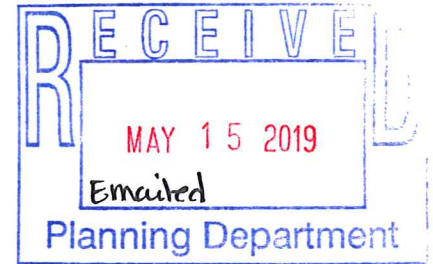


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## MEMORANDUM

**DATE:** May 15, 2019  
**TO:** McMinnville Planning Commission  
**FROM:** Ron Pomeroy  
**SUBJECT:** PDA 3-18, PDA 4-18 and S 3-18



The information presented herein is relevant to the public review, deliberation and decision making relative to PDA 3-18/PDA 4-18/S 3-18.

### Goal Post Rule

In Oregon land use there is an established legal rule rooted in Oregon Revised Statute (ORS) 227.178(3) (cities) and ORS 215.247(3) (counties) which answers the question of whether requirements or regulations that change during the time a land use proposal is undergoing public review can be applied to that proposal during the review. The answer to this question is an unequivocal No. In the plainest terms, you cannot change the goalposts once the ball is in play.

As articulated in many Oregon LUBA (Land Use Board of Appeals) cases, and particularly succinctly in the Land Use Board of Appeals case Setniker, et. al., v. Polk County, et. al. (LUBA 20140057, A148070), the Goal Post Rule, as it has come to be known, is summarized in that deliberation as follows:

"The "goal-post rule," ORS 215.427(3)(a), provides, in essence, that the rules in existence when an application is complete are the rules that govern the approval or rejection of the application--government, in other words, cannot "move the goal-posts" after the applicant has (to complete the sport metaphor) kicked the ball: "If the application \* \* \* was complete when first submitted or the applicant submits additional information \* \* \* within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251 [compliance acknowledgment], approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

With the exception of modifications proposed by an applicant through a comprehensive plan amendment or zone change request (Columbia Riverkeeper v. Clatsop County, 58 Or LUBA 190), the standards and criteria that were applicable at the time the land use application was first submitted are those, and only those, that must be applied for the entirety of the land use review, inclusive of all potential appeals and remands. A reviewing body cannot legally base its deliberation or decision making on standards or criteria as they might exist in the future or as one might wish them to exist today.

Relative to the matter of the Premier Development's current land use applications and the established FEMA (Federal Emergency Management Association) 100-year floodplain, the City of McMinnville, inclusive of all of its decision-making bodies, is required to rely on the application of the FEMA 100-year floodplain identified on applicable FIRM(s) (Flood Insurance Rate Maps) as they currently exist and not as one may speculate that they might exist at some time in the future. Additionally, as the City is locally and federally required to do exactly that, the City cannot supplant that data and/or mapping for other information that it might prefer, nor can the City legally base any of its deliberation or decision(s) on additions to or modifications that have the effect of supplanting that FEMA FIRM data and/or mapping.

**Building Moratorium**

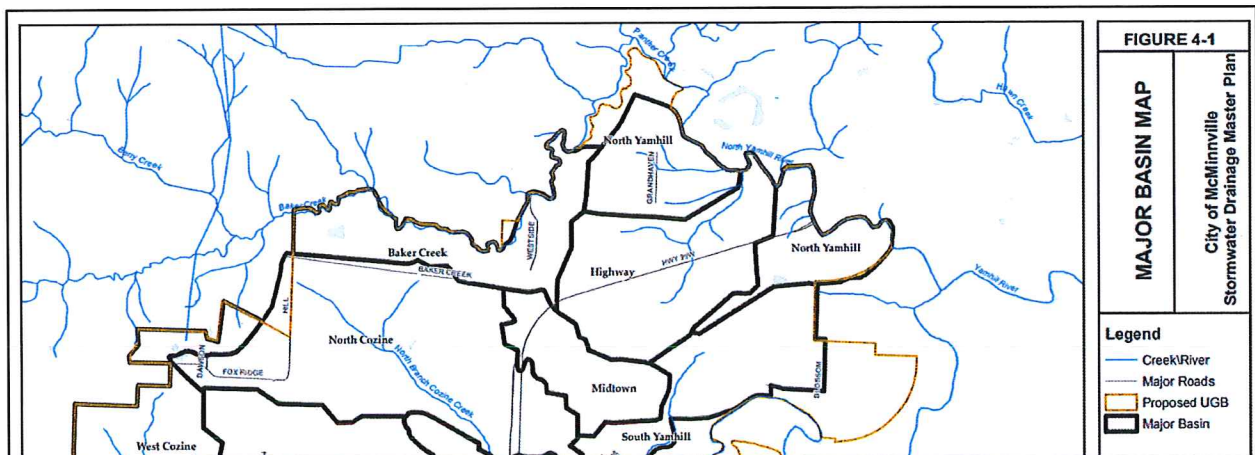
Relying on new, unsubstantiated claims that the adopted FEMA mapping should be ignored, or speculative claims relative to State regulated wetland mitigation, or other such claims as a basis to, even in part, deny the Oak Ridge Meadows development proposal is wholly unlawful under the "no change in the goalposts" rule articulated above. Such action sets a precedent that will require the City to deny all future development proposals from this point forward until updated FEMA FIRM maps have been issued (which may or may not happen) or until the city adopts its own wetland and/or wetland mitigation standards (which may or may not happen). Such a precedent setting decision by the City would result in an immediate de facto building moratorium in McMinnville, and here's how that works.

