



RESOLUTION NO. 2024-11

A RESOLUTION APPROVING A MORATORIUM ON DEVELOPMENT PURSUANT TO ORS 197.505 TO 197.540 BASED ON LIMITED SANITARY SEWER CAPACITY

WHEREAS, pursuant to the federal Clean Water Act of 1972, the City of Sandy sanitary sewer collection and treatment system is subject to a National Pollutant Discharge Elimination System (NPDES) permit (the Permit) issued to the City by Oregon Department of Environmental Quality (DEQ) under authority granted by the U.S. Environmental Protection Agency (EPA); and

WHEREAS, the Permit limits the types and amounts of discharges from the City treatment plant into Tickle Creek; and

WHEREAS, population growth and development in the city has increased the demand on the available capacity at the treatment plant; and

WHEREAS, inflow and infiltration (I&I) into the City collection system (i.e. sewer pipes) from surface water has also increased the demand on available treatment plant capacity; and

WHEREAS, the combination of I&I and increased base flows has caused discharges from the treatment plant to violate permitted NPDES levels during certain weather events; and

WHEREAS, the City has engaged in a significant program of investigation, remediation, and repair of the collection system to reduce the amount of I&I and the corresponding demand on the treatment facilities; and

WHEREAS, the City is also amending the Facilities Master Plan to provide for the design, financing, and construction of additional treatment facilities to improve the capacity of the City's wastewater system in the long term; and

WHEREAS, the aforementioned permit violations resulted in enforcement proceedings from DEQ and EPA which were resolved via the consent decree entered in the U.S. District Court for the District of Oregon on September 11, 2023 (the "Consent Decree"); and

WHEREAS, the terms of the Consent Decree required the City to perform a "stress test" and comprehensive capacity analysis to determine the capacity of the City's existing sanitary sewer system based on work the City had already performed to improve capacity; and

WHEREAS, the Consent Decree also required the City to limit new connections to the City's sanitary sewer system, and modifications to existing connections to the City's sanitary sewer system that increase flows, to no more than 300 equivalent residential units (ERUs) until the comprehensive capacity analysis results were approved by EPA and DEQ, at which point the 300 ERU cap would be replaced with a cap determined by the results of the comprehensive capacity analysis; and

WHEREAS, the City submitted the results of the comprehensive capacity analysis to EPA and DEQ on September 29, 2023, which resulted in a conditional approval decision on April 11, 2024, authorizing the City to immediately access 270 additional ERUs above and beyond the 300 ERUs previously available, and to access 190 additional ERUs upon the completion of certain specified actions by the City and approval by EPA and DEQ; and

WHEREAS, as of the date of this Resolution, the City has issued 118.8 ERUs to developments out of the initial 300 ERUs, resulting in a total number of ERUs available as of this date of 451.2 ERUs; and

WHEREAS, upon completion of the actions described in the conditional approval, and further approval by EPA and DEQ, the City anticipates that more capacity will become available and additional development projects will be allowed to connect to the sanitary sewer system and add increased flows through existing connections; and

WHEREAS, the Consent Decree requires the City to take such actions as are necessary to meet the above obligations, including enactment of a development moratorium; and

WHEREAS, while negotiations with EPA and DEQ relating to the Consent Decree were ongoing, the City enacted a development moratorium via Resolution 2022-24 on October 3, 2022, and extended that moratorium via Resolution 2023-07 on March 20, 2023 (the "First Moratorium"); and

WHEREAS, upon approval of the Consent Decree by City Council, the City repealed and replaced the First Moratorium and enacted a new development moratorium with Resolution 2023-27 on June 20, 2023, and extended that moratorium via Resolution 2023-34 on November 20, 2023 (the "Second Moratorium"); and

WHEREAS, land use applications which were submitted prior to enactment of the First Moratorium (the "Pre-Moratorium Applications") were not subject to the prohibition on acceptance and processing of new land use and development applications in the First Moratorium and Second Moratorium, but were impacted by the limitations on issuance of building permits and other permits also established in the First Moratorium and Second Moratorium; and

WHEREAS, in the interest of fairness, a priority of the City has been and continues to be to limit negative impacts on the Pre-Moratorium Applications; and

WHEREAS, the additional ERUs now available to the City make it possible for the first time since the enactment of the First Moratorium for the City to ensure ERUs are available to allow each of the Pre-Moratorium Applications to move forward; and

