

**CITY OF FLORENCE
ORDINANCE NO. 9, SERIES 2022**

AN ORDINANCE ADOPTING SUPPLEMENTAL FINDINGS AFFIRMING ORDINANCE NO. 2, SERIES 2021 THAT ASSIGNED LOW DENSITY ZONING DESIGNATION TO OCEANA DR., EAST OF RHODODENDRON DR. AND ASSESSOR'S MAP 18-12-10-40, TAX LOTS 400 AND 401 AND ASSESSOR'S MAP 18-12-10-34, TAX LOT 801 AND NOTING PRIME WILDLIFE OVERLAY ASSIGNMENT TO PORTIONS OF TAX LOTS 400 AND 401.

RECITALS:

1. Florence City Code (FCC) Title 10, Chapter 1, Section 2-3 provides that Council may establish zoning and land use regulations that become effective on the date of annexation.
1. The City of Florence was petitioned by the property owner, Benedick Holdings LLC, on July 30, 2020, as required by Oregon Revised Statutes (ORS) 222.111(2) and Florence City Code (FCC) 10-1-1-4.
2. The Planning Commission met on November 10, 2020, at a properly noticed public hearing to consider the proposal, evidence in the record, and testimony received.
3. The Planning Commission determined on December 8, 2020, after review of the proposal, testimony, and evidence in the record, that the proposal was consistent with the City's acknowledged Realization 2020 Comprehensive Plan and adopted findings of fact in support of the annexation and zoning assignment.
4. The City Council met in a public hearing on February 1, 2021, after giving the required notice per FCC 10-1-1-6, to consider the proposal, evidence in the record, and testimony received.
5. The City Council deliberated on February 1, 2021, and found that the subject property is plan designated Low Density Residential in the Realization 2020 Plan, and the City Council supported the establishment of zoning as Low Density Residential consistent with Florence Comprehensive Plan and Zoning Code objectives.
6. The City Council adopted Ordinance No. 1, Series 2021, annexing the property as described in the Ordinance title above.
7. Oregon Coast Alliance and Bruce Hadley filed an appeal on May 3, 2021 with the Land Use Board of Appeals of the State of Oregon (LUBA).
8. January 28, 2022, LUBA, under case No. 2021-051, remanded Ordinance 2, Series 2022 in order for the City to provide supplemental findings that explain why assigning the City's Low Density Zoning District to the Subject Property is "not contrary to the public interest."

9. June 2, 2022, Michael Farthing representing Benedick Holdings LLC requested the city respond to LUBA's remand in accordance with ORS 227.181.

Based on these findings,

THE CITY COUNCIL OF THE CITY OF FLORENCE ORDAINS AS FOLLOWS:

1. The City of Florence adopts supplemental findings, Exhibit A, affirming Ordinance No. 2, Series 2021 that assigned Low Density zoning designation to Oceana Dr., east of Rhododendron Dr. and assessor's map 18-12-10-40, tax lots 400 and 401 and assessor's map 18-12-10-34, tax lot 801 and noting Prime Wildlife Overlay assignment to portions of tax lots 400 and 401.
2. This decision considers no new evidence and is based on the existing record of Ordinance 2, Series 2021.
3. This decision considers only one specific issue related to the applicable public interest criterion.
4. The City Recorder is hereby directed to file certified copies of this Ordinance with the Lane County Assessment and Taxation Office and the Lane Council of Governments.
5. Pursuant to FCC 10-1-2-3, the zoning established by this Ordinance will take effect 30 days from approval.

ADOPTION:

First Reading on the XX day of August, 2022

Second Reading on the XX day of August, 2022

This Ordinance is passed and adopted on the XX day of August, 2022.

AYES

Councilors:

NAYS

ABSTAIN

ABSENT

Joe Henry, Mayor

Attest:

Lindsey White, City Recorder

SUPPLEMENTAL FINDINGS OF FACT

(Exhibit A)

Request

On June 2, 2022, pursuant to ORS 227.181, Michael Farthing, attorney for Applicant Benedick Holdings, LLC, requested that the City proceed on remand for its application to assign zoning to the subject property that was annexed into the City via Ordinance No. 1, Series 2021. These supplemental findings address the remand proceedings and applicable criterion, as remanded to the City Council by the Land Use Board of Appeals (“LUBA”) in *Oregon Coast Alliance v. City of Florence*, LUBA Case No. 2021-051 (the “LUBA remand”).

Background

On April 5, 2021, the City Council adopted Ordinance No. 1, Series, 2021, which annexed a 48.82-acre parcel (the “Subject Property”), and the Oceana Drive right-of-way into the City. At the same time, the City Council adopted Ordinance No. 2, Series, 2021 (“Ordinance No. 2”), which assigned the City’s Low Density Residential Zoning District and Prime Wildlife Overlay to the Subject Property.