Either through natural drainage methods, storm water detention facilities, or by direct or indirect outfalls of the City's engineered storm sewer system, stormwater is required in McMinnville to enter local waterways. Those waterways are the North Yamhill River, South Yamhill River, Cozine Creek, and Baker Creek and their tributaries. Sending this stormwater to the municipal Water Reclamation Facility (sewage treatment plant) is a design of the past and the City and its citizens have spent enormous sums of dollars in recent decades in a continuing effort to separate those two systems. All of the city's planning programs and supporting documents require stormwater from development sources to ultimately be discharged into natural drainage ways.

Premier Development's Oak Ridge Meadows site is located within the Baker Creek Basin and is required to convey its collected stormwater into this basin. Specifically, Section 4.4.4 of the adopted McMinnville Stormwater Drainage Master Plan states:

"Baker Creek forms the northwest portion of the McMinnville UGB. Sub-basins in this major basin drain directly into Baker Creek, which flows in a well-defined channel."

The Baker Creek Basin is depicted on the portion of Figure 4-1 of this plan provided below.



McMinnville's current storm sewer network in the vicinity of Premier Development's Oak Ridge Meadows site is depicted on the City of McMinnville Storm Sewer Network map; a portion of that map is depicted below. The green lines on this graphic represent Storm Water Main Lines, and the black circles with green pluses represent Storm Water Outfalls. As is clearly seen, a number of these storm water outfalls empty directly into Baker Creek and/or its surrounds as is the design of this municipal system and as is required to occur.



These graphics and observations make clear that existing development either associated with or downstream from the Oak Ridge Meadows site already discharge stormwater directly into wetlands as well as into other land located within the FEMA established 500-year floodplain of Baker Creek. It is established that the impacts of this system are well accommodated by the Baker Creek stream channel and/or its associated upland areas.

Relying on new, unsubstantiated claims of outdated or inaccurate FEMA mapping or other such claims as a basis, even in part, to deny the Oak Ridge Meadows development proposal runs counter to the City's entire program and premises for the construction of its Storm Sewer Network which is designed to place stormwater into local waterways such as Baker Creek.

Similarly, denying the proposed Oak Ridge Meadows development for reasons associated with speculation about wetland mitigation which is regulated entirely by the Oregon Department of State Lands wetland mitigation program also runs counter to the purpose of why the State has designed, funds, and operates this wetland mitigation program.

Denial of the Oak Ridge Meadows development proposal for reasons associated with either, or both, of these situations would be precedent setting and have devastating ramifications for virtually all future

development proposals in McMinnville since the Oak Ridge Meadows proposal is not unique in its aim to ultimately convey resultant stormwater to a local waterway given that this is the City's aim of the required municipal storm sewer system. This proposed development project is designed to and does comply with all applicable local regulations inclusive of storm water collection and conveyance as is confirmed by the City's professional staff. Additional review and permitting as required by conditions of approval of this proposal shall be complied with by Premier Development.

Denial of this proposal based wholly or in part on regulations as you may like them to be relative to the issues discussed above would be precedent setting for this community and not in a good way. A decision so reached would require the City to deny all future development proposals *for the same reasoning* used to deny this proposal before you. In other words, that decision would be imposing a de facto building moratorium in McMinnville that would not only be spurious but would violate the City's required compliance with Oregon Planning Goal 10 (Housing – OAR Chapter 660, Division 8). -- This portion of Administrative Rule exists to ensure the provision of adequate numbers of needed housing units, the efficient use of buildable land within urban growth boundaries, and to provide greater certainty in the development process so as to reduce housing costs. Division 8 also provides standards for Goal 10 compliance to implement ORS (Oregon Revised Statute) 197-303 through 197.307; i.e., needed housing.

Such an unintended de facto moratorium in McMinnville would prevent the City from implementing adopted Goals, Policies and Standards and would force the City into non-compliance with the State requirements of Goal 10 as the City would no longer be able to approve residential development for an unknown number of years until such time that new FEMA FIRMs were adopted for land within the McMinnville UGB (urban growth boundary) or the City assumed control over wetland permitting and mitigation. Neither are likely in the future and neither are legitimate bases for denying any project including the proposed one pending before you.