WHEREAS, the Consent Decree also sets out a process the City is required to follow in order to address the need for additional capacity in its wastewater system into the future, including specific steps the City is required to take and deadlines for completion; and

WHEREAS, the moratorium imposed by this Resolution is intended to meet the City's obligations under the Consent Decree and to prevent the approval of additional development that will require new connections to the City's sanitary sewer system or increased flow through existing connections to the City's sanitary sewer system, until such time as sufficient additional capacity in the City's wastewater system is achieved; and

WHEREAS, the new moratorium enacted by this Resolution is intended to replace the Second Moratorium; and

WHEREAS, this Resolution is authorized by ORS 197.505 to 197.540.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SANDY:

DEVELOPMENT APPLICATION LIMITATIONS

Section 1. **Generally.** The City of Sandy Development Services Department (the “Department”) staff shall not accept or process a land use application or other application for approval of development that is submitted on or after the effective date of this Resolution if the development will require a new connection to the City sanitary sewer system or will result in increased flow through an existing connection to the City’s sanitary sewer system.

Section 2. **Subject Application Types.** Section 1 of this Resolution applies to the following types of land use applications or other similar applications as determined by the Department Director:

- a. Subdivision.
- b. Partition, except as provided in Section 3.n below.
- c. Specific area plan.
- d. Replat that results in creation of an additional lot.
- e. Design review that will require a new connection or increased flows through an existing connection if approved, including conversion of a single-family dwelling into a duplex.
- f. Accessory dwelling unit.
- g. Food cart permit outside of an existing food cart pod.
- h. Conditional use permit that requires a new connection or will result in increased flows through an existing connection.

Section 3. **Exempt Application Types.** Section 1 of this Resolution does not apply to the following types of land use applications or other similar applications as determined by the Department Director:

- a. Comprehensive plan or zoning map amendment.
- b. Property line adjustment.
- c. Design review without a new connection and which will not result in increased flows through an existing connection.

- d. Conditional use permit without a new connection and which will not result in increased flows through an existing connection.
- e. Food cart permit inside an existing food cart pod.
- f. Adjustment, variance, or design deviation.
- g. Tree permit.
- h. Flood slope hazard permit.
- i. Hillside development permit.
- j. Replat that does not create an additional lot.
- k. Street vacation.
- l. Request for code interpretation.
- m. Development that relies on on-site septic treatment or another alternative that does not connect to the City sanitary sewer, as allowed under City code and other applicable laws.
- n. Middle Housing Land Division per Section 17.100.50 of the Sandy Municipal Code and SB 458 (2021).
- o. City projects described in a facility plan or master plan.
- p. Annexations.
- q. Hardship permits.

Section 4. **Other Exceptions.** Section 1 of this Resolution does not apply to the following land use applications or other applications for approval of development:

- a. Applications which will not require a new connection to the City sanitary sewer system and will not result in increased flow through an existing connection to the City's sanitary sewer system.
- b. Applications for which ERUs have been allocated pursuant to Sections 6 through 10 of this Resolution or to which ERUs have been reassigned pursuant to Section 12 of this Resolution.

SEWER CONNECTION LIMITATIONS

Section 5. **Generally.** During the time this Resolution is in effect, the Department will limit any new connections to the City's sanitary sewer system, and any increased flows through existing connections, to 451.2 ERUs. The Department shall not issue building permits or other permits that in total would allow more than 451.2 ERUs through new connections or increased flows through existing connections to the City's sanitary sewer system. This Section 5 is subject to the following:

- a. ERUs shall be calculated as set forth in the Consent Decree.
- b. A second connection to an existing duplex currently served by a single connection in order to allow a Middle Housing Land Division under Section 3.n above, per Section 17.100.50 of the Sandy Municipal Code and SB 458 (2021), shall not be considered a new connection for purposes of this Section 5.
- c. Because the City anticipates that all of the ERUs available under this Section 5 may be required in order to meet the needs described in Sections 6 through 10 below, the Department shall not issue any building permits or any other permits that would allow new connections or increased flows through existing connections to the City's sanitary sewer system except for developments for which ERUs have been allocated pursuant to Sections 6 through 10 of this Resolution or to which ERUs have been reassigned pursuant to Section 12 of this Resolution.

