

**Ezone Map Correction Project  
Comments and Proposed Adjustments  
September 26, 2021  
Prepared by Jeff Bachrach**

**1. Introduction.**

Since public testimony was opened on this project about a year ago, staff has made significant efforts, including 256 site visits, to respond to concerns and objections raised by property owners. The record includes 388 submissions of testimony and evidence by the public. Staff has had to manage what became a massive zoning project; covid restrictions have made the process that much more difficult for both staff and the affected property owners. Over 12,000 properties have been impacted, including 3,280 properties that don't currently have any ezone overlay but will be subject to ezone regulations for the first time. (In hindsight, perhaps calling this a "correction" project may not have been the most apt description.)

As a number of people testified, the inability of owners to appear in person before the PSC to present their case, to show visual exhibits, and discuss face-to-face their circumstances and the financial impacts of the proposed regulations was a real limitation on their ability to get a full and fair hearing before the PSC. Two-minute zoom calls proved not to be an adequate substitute. Before embarking on another major zoning project while covid restrictions are in place, staff and the PSC should figure out a different format that will better facilitate the public's ability to effectively participate in the process.

**2. PSC Policy Discretion.**

The PSC has discretion under Statewide Planning Goal 5 to apply an ESEE balancing analysis in response to site specific evidence and decide whether some adjustment in the proposed ezone overlay is warranted, either because the factual evidence supports a change or because a balancing of equitable considerations could support a change. The implementing rule for Goal 5 provides:

"(3) Determine the Economic, Social, Environmental, and Energy Consequences: If conflicting uses are identified, the economic, social, environmental and energy consequences of the conflicting uses must be determined. Both the impacts on the resource site and on the conflicting use must be considered in analyzing the ESEE consequences."

As staff has explained, the ESEE analysis can be applied to the entirety of a natural resource area proposed for protection and not to individual affected properties. However, in situations where an owner has presented site-specific evidence that challenges the identification of a natural resource or has raised concerns that could be addressed with a site-specific ESEE analysis, the city should respond and explain its decision.

The kinds of conflicting factors that could be balanced when considering the application of an ezone to a given site might be impacts on future housing development or on other economic development opportunities or financial impacts for the property owner or broader social issues that might justify an adjustment to a proposed designation or boundary .

For example, a discretionary ESEE analysis was used earlier in the process to support separate requests from OHSU and the Audubon Society to remove or lessen the proposed ezones for large tree canopies on their respective properties. The PSC supported staff's recommendation to accommodate those requests. Staff's findings should explain the analysis that was utilized to support the adjustments to the ezones on those two properties. Such findings should be provided both as legal support, and more importantly as guidance to both decision-makers and property owners as to how and why a discretionary analysis can be applied to an individual property.

### **3. PSC Scope of Review.**

Exhibit G provides a brief summary of site-specific evidence for 31 properties and staff's findings in support of their proposed ezone determinations.

Staff writes in Attachment 3 sent to the PSC on September 24 that they used "objective methodologies" and followed "an approach of strictly adhering to the standardized mapping protocols to avoid subjective mapping decisions." While that emphasis on strict objectivity describes staff's intent and the starting point for their work, it doesn't recognize that there can be an element of subjectivity and discretion in how those "objective" determinations are made. That is consistent with PSC's role as policy advisors to the city council.

The discretionary consideration of factors allowed under an ESEE analysis comes into play once a natural resource is identified. But there can also be subjectivity and discretion when it comes to identifying and mapping the resources, as well.

For example, drawing an ezone boundary along the drip line of a tree canopy or determining the exact location of a stream's top-of-bank and then drawing the ezone boundary along its meandering path entails some degree of subjectivity and discretion. And a slight difference in the location of an ezone boundary – a change of 20 feet – can have a significant impact on an owner's ability to build a deck or site an ADU or make some other use of their backyard that they were free to make before their property got zoned.

**Question:** What is basis for applying different size p zone and c zone overlays around different wetlands? For example, G10 (p 23) applies a c zone within 75 feet of a wetland; G24 (p 70) applies a p zone within 30 feet of a wetland; and, G9 (p 21) applies a p zone within 25 feet and a c zone between 25 to 50 feet around the wetland. What is basis for deciding which of the different buffer sizes and overlay designations apply to different wetlands?

### **4. Proposed Changes to Properties in Exhibit G.**

#### **G5 – clear and convincing evidence supports removal of the predicted wetland.**

The proposed ezone on this property is based on the presence of a predicted wetland, but the evidence does not support that prediction. The determination of an actual wetland - as opposed to a predicted one – must be based on a formal onsite delineation prepared in accord with state and federal methodology. Predicted wetlands are based on staff's views from off-site. As noted in Exhibit G, there

were a number of sites where ezones based on predicted wetlands had to be removed when delineations proved no actual wetland existed.

The site adjoining G5 had a large predicted wetland removed based on a delineation that showed no wetland existed. The supposed wetland on G5 was connected to the larger now-removed predicted wetland on the adjoining site. The determination that there is no wetland on the adjoining site provides persuasive evidence that there is no actual wetland on G5 either. The testimony submitted by Dominic Corrado on September 5, 2021, in particular the email correspondence between him and staff, supports amending the map to remove the ezone that has been applied based on the predicted wetland.

**G13 – Another situation where a delineation removed the predicted wetland on the adjoining site.**

Regarding G13 at 11346 S Northgate Avenue, staff has removed the predicted wetland and ezone from the adjoining site upstream from G13 based on a delineation that was submitted for G9. Based on the delineation for the adjoining property and the determination that no wetland exists on G9, the predicted wetland should be removed from G13 and ezone map adjusted accordingly.

**Question:** In addition to G5 and G13, how many other sites have ezones been applied based on a predictive wetland? Close scrutiny of the evidence in those situations is warranted.

**G15 – Discretion to Adjust Wetland Buffer?**

In this situation, staff applied a c zone buffer 50 feet from a wetland located across the street from G15, which resulted in an approximately five-foot wide buffer on G15. Can the presence of an intervening street mitigate the need for a buffer on the other side of the street (not just for this site, but in general)? How would the impact of development on G15 impact the wetland on the other side of the street?