commission member after the hearing regarding whether Metro is a 'moving party' under state law and Metro Code 2.05.030(e). This will be discussed at the January meeting, so you may want to have Metro's position on this matter.

The Planning Commission meeting to continue testimony on the Title 3 amendments is set for January 27, 2002. The meeting will be at the Sunnybrook Service Center, 9101 SE Sunnybrook Blvd., and will begin at 6:30 pm.

The BCC hearing has been rescheduled from December 4, 2002, to March 19, 2003.

Please contact me if you have questions regarding this matter.



Greg Fritts
Senior Planner,
Title 3 Compliance Manager



METRO

Resolution No.: 04-3500
Attachment 4

January 13, 2003

Mr. Greg Fritts, Senior Planner
Department of Transportation & Development
Clackamas County
9101 S.E. Sunnybrook Boulevard
Clackamas, OR 97015

Dear Mr. Fritts:

This letter is in response to the Planning Commission's request for information regarding Title 3 compliance as it affects the Boardman wetland and Boardman Creek. The following numbered items correspond to the items listed in your letter of November 29, 2002 (Attachment A):

1. *Reaffirmation of the Boardman Wetland as a Goal delineated wetland and Title 3 resource.*

Response: The Water Resources Policy Advisory Committee (WRPAC), a standing committee to the Metro Council, led the development of Title 3. WRPAC used the following sources for designating wetlands on the Water Quality and Flood Management Area Map, the adopted map of Title 3:

- National Wetlands Inventory
- Local jurisdiction information

The northern section of the Boardman Wetland was identified by Metro through the National Wetland Inventory; Clackamas County staff modified its final shape. The southern section of the wetland was included on the Title 3 map as a result of information provided to Metro by Clackamas County staff. I understand that County staff identified it as part of the local Goal 5 process.

2. *The potential impacts on downstream resources of development in the area.*

Response: If 'potential impacts' means what effect on development a 50-foot vegetated corridor will have vs. a 25-foot corridor, I have not calculated the difference in the number of dwelling units. This, of course, is dependent on how the parcels are platted, the land netted out for streets and other infrastructure and any assembly of parcels. A preliminary observation of the lots through aerial photography seems to indicate that the impact would be minor, given the zoning of one unit per 10,000 square feet of land. This impact needs to be balanced with the environmental impact from development within 25 feet of the stream. The streams and wetlands are part of a system. It is important, therefore, that the component parts of that system are treated consistently, if possible. The larger buffer helps in many ways including moderation of stream temperatures; minimizing erosion, nutrient and pollutant loading; and moderating storm water flows. The width of the vegetated corridors for streams and wetlands are actually on the low end of a range of several scientific studies (see 3 below).

3. *Facts and evidence supporting the reasons for changing the buffers from 25 feet to 50+ feet.*

Response: Title 3 was developed after almost two years of analysis and debate by WRPAC. This committee represents a broad spectrum of water resources including stormwater management, municipal water providers, natural resource agencies and citizens. After extensive review and subsequent recommendation by the Metro Technical Advisory Committee (MTAC) and Metro Policy Advisory Committee (MPAC), the Metro Council adopted the Title 3 recommendation without modification in June 1998. Local jurisdictions had until January 2000 to amend their plans and codes to comply with this title.

WRPAC had access to several scientific studies during the development of the performance measures found in Title 3. I have included excerpts from a white paper released by Metro in July 1997, entitled "Policy Analysis and Scientific Literature Review – For Title 3 of the Urban Growth Management Functional Plan," to help the Planning Commission understand the level of research and review that went into the determination of Title 3 vegetated corridors (Attachment B). As you will read in the white paper, the 50-foot buffer width around wetlands and streams is on the low end of a range of scientific studies conducted for the various functions associated with stream and wetland corridors.

