

A G E N D A

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METRO

Agenda

MEETING: METRO COUNCIL WORK SESSION MEETING
DATE: March 3, 2005
DAY: Thursday
TIME: 3:30 PM
PLACE: Metro Council Annex

CALL TO ORDER AND ROLL CALL

1. GOAL 5 FUNCTIONAL PLAN ELEMENTS


ADJOURN

M E M O R A N D U M

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METRO

To : Metro Council
From: Andy Cotugno, Chris Deffebach 
RE: Nature in the Neighborhoods
Date: March 2, 2005

In December, Council approved a Resolution, supported by MPAC, which directed staff to develop a Fish and Wildlife Habitat Program to reflect the following basic principles:

- Focus the regulatory element of the program on Class I and II Riparian Habitat;
 - 41,240 acres or 50% of the total habitat inventory
 - 40% of this is covered by Title 3 Water Quality Resource Area standards, and another 22% is covered by Flood Management Area cut and fill requirements
 - 38% is in parks
 - 4,615 vacant buildable acres within the urban growth boundary
- Develop a strong voluntary, incentive based approach to protect and restore Class III Riparian, and Class A, B and C upland habitat;
- Apply a regulatory element that limits development on all habitat, on Class I, II III Riparian and Class A and B Upland Habitat, in future additions to the Urban Growth Boundary; and

The Council directed staff to develop a program that relies on the use of voluntary actions to protect and restore habitat areas and specifically stated the Council's intention to seek voter approval of a bond measure to support fish and wildlife habitat acquisition and restoration. Other key elements of the program include expanding education and awareness of the value of habitat areas and increasing the capacity for restoration projects in the region.

In response to Council's direction from this and other resolutions, staff has developed a proposal for a Nature in the Neighborhoods Program that describes the implementation actions that Metro and others can take to support habitat conservation and restoration. Part of this proposal includes an amendment to the Urban Growth Management

Functional Plan that would require cities and counties to ensure that their comprehensive plans substantially comply with the functional plan, which is based on Metro's habitat area maps and includes new development standards for Class I and II riparian habitat areas.

The proposed language for the Functional Plan calls for:

- Requiring cities and counties to allow the use of habitat friendly development practices in Class I and II areas, and
- Requiring cities and counties to avoid, minimize and mitigate for development in the Class I and II riparian habitat, based on the priorities established by Council for habitat areas.

Over the last eight weeks, staff have been soliciting comments on draft versions of this proposal from the Program Working Group, MTAC, MPAC, Goal 5/WRPAC, private business representatives and non-profit groups who have been participating in this process as well as individuals and other elected officials not represented on MPAC. These discussions have raised both technical and policy issues. The intent of this memo is to identify the areas of highest priority for your consideration. Below are the top ten policy issues. This memo discusses the first five, and will follow up on the remainder at a later date.

1. Do the proposed standards impose the appropriate regional requirements?
2. Should habitat-friendly development practices be required, where practicable, or should cities and counties simply be required to *allow* the practices?
3. What level of protection, or "floor" should be applied to new UGB expansion areas, and should the rules that apply there be spelled out explicitly at this time, or left to be developed at the time a new expansion is approved?
4. Is the Council willing to accept lower residential densities than established in Title 1 and agree to a more "automatic" and less rigorous review process than offered in Title 8 for the reduction?
5. Is it realistic to consider new regulations in a post-Measure 37 era and how much can Functional Plan language be used to help avoid claims?
6. Role of performance standards in setting vision/goals for the region and in linking to responsible actions and implications for ongoing monitoring?
7. Value of tree protection standards outside of development review process to protect trees in Class I and II areas, with exceptions for developed SFR?
8. Map verification process, including verification for urban development values (and the policy issues of the major institutions)
9. How best to motivate creativity in city and county compliance yet assure certainty and consistency?
10. How best to motivate and inspire voluntary activity among the region's governments, agencies, non-profits, business and individuals?
11. What is a reasonable, timely and consistent compliance timeline?

Policy Issues on the Functional Plan Title for Fish and Wildlife Habitat Areas

1. Application of Avoid, Minimize and Mitigate Standards to Class I and II Riparian

Key Policy Issue: Do the proposed standards impose the appropriate regional requirements?

This section sets the standards of regional consistency for conserving habitat in Class I and II Riparian areas. It is a key policy decision as it sets the floor or minimum for protection in the streamside areas. The comments on this section range from concerns about placing any new requirements in a post Measure 37 era, to concerns that the level of protection isn't enough to make it worth the effort to change comprehensive plans and that it may, in fact, undermine existing programs in some jurisdictions, to comments that it is about right.