The City Council’s approval of Ordinance No. 1 (annexation approval) was appealed to LUBA who dismissed the appeal on October 18, 2021 (LUBA, No. 2021-050). That dismissal was affirmed by the Oregon Court of Appeals on January 21, 2022. *Oregon Coast Alliance v. City of Florence*, 317 Or App 137 (2022). The Court of Appeals’ decision is now final. As a result, Ordinance No. 1, Series 2021 is final and the Subject Property is within the Florence city limits – the Subject Property is annexed.

Ordinance No. 2 was also appealed to LUBA. On January 28, 2022 LUBA determined that the findings adopted by the City Council did not adequately explain

why the zone change satisfied the “public interest” standard set forth in FCC 10-1-3-B-4. That criterion states:

“Planning Commission Review: The Planning Commission shall review the application for quasi-judicial changes and shall receive pertinent evidence and testimony as to why or how the proposed change is consistent or inconsistent with and promotes the objectives of the Florence Comprehensive Plan and Zoning Ordinance and is or is not contrary to the public interest. The applicant shall demonstrate that the requested change is consistent with the Comprehensive Plan and Zoning Ordinance and is not contrary to the public interest.” (Underline added.)

In the adopted findings supporting Ordinance No. 2, reference was made to the Applicant’s initial application (Exhibit “J”) for addressing this standard. LUBA concluded that Exhibit “J” did not adequately address the “public interest” portion of the requirement set forth in FCC 10-1-3-B-4.

Issue on Remand

Based on this single shortcoming in the adopted findings, LUBA remanded the Council’s approval of the zone assignment in order for the City to provide supplemental findings that explain why this particular zone assignment of the City’s Low Density Zoning District to the Subject Property is “not contrary to the public interest.” The following findings provide the factual and legal justification for concluding that approval of the requested zone assignment of Low Density Residential to the property described in Ordinance No. 2 supports the City’s public interest in providing residential homesites in accordance with its Comprehensive Plan.

There will be no reconsideration of issues affirmed by LUBA in its remand decision. In addition, there will be no consideration of evidence irrelevant to the remanded criterion; evidence not referenced here is deemed either irrelevant to the

remand issue or unpersuasive as to the ultimate findings herein.

Incorporation of Supplemental Findings

These supplemental findings on remand affirm the original findings in support of Ordinance No. 2, except to the extent that findings in these supplemental findings actually conflict with the original findings. In the event of an actual conflict these supplemental findings shall govern.

Procedure

On July 30, 2020, property owner Benedick Holdings LLC applied to the City for annexation of the Subject Property together with a request to assign city zoning to the Subject Property. The annexation and zone assignment were addressed concurrently throughout the city proceedings. After proper notice, the Planning Commission met on November 10, 2020 to consider the zone assignment application. After considering submitted evidence, testimony and argument, the Planning Commission on December 8, 2020 adopted findings in support of assigning the requested zone district and overlay. Upon receiving the Planning Commission's recommendation, and proper noticing, the City Council met in a public hearing held on February 1, 2021 and February 22, 2021 to consider the application, evidence and testimony. On April 5, 2021 the City Council deliberated on the application and adopted Ordinance No. 2. As noted above, on January 28, 2022, LUBA remanded Ordinance No. 2 to the City Council for consideration of one specific issue related to the applicable public interest criterion.

ORS 227.181 governs the City's procedure on remand from LUBA. The city has no specific local procedures that govern the processing of a remand. The record in this matter is already voluminous after vigorous debate during the consideration of Ordinance No. 2. The remand issue is not a new issue, but one that was discussed already.

As to the singular public interest criterion, as provided by LUBA, the question for the City Council on remand is to identify the facts the relied on for this criterion and explain how those facts lead to the conclusion that the public interest standard is satisfied. Based upon the state of the existing record, the arguments already made throughout the course of this matter, and the specific scope of the remand issue, there is little reason to re-open the record or hear new argument as to the remand issue. On balance, it is best to proceed directly to deliberation of the remand issue so that the Council can correct the error found by LUBA.

The Council will consider no new evidence on remand. In addition, the Council will not hold a public hearing on this matter to consider any new testimony or argument.

This matter was set for City Council deliberation and action on August 15, 2022.