4. *Justification as to why this stream needs to be protected under Title 3 and the inadequacy of the 25-foot to meet the objectives of Title 3.*

Response: My response to item 3 above, including the white paper excerpts, addresses the issue of why 50-foot buffers are more effective than 25-foot buffers for protecting the functions and values of wetland and vegetated corridors. If this item relates more to the issue of substantial compliance, I offer the following:

- As you know, County and Metro staff have been working since June 1999 on the County's compliance with Title 3. After several discussions and much review of existing County code as well as adoption of Title 3 regulations by CCSD1 and SWMCC, Metro staff wrote two letters to Doug McClain during April 2001 with our final determination regarding County compliance with Title 3 (Attachment C). This determination includes consideration of 'substantial compliance,' as described in those letters.
- In summary, the letters conclude that the County will be in substantial compliance with Title 3 after meeting three conditions. One condition has been met, i.e., SWMCC adopted new regulations for the Stafford Basin area. The two remaining conditions are as follows (excerpted from the letters):
 - 1) "Once the County has adopted Title 3 standards for the Oak Lodge Sanitary District including the Boardman Swamp wetland, Metro will deem the County in substantial compliance to Title 3's water quality and floodplain protection policies for the area inside the Metro UGB. If the County chooses not to follow Metro requirements, the County would need to request an exception to the requirements."
 - 2) "Damascus - Extend the same level of protection, pursuant to existing County code, to all stream segments and wetlands that are shown on the Title 3 map. If any of the Title 3 mapped water features are inaccurate or no longer exist, please submit this information with evidence demonstrating why they should be removed from the map. Upon future adoption by Metro of Goal 5-related regulations and implementation of them by the County, extend full Title 3 stream and wetland protections to all mapped water features."
- As defined in the Functional Plan, 'substantial compliance means city and county comprehensive plans and implementing ordinances, on the whole, conform with the purposes of the performance standards in the functional plan and any failure to meet individual performance

standard requirements is technical or minor in nature.' The intent behind this definition is to allow for some flexibility in implementing Title 3 standards. The use of this type of compliance has been limited, however, to three instances within the entire metropolitan region, including the County's case. All other jurisdictions except West Linn have adopted code to comply with Title 3 without an interpretation of substantial compliance.

The City of Portland staff demonstrated that the City's code for development within the environmental overlay zones gives as much or more protection for streams and wetlands as does Title 3. In addition, the code serves to ensure that a development is located as far away as possible from the resource. Further, a mitigation or remediation plan is required when, through an alternatives analysis, it is determined that development cannot avoid impacts to the resources on the site.

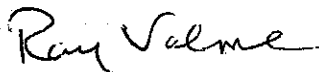
The City of Lake Oswego requested that Oswego Lake not be subject to the balance cut and fill provision of Title 3's floodplain standards, due to the lake not being a river or stream channel and not having a riverine floodplain. City staff submitted information demonstrating that the lake functions as a detention facility, especially during flood events. Based on the information submitted, Metro staff concluded that the City's not meeting performance standard 3.07.340A(2)(b) is minor in nature for reducing the risk of flooding, preventing or reducing risk to human life and property and maintaining functions and values of floodplains.

Based on the information submitted to date from the County, Metro staff abides by the letters of April 5 and April 9, 2001 regarding substantial compliance to Title 3. If the County chooses not to meet the two remaining conditions put forth in those letters, it may request an 'exception' to these requirements of Title 3. We have already discussed with you the process to request an exception. Section 3.07.860 of the Metro code includes the criteria for granting an exception (Attachment D).

Ken Helm from the Metro Attorney's Office and I will attend the Planning Commission's meeting on January 27, 2003 to answer any additional questions about this matter. Please forward this letter to the Commission.

If you have any questions about this letter, please contact me at 503-797-1808 or email me at valoner@metro.dst.or.us.

Sincerely,



Ray Valone
Senior Regional Planner
Planning Department

RV/srb
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Enclosures

cc: Brenda Bernards
Ken Helm



METRO

600 NORTHEAST GRAND AVENUE | PORTLAND, OREGON 97232 2736
TEL 503 797 1540 | FAX 503 797 1793

Resolution No.: 04-3500
Attachment 5

March 7, 2003

Council President David Bragdon

The Honorable Larry Sowa, Chair
Clackamas County Board of Commissioners
807 Main Street
Oregon City, OR 97045

Dear Chair Sowa:

Larry

This letter addresses the current status of County compliance with Metro's Title 3. It is in part a response to the Planning Commission's hearing and motion on January 27 regarding proposed ZDO-191 to adopt Title 3 regulations within the Oak Grove Sanitary District. As you know, our staff has been working with County staff for almost three years on compliance with Title 3. This letter summarizes the process to date as well as lays out possible next steps in order to complete the process.

Originally adopted in June 1998, Title 3 was to be implemented by all jurisdictions by December 18, 1999. Due to several issues including staffing resources and controversial provisions of that title, many jurisdictions requested that the Metro Council extend the deadline. The Council did extend all requested deadlines from early 2000 to December 2001. At that time, the Metro Council stated that no more extensions would be granted. The last extension expired in December 2002, which included the deadline for Clackamas County.