ERU ALLOCATION PROGRAM

Section 6. **Generally.** The City will allocate ERUs to specific development projects for which land use applications were submitted prior to the enactment of the First Moratorium, and for which such approval was subsequently obtained, as set forth below, in the interest of ensuring maximum possible fairness and certainty under the circumstances, and in an effort to accommodate the housing and economic development needs of the City as much as possible, pursuant to ORS 197.520.

Section 7. **Application.** A person who wishes to obtain an allocation of ERUs for a development project on a property owned by that person must submit a written application to the Department no later than 4:00 p.m. on September 3, 2024. The application must include the following:

- a. A description of the property.
- b. A reference to the land use decision which approved the development on the property for which an ERU allocation is sought.
- c. The number of ERUs requested to be allocated.
- d. The names and signatures of all of the owners of the property.
- e. A narrative explaining how the criteria of Section 8 are met.
- f. A processing fee in the amount of \$530.00.

Section 8. **Approval Criteria.** The Development Services Director, or designee, shall review applications submitted under Section 7 as they are received, and shall approve each application in writing if it meets all of the following criteria:

- a. In regard to the land use approval for which ERUs are requested to be allocated, the application was submitted prior to the date the First Moratorium was enacted (October 3, 2022), and such application has received final approval.
- b. The number of ERUs requested to be allocated does not exceed:
 - i. For land use decisions where a specific number of ERUs can be calculated based on the terms and conditions of the approval (e.g. unit count, unit type, approved use) or based on building permits submitted prior to the effective date of this Resolution and not issued prior to the effective date of this Resolution, the number of ERUs so calculated.
 - ii. For all other land use decisions, 1 ERU per lot or parcel, excluding lots and parcels which are dedicated or restricted to use as open space, common areas, water quality facilities, or similar.
 - iii. If any building permits were issued for the property in question prior to the effective date of this Resolution, the number of ERUs attributable to those building permits will be subtracted from the number calculated under either subsection (i) or (ii) above.

Section 9. **Terms of Allocation Approval.** An allocation approval issued by the Department Director, or designee, shall:

- a. Specify and be restricted to the property for which it was requested and qualified, except as set forth in Section 12.
- b. Specify and be restricted to the land use approval for which it was requested and qualified, except as set forth in Section 12.
- c. Specify the number of ERUs allocated.
- d. Expire one (1) year after the date that it is issued, unless extended pursuant to this subsection. The recipient of the approval, or their successor or assign, may submit a written request meeting the requirements of Section 7(a) through (f) (except that information submitted under subsection 7(e) shall be related to the criteria in this subsection) to the Department for an extension of the expiration date, prior to such expiration date. Such extensions shall be granted in writing by the Department Director, or designee, if the request meets the criteria in this subsection. The duration of each extension shall not exceed one (1) additional year, and no more than two (2) extension may be granted, for a total period not to exceed three (3) years.

Section 10. **Additional ERUs.** Any ERUs not allocated under Sections 7 through 9 of this Resolution, or for which such allocations have expired, shall be reserved by the City for further allocation based on the following:

- a. ERUs will be allocated on a first come, first served basis at the time of issuance of the permit indicated below.

- b. ERUs may only be allocated for either:
 - i. Connection to the City's wastewater system for existing development where such connection is necessary due to pollution, health, or safety concerns, such as failed septic systems. These ERUs will be allocated at the time of plumbing permit issuance.
 - ii. Development of duplexes on properties and for land use approvals which obtained an ERU allocation under Sections 7 through 9 of this Resolution. These ERUs will be allocated at the time of building permit issuance.

Section 11. **Future Allocation of Unallocated ERUs.** Upon repeal of this moratorium, the City Council may re-evaluate the method of allocating ERUs for any ERUs which have not already been allocated under Sections 7 through 10 of this Resolution, or for which the allocation has expired.

