

NATURE OF THE DECISION

Petitioner appeals a decision by the city amending its comprehensive plan to adopt an update to the city’s Storm Water Master Plan (SWMP).

FACTS

Petitioner is a water control district formed in 1953. Petitioner owns and manages a system of canals and ditches that provide irrigation, drainage, flood and surface water control for approximately 17,000 acres of agricultural properties within the district, mainly located north and northwest of the city. The city is not located within petitioner’s boundaries and is not a part of petitioner. However, petitioner’s system also diverts and delivers the city’s municipal water from the North Santiam River.

The two main canals within the system are referred to as the Salem Ditch and the Power Canal. Petitioner’s system diverts water from the North Santiam River upstream of the city into the ditches, which flow through the city of Stayton. Historically, the city’s surface water drainage has been discharged into those canals and then carried to petitioner’s smaller canals and ditches located west of the city. As the city’s population has gradually increased, a greater quantity of storm water has been entering petitioner’s system each year, and petitioner maintains that that water also contains more pollutants. There is no formal agreement between petitioner and the city for the city’s discharge of that storm water into petitioner’s ditches and canals, and that lack of agreement is the heart of petitioner’s concern.

The city’s original storm water plan was adopted in 1981, and in 2005 the city began the process of preparing the SWMP as an update to the original plan. The city included a representative of petitioner as a participant in the preliminary proceedings. Petitioner appeared at the planning commission hearing on the proposed SWMP and expressed concern about the quality and the quantity of storm water entering petitioner’s system and the potential loss of petitioner’s agricultural exemption from the provisions of the Clean Water

1 Act. During the time that the SWMP was being considered, petitioner and the city were
2 attempting to negotiate an agreement regarding the city's discharge of storm water into
3 petitioner's system.

4 In May, 2009, the city adopted the SWMP and petitioner appealed the decision to
5 LUBA.

6 **FIRST ASSIGNMENT OF ERROR**

7 Statewide Planning Goal 2 (Land Use Planning) requires that the city coordinate with
8 affected governmental units in adopting the SWMP as an amendment to the city's
9 comprehensive plan. Petitioner is an affected governmental unit. *Santiam Water Control*
10 *District v. City of Stayton*, 54 Or LUBA 553, 559 (2007) (*SWCD I*).

11 In the present case, we understand petitioner to allege that the city failed to fulfill its
12 obligation to coordinate with petitioner in two respects. First, petitioner argues that the city
13 failed to coordinate the SWMP with petitioner's Storm Water Drainage Plan and Policies
14 (SWDPP), which were adopted by petitioner's board of directors in 2007 after our decision
15 in *SWCD I*. Record 127-30. Second, petitioner argues more generally that the city failed to
16 coordinate with the need that petitioner has to control and reduce the amount of city storm
17 water that it entering its system.

18 **A. SWDPP**

19 According to petitioner, its SWDPP adopted a system for issuing permits to parties
20 who desire to discharge water into petitioner's facilities. As we understand it, petitioner
21 argues that the SWMP is not coordinated with petitioner's SWDPP because the SWDPP
22 requires the city to apply for a permit in connection with its use of petitioner's facilities,
23 while the SWMP does not contain a similar requirement.

24 In order to fulfill its coordination obligation under Goal 2, the city is obligated to
25 address the legitimate concerns of petitioner. As the city points out, and petitioner does not
26 dispute, the SWDPP was not adopted as part of a public process and petitioner made no

1 attempt to coordinate with the city in adopting the SWDPP. The SWDPP is not an
2 expression of petitioner’s legitimate concerns about the quantity and quality of city storm
3 water entering petitioner’s system, but rather is a unilateral attempt by petitioner to dictate a
4 particular outcome of the dispute between petitioner and the city, and specify the means for
5 achieving that outcome. The city was not obligated to coordinate with the SWDPP.