The new requirements build off of the Avoid, minimize and mitigate standards in place in the region now under the existing Title 3. The proposal would retain the existing Title 3 standards, which already apply to about 60% of these riparian habitat areas. However, the new standards would place more requirements on undeveloped floodplains, since these areas are currently subject only to cut and fill requirements for water storage but not the avoid, minimize, mitigate standards that apply to the Water Quality Resource Areas.

The proposal ties the requirements to avoid, minimize and mitigate to the habitat resource quality and the urban development values approved by Council in the ESEE (economic, social, environmental and energy) analysis, and creates three types of Habitat Conservation Areas (HCA):

- High HCA: Avoid, Minimize, Mitigate (same standard as Title 3);
- Moderate HCA: Minimize, Mitigate; and
- Low HCA: Mitigate only.

Options to make the "floor" level of protection higher include making the Avoid test apply to all habitat conservation areas, instead of only the high conservation area, as proposed. Options to make the "floor" level of protection lower include eliminating any need for a development to show that practical options to Avoid the habitat areas have been considered as part of the development application. Instead, a minimize or mitigate standard could apply.

Council direction to apply regulatory protection only to Class I and II habitat greatly simplified the types of habitat covered and significantly reduced the area subject to new regulations. A substantial portion of the Class I and II habitat is covered by Title 3 Water Quality Resource Area standards. Opinions have been expressed that the urban development value is not an appropriate tool to vary protection levels from two perspectives: habitat in centers and regionally significant industrial areas is just as valuable as in other areas, and that residential development should not be classified as "low urban development value" since it is a major driver of the regional economy and the single largest user of land. One way to address these concerns is to treat all of the Class I and II habitat the same and apply a Minimize and Mitigate standard, since the core area closest to streams is already subject to Avoid under existing Title 3 standards.

The approach proposed in the Functional Plan is necessarily a discretionary approach, because it requires a jurisdiction to consider specific facts related to a property and determine, for example, whether or not it is reasonably possible to "avoid" the habitat. Recall that the Goal 5 rule requires that the program provide property owners with a clear and objective approach and, once that

approach has been provided, then a discretionary approach may also be provided. The draft functional plan passes this requirement through to the region's cities and counties, requiring them to have a clear and objective approach that would result in protection at least as protective as the protection that would be provided by the discretionary approach described above. The model ordinance will provide an example of a clear and objective development approval approach, consistent with the Goal 5 rule, and a discretionary approach.

2. Require Habitat-Friendly Development Practices, where practicable, in Class I and II Riparian areas.

Key Policy Issue: Should these practices be required, where practicable, or should cities and counties only be required to *allow* the practices?

Habitat-Friendly Development practices include a variety of tools such as reducing water runoff and reducing the amount of effective impervious surfaces. Some of these are included in some city and county stormwater management plans. The proposal calls for requiring city and county codes to require the use of these practices. Because only some practices are feasible in some instances, the proposal specifies that the requirements would apply only when practicable. The proposal calls for requiring these practices in all Class I and II habitat areas, even in existing Title 3 WQRA and floodplain areas and in the streamside areas that were exempted from Title 3 when it was adopted.

Based on comments received, the difficulties in using these habitat friendly practices today range from concerns about capital and maintenance cost, barriers in local codes that make the practices difficult to apply, and lack of up to date familiarity or knowledge on the part of all parties involved on how to apply the quickly evolving technologies. The advantages of using these practices are their benefits to water quality and channel conditions as well as opportunities to retain green infrastructure on the site.

3. Applicable Habitat Conservation Area Standards for New Urban Areas

Key Policy Issue: What level of protection, or "floor" should new additions to the UGB have, and should the rules that apply there be spelled out explicitly at this time, or left to be developed at the time a new expansion is approved?

The proposal will identify a process that new urban areas would be required to follow, including establishing a habitat inventory consistent with the methodologies for the existing habitat inventory and establishing the urban development value of the area consistent with the methodology developed in the ESEE. (A new inventory may not be needed for several years because the current inventory extends one mile beyond Metro's jurisdiction, but the inventory would need to be updated at the time of the expansion). The concept level design types would guide the application of the urban development values until final planning was completed and final design types applied.

The proposal anticipates to apply the same Avoid, minimize, mitigate principle to upland areas as in the Class I and II areas. The same choices regarding the use of Avoid apply as described above. However, new urban areas also offer opportunities to avoid the resources in the initial concept planning in ways not possible in the more built-up urban areas. For example, rules could be imposed that prohibited habitat areas from being divided into parcels smaller than a certain size, or from being zoned for dense uses. In addition, other provisions become more relevant, such as a tree protection ordinance, because of the importance of trees in defining the upland

habitat functional values. The same disadvantages that the Council weighed in deciding to designate the upland areas “allow” apply in new urban areas, too, since many of the upland areas are also less constrained development areas.