As a result of many months of contacts between our staffs, two letters were sent to Doug McClain from Ray Valone during April 2001. Those letters reflect Metro staff's final determination that the County would be in substantial compliance with Title 3 upon the completion of the following three actions (also see Attachment 1):

1. Adopt Title 3 standards for the Oak Lodge Sanitary District including the Boardman wetland;
2. Adopt Title 3 standards for the Stafford Basin area within the Metro jurisdictional boundary; and
3. Extend the same level of protection, pursuant to existing County code, to all stream segments and wetlands that are shown on the Title 3 map within the Damascus/Boring area, defined as east of the pre-2002 Urban Growth Boundary line, south of the Multnomah/Clackamas county line, and west and north of the Metro jurisdictional boundary. If any of the Title 3 mapped streams or wetlands are inaccurate or no longer exist, please submit this information with evidence demonstrating why they should be removed from the map.

March 7, 2003

Page 2

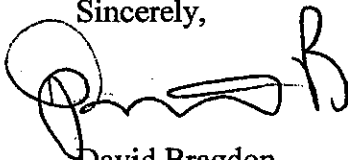
On January 27, 2003, the Clackamas County Planning Commission voted, though not a formal recommendation, to not adopt code language implementing Title 3 regulations within the Oak Lodge Sanitary District. We understand that the Board of Commissioners' hearing on this proposal (ZDO-191) is scheduled for March 19. The County has met the second condition through the Board of Commissioners' adoption of Title 3 requirements into the Rules and Regulations, effective July 2002, of the Surface Water Management District of Clackamas County. The County has not yet addressed the last condition.

The County has not, therefore, demonstrated substantial compliance with the requirements of Title 3. Because the time extension for compliance elapsed at the end of December 2002, future County decisions could be subject to appeals by Metro or any third party who is affected by the non-compliance. At this time, the County's options are as follows:

1. Adopt ZDO-191 extending Title 3 coverage for stream and wetland protection within the Oak Lodge Sanitary District, thereby meet condition 1 above.
2. Initiate a process to extend the same level of protection, pursuant to existing County code, to all stream segments and wetlands shown on the Title 3 map within the Damascus/Boring area, thereby meeting condition 3 above.
3. Alternatively, request an exception to the appropriate Title 3 requirements. This process includes review by MPAC and a public hearing by the Metro Council to determine whether the exception request meets the criteria found in Section 3.07.860 of the Functional Plan.
4. Demonstrate substantial compliance with Title 3. Completion of options 1 and 2 above would be considered substantial compliance. Alternatively, the County may submit additional substantive information demonstrating how these resources would be protected in conformance with the purposes of the Title 3 standards.

If you have questions about this letter, please contact Ray Valone by phone at 503-797-1808, or email him at valoner@metro.dst.or.us.

Sincerely,



David Bragdon
Council President

Enclsoures

cc: Doug McClain
Andy Cotugno
Ray Valone

**METRO**Resolution No.: 04-3500
Attachment 6

May 7, 2003

The Honorable Larry Sowa
The Honorable Bill Kennemer
The Honorable Martha Schrader
Clackamas County Board of Commissioners
906 Main Street
Oregon City, OR 97045

Dear Chair Sowa and Commissioners Kennemer and Schrader:

Re: Title 3

As you know, Title 3 (Water Quality, Flood Management and Fish and Wildlife Conservation) of Metro's Urban Growth Management Functional Plan (Functional Plan) requires all cities and counties in the Metro jurisdictional boundary to revise their comprehensive plans and land use ordinances, if necessary, to comply with performance standards in the title. Clackamas County has complied with Title 3 for most areas of the county. I understand, however, that the county decided in March not to revise its plan or ordinances to comply with Title 3 in the Oak Lodge Sanitary District area. My purpose here is to tell you about avenues now available to the county and to ask you which of these avenues the county would like to pursue.

First, the county may seek an exception to the Title 3 requirement from the Metro Council. The process and the criteria for an exception are set forth in Title 8 (Compliance Procedures, section 3.07.860) of the Functional Plan and are enclosed with this letter for your review. From what I know of the circumstances you face in Oak Lodge, I believe that it will be difficult for the county to satisfy the exception criteria in Title 8. However, this process is nonetheless available to the county. I have enclosed the form provided by Metro for an exception application.