6 **B. ORS 197.015(5)**

7 Petitioner also argues that the city failed to fulfill its coordination obligations under
8 Goal 2 because it failed to consider and accommodate the needs of petitioner in adopting the
9 SWMP. Under ORS 197.015(5), comprehensive plans are “coordinated” when the needs of
10 all levels of government have been considered and accommodated as much as possible.¹ In
11 *City of Portland v. Washington County*, 27 Or LUBA 176, 186-87 (1994), we explained that
12 the requirement to coordinate is both procedural and substantive, and that the “substantive
13 requirement is achieved through the balancing of needs of all affected governmental units
14 and selecting a particular course of action from among the competing proposed courses of
15 action.” However, we have also held that a local government is not required to “accede to
16 every request that may be made by a state agency.” *Brown v. Coos County*, 31 Or LUBA
17 142, 146 (1996).

¹ ORS 197.015(5) contains definitions for a number of terms, and provides in relevant part:

“‘Comprehensive plan’ means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. ‘Comprehensive’ means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. ‘General nature’ means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. *A plan is ‘coordinated’ when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible.* * **” (Emphasis added.)

1 The city responds by pointing to a portion of the record that demonstrates that the
2 city's consultants that prepared the SWMP considered each of the concerns that were
3 expressed by petitioner prior to the first planning commission hearing, and responded to
4 those concerns in a letter to petitioner explaining how its concerns would be addressed by
5 adoption of the SWMP, or how the concerns could not be reasonably addressed without
6 significant cost to the city. Record 209-214. For example, regarding petitioner's concerns
7 about the quality of water entering petitioner's system, the city's consultant responded that
8 the SWMP contains a water quality monitoring component and that the city has completed
9 the first step to comply with National Pollution Discharge Emission Standard (NPDES) Total
10 Maximum Daily Load (TMDL) requirements that the city will be required to comply with in
11 the near future. Record 210. Regarding petitioner's concerns about the quantity of water
12 entering petitioner's system, the city's consultant responded to petitioner that the SWMP
13 provides for no increase in storm water from new development, and that improvements
14 recommended in the SWMP reduce peak runoff rates to less than existing peak runoff rates.
15 Record 211.

16 We think the record is adequate to demonstrate that the city considered and
17 accommodated the needs of petitioner as much as possible, as required under ORS
18 197.015(5). However, petitioner also argues that the city's decision fails to include findings
19 that specifically address petitioner's legitimate concerns. Petition for Review 7. In support
20 of its argument, petitioner cites *DLCD v. Douglas County*, 33 Or LUBA 216, 222 (1997), for
21 the proposition that such findings are required.

22 Generally, legislative decisions such as the challenged decision are not required to be
23 supported by the detailed findings that are typically required for quasi-judicial land use
24 decisions. For legislative land use decisions, the city may rely on findings as well as
25 arguments in its brief and accessible material in the record to establish that applicable legal
26 standards are satisfied. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n

1 6, 38 P3d 956 (2002); *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA
2 560 (1994) (same).

3 However, even if findings were required in this case to establish that the city
4 responded to the district's legitimate concerns, the city adopted findings that include the
5 following:

6 "On May 27, 2008, the Stayton Planning Commission held a public hearing
7 on the Master Plan. The only testimony provided to the Planning Commission
8 other than from staff and the City's consultants was from [petitioner].
9 [Petitioner] testified that the City has no agreement to discharge drainage into
10 [petitioner's] facilities, that there have been instances of flooding and surface
11 water contamination, and that [petitioner] fears it may lose its agricultural
12 exemption from the requirements of the federal Clean Water Act because of
13 urban storm water being discharged into its canals. As a result of
14 [petitioner's] testimony the hearing was continued until June 30, 2008.

15 "Following additional testimony from Staff and [petitioner], the Planning
16 Commission concluded its public hearing. As a result of testimony from
17 [petitioner], the Planning Commission made changes to the [SWMP] that
18 recognize the need for the City and [petitioner] to work together to control
19 runoff and come to an agreement regarding the management of [petitioner's]
20 facilities." Record 7.

21 The city's conclusions regarding Goal 2 are:

22 "The City Council concludes that the City has satisfied its obligations to
23 coordinate its planning efforts with other levels of government and other
24 quasi-governmental organizations through notification of these other entities
25 of the planning process; by review of testimony of [petitioner] by the Stayton
26 Planning Commission; by the amendments to the draft Plan made by the
27 Planning Commission in direct response to the testimony of the [petitioner];
28 by the efforts of the City Staff to negotiate an Interim Agreement with
29 [petitioner]." Record 11.