ERU REASSIGNMENT PROGRAM

Section 12. **Generally.** The owner of a property may submit an application to the Department to reassign ERUs associated with that property, subject to the following:

- a. **Eligible Properties.** ERUs may be reassigned only from either:
 - i. A property to which ERUs have been allocated pursuant to Sections 7 through 9 of this Resolution; or
 - ii. A property on which an existing development is located. For purposes of this Section, "existing development" means any existing improvements to the property that involve use of the City's sanitary sewer system.
- b. **Number of ERUs Available to be Reassigned**
 - i. For properties described in Section 12(a)(i) (allocated ERUs), the number of ERUs which can be reassigned is limited to the number of ERUs so allocated.
 - ii. For properties described in Section 12(a)(ii) (existing developments), the number of ERUs which can be reassigned is limited to the number of ERUs calculated for the existing development based on the terms of the Consent Decree.
- c. **Where ERUS May be Reassigned.**
 - i. ERUs from properties described in Section 12(a)(i) (allocated ERUs) may be reassigned to either:
 - i. The same land use on a different property; or
 - ii. A different land use on the same property.
 - ii. ERUs from properties described in Section 12(a)(ii) (existing developments) may only be reassigned to a different land use on the same property.

- iii. ERUs may not be reassigned to a different land use on a different property.
- iv. Notwithstanding the foregoing, ERUs from properties described in Section 12(a)(ii) (existing developments) may be reassigned to a different property, regardless of land use type, for essential public facilities. For purposes of this subsection, essential public facilities means public safety facilities, public schools, and city administrative facilities.
- d. **Deed Restriction.** When the request is to reassign ERUs from one property to a different property, the owner of the property from which ERUs are requested to be reassigned (the “Originating Property”) must record a deed restriction on the Originating Property, preventing the Originating Property from being developed until such time as the City is no longer subject to the Consent Decree or such time as the City agrees, in its sole discretion, to release the deed restriction. The recording instrument for the deed restriction shall be approved by the Department Director prior to recording. For purposes of this subsection, “developed” refers to any use of the property that would involve use of the City’s sanitary sewer system.
- e. **Review and Approval.** If the application meets the requirements of this Section 12, the Department Director, or designee, shall approve the request in writing.

MISCELLANEOUS PROVISIONS

- Section 13. The moratorium previously enacted via Resolution 2023-27 on June 20, 2023, and extended via Resolution 2023-34 on November 20, 2023, is hereby repealed.
- Section 14. The City Council shall review this Resolution and determine whether there is a need to extend or repeal the moratorium it establishes not more than six months after the effective date of this Resolution.
- Section 15. The City hereby adopts the requirements of the Consent Decree as its program to correct the problems leading to this moratorium, as required by ORS 197.530.
- Section 16. This Resolution is based on the recitals above and the findings of fact set forth in the attached Exhibit A.
- Section 17. This Resolution is effective on the date it is adopted by the City Council and shall remain in effect for a period of six months, unless earlier extended or repealed.

This resolution is adopted by the City Council of the City of Sandy this 3rd day of June, 2024.

A handwritten signature in black ink, appearing to read "S. Pulliam", written above a horizontal line.

Stan Pulliam, Mayor

ATTEST:

A handwritten signature in black ink, appearing to read "Jeffrey Aprati", written above a horizontal line.

Jeffrey Aprati, City Recorder

EXHIBIT A

FINDINGS OF FACT

1. These findings are intended to supplement the findings stated in the recitals to Resolution 2024-11.
2. ORS 197.520 provides:

- (1) No city, county or special district may adopt a moratorium on construction or land development unless it first:
 - (a) Provides written notice to the Department of Land Conservation and Development at least 45 days prior to the final public hearing to be held to consider the adoption of the moratorium;

Finding: The City e-mailed notice to DLCD on April 19, 2024. This criterion is satisfied.

- (b) Makes written findings justifying the need for the moratorium in the manner provided for in this section; and

Finding: The findings stated in the recitals to Resolution 2024-11 and this Exhibit A are written findings justifying the need for the moratorium. This criterion is satisfied.

- (c) Holds a public hearing on the adoption of the moratorium and the findings which support the moratorium.

Finding: The City Council held a hearing on the adoption of the moratorium and the findings during a duly noticed public meeting on June 3, 2024. This criterion is satisfied.

- (2) For urban or urbanizable land, a moratorium may be justified by demonstration of a need to prevent a shortage of public facilities which would otherwise occur during the effective period of the moratorium. Such a demonstration shall be based upon reasonably available information, and shall include, but need not be limited to, findings:

Finding: The land affected by this moratorium is the entire city limits of the City of Sandy, which is urban or urbanizable land. The basis for the moratorium is a need to prevent a shortage of public facilities which would otherwise occur during the effective period of the moratorium. This criterion is satisfied.