Plan and Zone Consistency

The starting point for finding the requested zoning assignment to be not contrary to the public interest is to focus on the location of the standard in FCC 10-1-3-B-4, and how it fits within the entire criterion which actually contains two requirements. The first requirement is that the proposed zone assignment be “consistent with and promotes the objectives of the Florence Comprehensive Plan and Zoning Ordinance.” The adopted findings that supported Ordinance No. 2 addressed relevant policies in the Florence Realization Comprehensive Plan (“Florence Comprehensive Plan”) and also applicable provisions of the Florence City Code. (Ord. No. 2 Findings at pages 5-26, 31-41.) These findings provide a detailed explanation of how and why the proposed Low Density Residential Zoning District is consistent with and promotes the objectives of the Florence Comprehensive Plan and Zoning Ordinance. (Ord. No. 2 Findings at pages 5-26, 31-41.) These findings cover a broad range of subjects relating to how this zone change positively satisfies and

implements the relevant policies and requirements of both the Florence Comprehensive Plan and Zoning Ordinance. This first standard is not at issue on remand from LUBA, so the prior findings are conclusive.

This first standard in FCC 10-1-3-B-4 that requires review of the Comprehensive Plan and Zoning Ordinance requirements is then followed with the general and subjective standard of “. . . is or is not contrary to the public interest.” Given the overwhelming evidence that supports the conclusion that this zone assignment, as applied to the Subject Property, conclusively addresses and satisfies all of the requirements, standards and criteria of the Florence Comprehensive Plan and Zoning Ordinance, we therefore, conclude that the assignment of the Low Density Residential zoning to the Subject Property is not only reasonable but is compelling for all of the positive circumstances that will occur when this zoning assignment is final and, therefore, is consistent with the public interest as reflected in the Florence Comprehensive Plan and Zoning Ordinance.

Benefits of Requested Zone Assignment

Of particular benefit to the public interest is that assignment of this Low Density Residential District will allow the owner to make an application to the City for low density residential development of those portions of the Subject Property that are not occupied by Coastal Shorelands. There is a documented public need for the low density residential development that will occur on the Subject Property. (Ord. No. 2 Findings at pages 10, 40.) An additional benefit to the public interest with this opportunity to make application for low density development is the city code requirement to provide access to Three Mile Prairie parkland, a Lane County public resource, upon land division. As shown on Exhibit G this would provide the opportunity for properties north and west of the subject property to have legal thru-access to the public park lands. (Ord. No. 2 Findings at page 17.) The Subject Property can be served by all urban facilities and services which will be provided by a

future developer. (Ord. No. 2 Findings at 5-7.) This includes a developer-financed pressurized public sewer line extended from Rhododendron to the Subject Property that will also be available to serve the existing residences in the Idylewood Subdivision that presently use individual septic systems. (Ord. No. 2 Findings at pages 5-6.) An additional benefit with this opportunity to make application for low density development is the city code requirement to perform extensive analysis and provide methods for treatment, flood prevention, storage construction, limits to impervious areas, and vegetation retention and to consider known flooding ¼ mile up and down gradient from development. Upon annexation and subsequent development application the City's Stormwater Master Plan is applicable where the "the City may wish to complete further studies of stormwater behavior in this area, to assess the need for pump stations, pipe systems, and/or other infrastructure." (Ord. No. 2 Findings at pages 12 & 17.) Testimony from owners adjacent to the subject property cited instances of historic flooding on or near their properties. The City's zoning and related development policies provide the public benefit of both the private developer and city the ability to consider and implement solutions to resolve flooding in these county lands.

Beyond these positive and beneficial contributions to the public interest that are stimulated by this zone assignment, there is also the fact that the South Heceta Junction Lakes, that are located on a significant portion of the Subject Property, will be fully protected from any development. (Ord. No. 2 Findings at pages 11-12.) Those protections offered by the City's Prime Wildlife Overlay Zone exceed those provided by the existing County Prime Wildlife Zone as evidenced, in part, by the 100' setback rather than the 50' presently in place under Lane County regulations. (Ord. No. 2 Findings at pages 26, 33.) Moreover, the number of residences that could be developed in the future under the proposed zone is significantly less than would be allowed by the County's Suburban Residential and Prime Wildlife Zone. (Ord. No. 2

Findings at pages 19, 33.) Thus, zoning to Low Density and assuming the City's Prime Wildlife designation will do more to advance the public interest by supporting public health and welfare and reducing the risk of excessive public expense.

Zone Assignment Compared to Alternatives

As the above findings reflect, approval of this zone assignment of Low Density Residential to the Subject Property has followed a script that is prescribed by Statewide Planning Goals, the annexation and zone assignment policies in the Comprehensive Plan and implemented pursuant to detailed Zoning Ordinance provisions. The Subject Property has been annexed to the City and continues to be designated Low Density Residential in the Florence Comprehensive Plan. (Ord. No. 2 Findings at page 10.) The City's implementing zone for the Subject Property is the Low Density Residential District with a Prime Wildlife Overlay that provides increased protections for the property's Coastal Shorelands in comparison to the County's regulations. (Ord. No. 2 Findings at pages 11-12.) It is in the public interest to provide these increased protections as the property is developed inside the City and in satisfaction of all applicable City requirements. This can only occur if this zone assignment is completed.

