

LEGAL MEMORANDUM

To: Planning Commission

Date Written: August 6, 2019

From: Justin D. Gericke, City Attorney
Denny Egner, Planning Director
Vera Koliass, Associate Planner

Subject: **Applicability of Needed Housing Statutes:** Elk Rock Estates File# NR-2018-005, LC-2018-001, WG-2018-001, VR-2018-014 and VR-2018-015

This memorandum is in response to Michael C. Robinson's letter dated July 16, 2019, regarding applications filed by his client for development of Elk Rock Estates. In the letter, Mr. Robinson represents that applications for Elk Rock Estates are "Needed Housing" applications as defined in ORS 197.303(1) and that pursuant to ORS 197.307(4), the city "may adopt and apply only clear and objective standards, conditions and procedures" when processing the applications.

The city disagrees for the following reasons:

1. In the city's most recent geographic information system (GIS) analysis that was conducted in support of the Milwaukie's 2016 Housing Needs Analysis, the subject property was not identified as land that is required to meet the need shown for housing within the city's urban growth boundary. The GIS analysis excluded lands with development constraints such as the 100-yr floodplain and areas subject to water quality and habitat conservation overlays. Given these constraints, the GIS analysis found that the subject property would add only one additional dwelling unit to the city's overall housing capacity. The 2016 Housing Needs Analysis concludes that the city's zoned capacity provides land for 2919 housing units which far exceeds the 1150 housing units forecast as Milwaukie's future growth through 2036. Based on the analysis, the city's future housing demand can be met without maximizing the development potential of the subject property and therefore the development should not be considered as "needed."
2. The applicant has chosen to pursue a highly discretionary pathway to develop the property rather than a clear and objective pathway as allowed under the code.

The applicant chose an inherently discretionary pathway when other clear and objective alternatives are available. Due to its location within a Water Quality Resource (WQR) and a Habitat Conservation Area (HCA), the applicant is requesting to develop a residential cluster

development under MMC 19.402.14.C. The residential cluster development process is an adjustment or variance to the normal, clear and objective development process and is inherently discretionary in nature. The goal of a cluster development is to allow residential development to be clustered so that land can be developed at allowed densities while avoiding or minimizing impacts to WQR or HCA, including allowing alternative types of residential development, such as multifamily, to meet density. The type of development sought by the applicant would not exist without the application of discretionary criteria to determine the suitability of the site and the proposed development for a clustered development.

The discretionary cluster development process is allowed under ORS 197.307(6) because the city has otherwise provided clear and objective pathways that would allow residential development on the property, the approval criteria for the cluster development complies with statewide land use planning goals and rules, and the criteria for the cluster development authorizes a density level at or above the density level authorized in the zone under the available clear and objective pathways.

Because the applicant has chosen a discretionary pathway rather than one of the clear and objective pathways provided by the city, the city is authorized to apply discretionary criteria to this application for a residential cluster development.

Included by reference: 2016 Housing Needs Analysis and related GIS data -

[https://www.milwaukieoregon.gov/sites/default/files/fileattachments/planning/page/104111/background - draft housing needs analysis.pdf](https://www.milwaukieoregon.gov/sites/default/files/fileattachments/planning/page/104111/background_-_draft_housing_needs_analysis.pdf)