- (a) Showing the extent of need beyond the estimated capacity of existing public facilities expected to result from new land development, including identification of any public facilities currently operating beyond capacity, and the portion of such capacity already committed to development;

Finding: The Consent Decree constitutes a legally binding agreement and court order establishing that the capacity of the City's wastewater system is the ERU cap set by EPA and DEQ pursuant to the Capacity Assurance Program component of the Consent Decree, which is 451.2 ERUs as of June 3, 2024. City staff has estimated that applications for land use approval submitted prior to the effective date (October 3, 2022) of the prior moratorium created by Resolution 2022-24, and not yet developed, will require 447.7 ERUs of wastewater system capacity, including planned duplexes within those developments. City staff further estimates that a small number of ERUs will be necessary during the term of this moratorium to address failed septic systems. Therefore, the wastewater system capacity already committed to development, for purposes of ORS 197.520(2)(a), is expected to consume the capacity of existing public facilities. Any need which may exist beyond the development represented by applications for land use approval that were submitted prior to October 3, 2022, and failing septic systems, is thus beyond the estimated capacity of existing public facilities. This criterion is satisfied.

- (b) That the moratorium is reasonably limited to those areas of the city, county or special district where a shortage of key public facilities would otherwise occur; and

Finding: The City sanitary sewer system serves the entire city. Therefore, the moratorium must apply to the entire city. This criterion is satisfied.

- (c) That the housing and economic development needs of the area affected have been accommodated as much as possible in any program for allocating any remaining public facility capacity.

Finding: The City negotiated with EPA and DEQ to maximize the number of ERUs of capacity that would be available under the Capacity Assurance Program component of the Consent Decree in order to accommodate as much development addressing housing and economic development needs as possible. The City anticipates more capacity becoming available in the future once the City is able to meet the conditions specified in the approval from EPA and DEQ, and the moratorium will be revisited as needed to ensure any such capacity will be made available to address additional housing and economic development needs. Moreover, as further capacity becomes available as a result of the City's ongoing efforts toward improvement to and repair of the collection and treatment systems, the City also intends that this capacity will be made available to address additional housing and economic development needs.

The City anticipates that the number of ERUs now available under the Capacity Assurance Program and this revised moratorium will allow each of the developments for which land use applications were submitted prior to October 3, 2022, to move forward in accordance with their development plans. However, the City does not at this time anticipate that there will be an excess of capacity beyond what is needed to accommodate those developments. Therefore, by establishing an ERU allocation program designed to allow those developments to move forward, the City is accommodating housing and economic development needs as much as possible, with the level of need and the balance between economic development and housing needs determined by the market forces which resulted in those applications being submitted. If capacity remains after those developments have been given the opportunity to secure ERUs under this revised moratorium, the City intends to revisit the moratorium terms in order to make those ERUs available to address additional housing and economic development needs.

Finally, the City has structured the ERU allocation program and ERU reassignment program to ensure, to the maximum extent reasonably possible, that available capacity is actually used to address housing and economic development needs.

This criterion is satisfied.

3. ORS 197.530 provides:

- (1) A city, county or special district that adopts a moratorium on construction or land development in conformity with ORS 197.520(1) and (2) shall within 60 days after the effective date of the moratorium adopt a program to correct the problem creating the moratorium. The program shall be presented at a public hearing. The city, county or special district shall give at least 14 days' advance notice to the Department of Land Conservation and Development of the time and date of the public hearing.

Finding: Resolution 2024-11 adopts the requirements of the Consent Decree as the City's program to correct the wastewater system problems creating the need for the moratorium. The City's program to correct the wastewater system problems is adopted simultaneously with adoption of the moratorium. This program was presented at a public hearing under consideration of Resolution 2024-11 on June 3, 2024. Notice of this public hearing was provided to DLCD via e-mail on April 19, 2024. This criterion is satisfied.

- (2) No moratorium adopted under ORS 197.520(2) shall be effective for a period longer than six months from the date on which the corrective program is adopted...

Finding: The effective period for this moratorium is six months. This criterion is satisfied.

4. This Resolution is based on and directly implements state law. There are no applicable goals and policies in the Sandy Comprehensive Plan.