30 Petitioner does not explain why the above-quoted findings fail to address petitioner's
31 legitimate concerns. The findings identify and summarize petitioner's concerns with the
32 quality and the quantity of water the city sends into petitioner's system, and with the fact that
33 there is no written agreement in place between the city and petitioner. The findings also
34 explain that the city recognizes the importance of entering into an agreement with petitioner
35 and that the SWMP contains a provision that recognizes the issue.

1 More importantly, it is clear from the record that the city’s consultant responded to
2 petitioner’s concerns by explaining how the SWMP attempts to address those concerns and
3 estimating the cost of building a separate new storm drainage facility, at \$30 million to \$40
4 million dollars. Record 209-214. We think that the city’s findings, together with the
5 accessible material in the record, demonstrate that the city used information it received to
6 balance the needs of petitioner and its citizens. *Citizens Against Irresponsible Growth v.*
7 *Metro*, 197 Or App at 16.

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 In its second assignment of error, petitioner argues that the city erred in failing to
11 adopt findings that address Statewide Planning goal 3 (Agricultural Lands). Although
12 petitioner’s argument is difficult to follow, we understand petitioner to argue that Goal 3
13 requires the city to consider the impact that the SWMP will have on agricultural lands that
14 are within the Santiam Water Control District and to adopt findings explaining how the
15 SWMP complies with Goal 3.

16 Goal 3 provides:

17 “Agricultural lands shall be preserved and maintained for farm use, consistent
18 with existing and future needs for agricultural products, forest and open space
19 and with the state’s agricultural land use policy expressed in ORS 215.243
20 and 215.700.”

21 The city responds first by arguing that petitioner is precluded from raising the issue
22 presented in the second assignment of error because it failed to raise the issue below.
23 However, the “raise it or waive it” rule does not apply outside of the context of a quasi-
24 judicial proceeding. ORS 197.763(1). Moreover, the record is clear that petitioner raised the
25 issue. Record 64-65.

26 The city next responds that Goal 3 does not apply to the city’s adoption of the
27 SWMP, in the way petitioner suggests. We agree. Petitioner has not established that the

1 city's adoption of the SWMP implicates Goal 3. Some public facility plans that are adopted
2 to comply with Statewide Planning Goal 11 (Public Facilities) could also implicate Goal 3.
3 For example, if those plans proposed for the first time to extend a canal facility that provides
4 both urban and rural services onto rural agricultural lands, it is certainly possible that the city
5 would be required to limit that extension so that it would preserve and maintain agricultural
6 land for farm use.² But the challenged decision adopting the SWMP does not extend
7 petitioner's canals onto agricultural land. The canals have existed for many years and for
8 many years have served a mixed agricultural/municipal function. The SWMP merely
9 acknowledges and formalizes the city's long practice of using petitioner's existing canals and
10 ditches, many of which run through or serve agricultural land, to dispose of storm water
11 generated within the city limits. Petitioner has not established that the indirect impact of any
12 changes the SWMP may approve to govern future discharges into petitioner's canals
13 implicate Goal 3.

14 Finally, we have assumed in this opinion that the city has a current legal right to
15 discharge storm water into petitioner's canals and will have a legal right to continue to do so
16 in the future as anticipated in the SWMP. But we make no legal determination on that point.
17 Whether the city in fact has such a legal right is for the city and petitioner to agree on, and
18 for a court of law to determine if they are unable to agree.

19 The second assignment of error is denied.

20 The city's decision is affirmed.

² Goal 3 includes the following implementation measures:

- "2. Extension of services, such as sewer and water supplies into rural areas should be appropriate for the needs of agriculture, farm use and non-farm uses established under ORS 215.213 and 215.283.
- "3. Services that need to pass through agricultural lands should not be connected with any use that is not allowed under ORS 215.203, 215.213, and 215.283, should not be assessed as part of the farm unit and should be limited in capacity to serve specific service areas and identified needs."