Second, the county may seek review of the matter by the Metropolitan Policy Advisory Council (MPAC). MPAC may hold a hearing on the county's request, and make recommendations on possible resolution of the matter to the Metro Council. The matter would then go before the Metro Council at a public hearing. I have enclosed the sections of Title 8 (3.07.830 and 3.07.840) that describe this process more fully.

Please bear in mind that the time extension for Clackamas County's compliance with Title 3 lapsed December 2002. This means that the county must apply the provisions of Title 3 directly to land use decisions in the subject area until the county has amended its comprehensive plan to comply with Title 3. This is a requirement of Title 8, section 3.07.810.E, a copy of which is

The Honorable Larry Sowa
The Honorable Bill Kennemer
The Honorable Martha Schrader
Clackamas County Board of Commissioners
May 7, 2003
Page 2

enclosed. Any person who participates in the county's process may appeal the decision to Land Use Board of Appeals on grounds that the decision violates Title 3.

Ray Valone of Metro's Planning Department (503-797-1808), Dick Benner of the Office of Metro Attorney (503-797-1532) or I (503-797-1763) would be happy to discuss these options with you at your convenience.

Sincerely,



Andrew C. Cotugno
Planning Department Director

ACC/srb
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Enclosures

cc: David Bragdon, Metro Council President
Brian Newman, Metro Council District 2



*Clackamas
County*

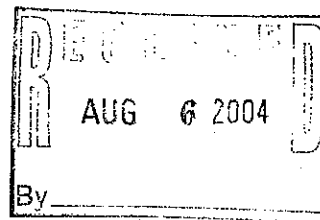
Resolution No.: 04-350.0
Attachment 7

**DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT**

Sunnybrook Service Center

July 22, 2004

Andy Cotugno
Metro
600 NE Grand Avenue
Portland, Oregon
97232



Re: Exception Request

Enclosed are the appropriate forms for a request for an exception from Title 3, for two specific areas. I have also included a copy of the Board Order denying the proposed amendments that would have brought the County into compliance.

If you have any questions regarding this material, please contact me.

Cordially,

Douglas M. McClain
Planning Director

MEMORANDUM

Resolution No.: 04-3500
Attachment 8


600 NORTHEAST GRAND AVENUE | PORTLAND, OREGON 97232 2736
TEL 503 797 1700 | FAX 503 797 1797



METRO

August 24, 2004

TO: Metro Councilors
Mike Jordan, Chief Operating Officer

FROM:  Andy Cotugno, Planning Director

RE: Title 3 Exceptions Application

I have recently received an application for an exception from Title 3 of the Urban Growth Management Functional Plan from Clackamas County. This application is for an exception from the requirements of the Water Quality Resource Area performance standards for the Oak Lodge Sanitary District portion of the county. The County Commission believes that it is in substantial compliance with the requirement. This represents the first time that a local government has applied for an exception to a functional plan requirement.

Metro Code 3.07.860 provides the exceptions process for compliance with functional plan requirements. The code calls for the Council President to set a public hearing on the issue before the Metro Council and must notify the Metro Policy Advisory Committee (MPAC), the Department of Land Conservation and Development (DLCD) and anyone who requests to be notified of exception requests. A staff report will be available to allow scheduling of this hearing in mid-October.

After the public hearing, the Metro Council determines whether the exception meets four criteria and may grant an exception if it finds:

1. It is not possible to achieve the requirement due to topographic or other physical constraints or an existing development pattern;
2. This exception and likely similar exceptions will not render the objective of the requirement unachievable region-wide;
3. The exception will not reduce the ability of another city or county to comply with the requirement; and
4. The city or county has adopted other measures more appropriate for that jurisdiction to achieve the intended result of the requirement.

The Council may establish terms and conditions for the exception to ensure that it does not undermine the ability of the region to achieve the 2040 Growth Concept. Such terms or conditions must relate to the functional plan requirement to which the Council grants the exception. The terms and conditions must be incorporated into the Council's order granting the exception.

The Council must issue an order with its conclusion and analysis and send a copy to the city or county seeking the exception, MPAC, DLCD and anyone requesting a copy of the order. The city or county or a person who participated in the proceeding may seek review of the Council's order as a land use decision described in ORS 197.015(10) (a) (A).

If you have any questions, please contact either Dick Benner at extension 1532 or me at extension 1763.

cc: Dan Cooper
Richard Benner