4. Relaxation of Title 1 Density/Capacity Requirements.

Key Policy Issue: Is the Council willing to accept lower residential densities than established in Title 1 and agree to a more “automatic” and less rigorous review process than offered in Title 8 for the reduction?

Metro Council has indicated, in multiple Resolutions, its intent to reduce density targets for residential capacity if necessary to protect natural resources. Title 8 allows a process for a city or county to do that by applying to Metro, in March of each year, for approval of a density requirement reduction to support natural resource areas. . To date, no local jurisdiction has made a request under these provisions.

As proposed, the process would not require further approval by Metro. Approval would occur automatically if the decision was necessary to protect the regionally significant habitat from development and offered permanent protection of the habitat. The loss of housing units would be taken into consideration in sizing the next UGB expansion or asking cities and counties to absorb additional capacity in other ways. Transfer of Development Rights are encouraged to minimize the effect on land supply.

This ability to reduce density would apply to only areas on Metro’s Inventory Map and to local Goal 5 inventories if they were on a map prior to the adoption of Metro’s program. This would apply to all habitat areas, both upland and riparian.

The reduction in density offers the ability to build larger lots at a lower density than currently allowed within the UGB. The provision would apply to residential areas only, not commercial, though residential zoning makes up 40% of the inventoried habitat areas.

5. Approach to Measure 37

Key Policy Issue: Is it possible to consider new regulations in the post-Measure 37 era, and if so, how much can language in the functional plan help to avoid Measure 37 claims?

Council Direction in Resolution No. 03-3506A called for:

- Program shall not result in reductions in FMV of properties unless program provides source of funds to compensate property owners.
- Not the intent of previous statement to require compensation in any instance where M37 would not require compensation—i.e. all exceptions apply (e.g. rules implemented to protect health and safety or to comply with federal law are exempt under M37).

The approach in current draft:

- Explicitly states goal of program is to increase fair market value of each property affected (by using more flexible development approaches such as allowing more intensive, but clustered,

development; allowing less intensive development of properties than would otherwise be required under density rules; etc.).

- Requires cities and counties to include provisions intended to increase the fair market value of individual properties; and makes all other rules subject to that provision (this ostensibly means that, if the other rules would decrease the FMV of a property, then the rule would not apply).
- Variances—provides a procedure to allow a property owner to obtain a variance if the rules resulted in a loss in FMV of a property; process is a land use decision (i.e. appeals to LUBA—bringing these claims “within” the land use system, unlike M37 claims); only minimum variance necessary may be granted; includes waiver of future M37 claims based on functional plan; one incentive for property owners to use the variance procedure is that the variance could be transferred to future property owner (unlike M37 waiver).
- Incorporates concept that rules should not decrease property values without including any exceptions, and provides variance procedure to waive rules to the extent that they do reduce FMV of property; if a property owner chose not to apply for a variance, or rejected an offered variance because the owner believed it was insufficient, and instead filed a M37 claim, then a city or county (or Metro) could still assert that the entire program was exempt under the “comply with federal rules” exception.

Comments on this section from advisory committee representatives, especially representatives of cities and counties (including both staff and elected officials) have included:

- The intent to increase fair market value goes beyond Measure 37’s requirements to compensate for losses in fair market values;
- Forcing jurisdictions to establish a separate variance procedure parallel to the Measure 37 procedure and separate from the jurisdictions other variance procedures is unnecessarily duplicative, and having the variance process “within” the land use decision arena (i.e. decisions can be appealed to LUBA, unlike Measure 37 decisions) could result in confusing and inequitable results for property owners;
- The draft functional plan institutionalizes Measure 37 and does not take into account the possibility that the measure could be amended in the future; and
- The approach does not seek to take advantage of any of the exceptions provided in Measure 37, such as an argument that these new rules are necessary to implement the soon to be finalized TMDL rule issued pursuant to the federal Clean Water Act.

An Alternative approach is to:

- Be generally silent within the functional plan (but address as part of the overall program description) as to the program’s effect on FMV—address M37 claims as they arise under the terms of the measure, either compensating or waiving the rules on a case-by-case basis. This would still allow Metro or a local government to assert M37 exceptions regarding all claims—i.e. argument that program was implemented to protect health/safety or to comply with TMDL Rule.