It is also reasonable to conclude that not assigning the Low Density Residential District to the Subject Property would be contrary to the public interest. Denial of this zone assignment would be in conflict with FCC 10-1-2-3 that authorizes zoning to be assigned to annexed properties when the zoning is consistent with the Florence Comprehensive Plan and Zoning Ordinance and regardless of whether it is requested by the annexation applicant. (Ord. No. 2 Findings at page 37.) The applicant has requested assignment of the Low Density Residential Zoning District to the annexed Subject Property. There is no other zone that is appropriate to be assigned to the Subject Property. Failure to do so would be contrary to the public interest as zoning assignment is required by the Florence Zoning Ordinance. The same rationale applies

if the City's Prime Wildlife Overlay zone was not applied to the Subject Property.

Opposition Testimony

Most of the opposition testimony is directed at the petition for annexation although there were claims that “the proposed change is contrary to the public interest.” (Exhibit M45, 11/10/2020 letter from Zack Mittge.) However, the reasons provided in support of this claim were based on the negative effects of a development that does not exist and is not presently proposed. (Exhibit M68, 2/1/21 letter from Zack Mittge.) This was reflected in the fact that most of the opposition testimony was directed at phantom proposals.

These misdirected allegations were focused primarily on the potential impacts of a development that has not been proposed by the zone assignment. These assertions were collectively cataloged in the adopted findings. (Ord. No. 2 Findings at pages 3-5.) As addressed previously the single remanded item by LUBA concerns the lack of findings explaining why this zone assignment is or is not in the public interest.

The opposition testimony alleging the lack of adequate findings addressing the public interest standard are not supported by actual examples of how approval of the zone assignment would be contrary to the public interest. No development is proposed by this zone assignment and none is approved if the zoning assignment becomes final. Indeed, the annexation has become final, and the action did not result in development of the Subject Property.

Importantly, no one provided arguments or evidence as to what would happen that is contrary to the public interest if this zoning assignment is approved and there was no development (which is the scenario the Council is faced with under this zone assignment application). There have been no assertions or allegations about negative or adverse effects that occur when the City's Low Density Residential District is assigned to the newly-annexed Subject Property in accordance with the Florence Comprehensive Plan and Zoning Ordinance.

Given the Comprehensive Plan designation and the available zoning districts that could apply to the Subject Property, the Low Density Residential District is the appropriate zoning district. It is not contrary to the public interest to assign the appropriate zoning district to the Subject Property.

As to the remand issue of public interest, the opposition testimony is unpersuasive in the face of the counter-evidence that supports a finding of public interest in this zone assignment. Given the fact that the subject property is annexed and within the city limits, it is in the public interest to zone the property as sought by the applicant, despite the evidence of flooding and other potential adverse impacts of future development.

Failing to assign a zoning district is not an available option under the City's zoning framework. Given that fact that a zoning district must be assigned, the Low Density Residential District is the appropriate assignment. Making this assignment is not contrary to the public interest when given the available options.

FCC 10-1-2-3

The LUBA remand directs the City to explain “why the zone change satisfies the public interest provision” in FCC 10-1-3-B-4. The findings in the previous sections set forth how and why approval of the Low Density Residential District assignment to the Subject Property is not only in the “public interest” but, in fact, to do anything other than make that assignment would be contrary to the public interest. This is supported and directed by FCC 10-1-2-3 which requires zoning to be applied either on the effective date of the annexation, which is what has occurred in the present case, or “automatically” applied with an interim classification that matches the County zoning classification. In either case, zoning will be applied to the Subject Property and that zoning will be the City's Low Density Residential District. There is no other zoning district that implements the Low Density Residential plan designation for the Subject Property. Indeed, LUBA itself noted that the only zoning district that

implements the Comprehensive Plan designation for the Subject property is the Low Density Residential District. (Footnote 5 of LUBA opinion.) The City agrees with LUBA's assessment and there is no valid argument to the contrary.

Conclusion

Assignment of the Low Density Residential District is required by a specific zoning ordinance provision that implements the City's Comprehensive Plan that designates the Subject Property as suitable for low density residential development within the city limits of Florence. Nothing could be more in the public interest than to assign a city zone that will allow the property to be developed in accordance with the Florence Comprehensive Plan and Florence Zoning Ordinance. This is how land development with strong City oversight and review should occur beginning with annexation followed by assignment of City zoning. (Exhibit N2, Applicant's final argument 3/1/21.) When the time comes in the future, the next step will be submission of a land development application that will be subject to complete public review.

For now, assignment of the Low Density Residential District to the Subject Property is mandated by the Florence Comprehensive Plan and Florence Zoning Ordinance which means that it is consistent with the public interest. Argument to the contrary is unpersuasive.