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MEMORANDUM

Community Development

To: Mayor Jackola and City Council
From: Kelly Hart, Community Development Director
Subject: New FEMA limitations on development in the floodplain

Date: November 5, 2024

I. INTRODUCTION

In 2009, FEMA was sued by the Portland Audubon Society and several environmental groups in Oregon, resulting in FEMA agreeing to implement Endangered Species Act protections for fish such as salmon through the National Flood Insurance Program (NFIP) requirements in Oregon. A formal draft rule review is underway under the National Environmental Policy Act and is expected to be completed in the next few years. However, in response to another lawsuit filed by Northwest Environmental Defense Center and the Center for Biological Diversity, FEMA sent letters to jurisdictions in Oregon on July 15, 2024, informing them that Pre-Implementation Compliance Measures are required to be in place as of December 1, 2024.

Oregon elected officials, including the governor, are lobbying FEMA to adjust the mandate to fit better with the Oregon land use system and provide more time for compliance, but these efforts have not yet been successful. City staff have also been in direct communication with FEMA and state legislators advocating for more time to implement these changes and pressed directly for revisions to the requirements, specifically requesting a delay of implementation until the National Environmental Policy Act process and traditional Oregon rulemaking process could be completed.

II. CURRENT REPORT

FEMA will require approximately 260 jurisdictions in Oregon that participate in the National Flood Insurance Program, including Lebanon, to take one of the following actions regarding development proposed in the Special Flood Hazard Area (often called the 100-year floodplain):

1. Adopt a moratorium/prohibition on new development in the Special Flood Hazard Area.
2. Adopt the FEMA model code, severely limiting development and requiring mitigation of impacts to the habitat-supporting functions of the floodplain with mitigation requirements that escalate dramatically if they cannot be accommodated on-site.
3. Conduct permit-by-permit habitat assessments per FEMA's guidance to achieve a "no-net-loss" of habitat functions with development. As described in FEMA's guidance document, this assessment requires review by habitat biologists or others with technical expertise.

Unfortunately, none of the options are a straightforward fit for Lebanon or other Oregon jurisdictions because of our unique land use system. Of the 6,288 properties citywide, 236 are

at least partially within the Special Flood Hazard Area. Most properties are adjacent to the Albany Canal and have already been developed, mainly outside the floodplain. Of the vacant, developable land with areas in the floodplain, most of the properties could be developed without impacting the floodplain or with minor incursion into the floodplain. In addition, these new requirements would affect public infrastructure projects, other than maintenance and repaving, in the floodplain. Regarding the magnitude of development occurring in the floodplain, the city has processed three floodplain permits in the past five years, one being a city permit for the westside interceptor project.

At this point, with the December 1, 2024, deadline for the city to determine a pre-implementation path forward, city staff recommends implementing the permit-by-permit option.

The moratorium or prohibition would lead to a Measure 56 notice to all landowners, which is required any time a city enacts an ordinance restricting or prohibiting the use of property. This action could potentially result in Measure 49 claims from property owners, which require compensation to a landowner when a local government enacts a land use regulation that restricts residential use and reduces the fair market value of a property. This is still being evaluated and is one example of how the FEMA pre-implementation does not align with Oregon's land use system.

The model ordinance is an extensive ordinance that would be added to an already large floodplain ordinance. The work that would need to be done to incorporate the model ordinance into the city's development code and evaluate for internal consistency would be time-consuming. In addition, although the Community Development Director is the assigned floodplain manager, with general training to implement the existing program, adding the model ordinance would require extensive training to implement the new ordinance adequately. With so few permits issued in the floodplain, the amount of work to adopt and train for implementing this ordinance would be onerous.

The permit-by-permit habit assessment is, unfortunately, the costliest to the private property owner but most sustainable for city operations. To implement the permit-by-permit assessment, there is a potential for minor amendments to the development code to codify the requirements. From there, private property owners/developers would need to hire habitat biologists to complete the FEMA guidance documents to demonstrate the development proposal meets the "no net loss" standard. The City would contract with a third-party habitat biologist to review the documentation for compliance with the program, and the review cost would be passed on to the applicant. The city utilizes this same process for the review of traffic impact analyses.

The city must identify which of the three paths it will implement by the December 1, 2024, deadline. If no path is chosen, FEMA will automatically place the city in the permit-by-permit review. The city will have until July 1, 2025, to fully implement the program. Until then, the city will automatically be placed in the permit-by-permit category. At any time, the city can change its mind on which option to implement with a simple notification to FEMA.

III. RECOMMENDATION

Choose a pre-implementation option. Staff recommends permit-by-permit.