

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON COAST ALLIANCE,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF BROOKINGS,

10 *Respondent,*

11
12 and

13
14 MAHAR/TRIBBLE, LLC,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2014-087

18
19 FINAL OPINION

20 AND ORDER

21
22 Appeal from City of Brookings.

23
24 Sean T. Malone, Eugene, filed the petition for review and argued on
25 behalf of petitioner.

26
27 No appearance by City of Brookings.

28
29 Daniel B. O'Connor, Medford, filed the response brief and argued on
30 behalf of intervenor-respondent. With him on the brief was Huycke O'Connor
31 Jarvis, LLP.

32
33 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
34 Member, participated in the decision.

35
36 REMANDED

 01/06/2015

37
38 You are entitled to judicial review of this Order. Judicial review is
39 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city council decision that (1) annexes land into the city, (2) amends the property’s comprehensive plan and zoning map designations from commercial and industrial to residential, and (3) amends the shoreland boundary on the property.

FACTS

The annexation area is 13.33 acres in size, consisting of two parcels, tax lots 1500 and 2000, together with 3,294 feet of the North Bank Chetco River Road (Chetco River Road) connecting the tax lots to the city limits over a distance of about one-third mile. Tax lot 2000 carries Curry County Light Commercial (C-1) zoning, while tax lot 1500 carries Curry County Industrial (I) zoning. The two parcels lie between the Chetco River Estuary to the south, and the Chetco River Road on the north. The two parcels are currently vacant, but have historically been used for mining and construction staging and storage. Ferry Creek traverses the property to empty into the Chetco River. Ferry Creek is located entirely within a 6-foot diameter culvert that crosses under the Chetco River Road to the river.

The county comprehensive plan provides that the Chetco River Estuary Shorelands Boundary, which implements Statewide Planning Goal 17 (Coastal Shorelands), is located at the edge of the 100-year floodplain, as delineated by the Federal Emergency Management Agency (FEMA). At the southern edge of the property, the 100-year floodplain and hence the coastal shorelands boundary is located adjacent to the Chetco River Road, *i.e.*, the entire southern portion of the property is within the floodplain and hence the coastal shoreland boundary.

1 Intervenor-respondent Mahar/Tribble, LLC (intervenor) applied to the
2 city to (1) annex the two tax lots and the connecting portion of the Chetco
3 River Road, (2) amend the city comprehensive plan designation for the two tax
4 lots from Commercial and Industrial to Residential, (3) amend the city zoning
5 designation from Commercial/Industrial to Two-Family Residential (R-2), and
6 (4) amend the shoreland boundary in the southern portion of the property,
7 based on intervenor’s pending application to revise the FEMA 100-year
8 floodplain boundary. Under the proposed zoning, the two tax lots could be
9 developed with up to 59 dwelling units.

10 The city planning commission held a public hearing on the applications
11 and recommended approval. On September 8, 2014, the city council held a
12 hearing on the planning commission’s recommendation, and voted to approve
13 the annexation and plan and zoning amendments, which were subsequently
14 adopted by ordinance. This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioner contends that the city erred in adopting inconsistent findings
17 under disjunctive prongs of ORS 222.111(1), one of the statutes governing the
18 annexation proposal.

19 ORS 222.111(1) provides, in relevant part that a city may annex territory
20 that is “contiguous to the city or separated from it only by a public right of
21 way[.]” In Ordinance 14-O-738, the board of commissioners declared that that
22 subject property “is contiguous to the City of Brookings, and the same is
23 hereby annexed to the City of Brookings.” Record 8. However, in a staff
24 report that was adopted by incorporation staff proposed a finding stating that
25 “the proposed territory for annexation is separated only by right of way that is a
26 County Road being [the] Chetco River Road.” Record 56.

1 Petitioner argues that the two findings that the annexation territory is
2 “contiguous” with the city and that the territory is “separated” only by a public
3 right of way are inconsistent and unreconciled in the city’s findings. However,
4 petitioner has not established that any inconsistency in the findings warrants
5 reversal or remand. Petitioner does not dispute that the city council correctly
6 concluded that the annexed territory, which includes the county road, is
7 contiguous with the city limits. The incorporated staff finding that the annexed
8 territory is separated from the city by the county road is clearly incorrect,
9 because the annexed territory includes the county road.

10 There are circumstances where adoption of inconsistent findings
11 warrants remand, but the present case is not one of them. Because ORS
12 222.111(1) sets out disjunctive requirements, the city’s above-quoted findings
13 can be viewed as alternatives. Adoption of alternative findings to address
14 disjunctive requirements is not inconsistent or inherently erroneous. An error
15 with one alternative is not a basis to remand, if the other alternative is sufficient
16 to establish compliance with applicable standards. As noted, petitioner does not
17 dispute that the annexation territory is contiguous with city limits. Absent a
18 more developed argument, petitioner has not demonstrated that adoption of the
19 above-quoted findings provides a basis for reversal or remand.

20 The first assignment of error is denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 Goal 17 requires that lands contiguous to estuaries be identified as
23 coastal shorelands, and describes seven types of areas or resources that must be
24 included within the coastal shoreland boundary, including what the parties
25 refer to as Criterion 3. Criterion 3 requires that the coastal shoreland boundary
26 include: “[n]atural or man-made riparian resources, especially vegetation

1 necessary to stabilize the shoreline and to maintain water quality and
2 temperature necessary for the maintenance of fish habitat and spawning
3 areas[.]”

4 As noted, the county comprehensive plan designates the coastal
5 shorelands boundary on the subject property to coincide with the 100-year
6 floodplain. Intervenor proposed to obtain FEMA approval to recognize a new
7 location for the 100-year floodplain on tax lot 2000, based on placement of fill
8 in the floodplain, and requested that the city move the coastal shorelands
9 boundary to coincide with the proposed new 100-year floodplain boundary on
10 that parcel. The proposal would remove 3.4 acres of TL 2000 from coastal
11 shorelands protection.

12 The city addressed the Goal 17 coastal shorelands identification
13 standards, including Criterion 3’s requirement to include “[n]atural or man-
14 made riparian resources[.]” Record 52-55, 71. The city rejected intervenor’s
15 proposed coastal shorelands boundary for reasons we need not describe, but
16 nonetheless concluded that a smaller reduction in the coastal shorelands
17 boundary would comply with Goal 17.

18 Petitioner first argues that the city failed to address the Goal 17 coastal
19 shorelands identification standards. However, as noted, the city in fact
20 addressed the identification standards. Record 52-55, 71. Petitioner does not
21 acknowledge or challenge those findings.

22 Next, petitioner argues that the city erred in failing to include Ferry
23 Creek within the coastal shorelands boundary. As noted, Ferry Creek crosses
24 the subject property, located entirely within a pipe from the Chetco River Road
25 to where the pipe discharges into the Chetco River. The lower portion of the
26 pipe and the discharge point is located within the amended shorelands

1 boundary. Petitioner apparently argues that the upland portion of the piped
2 creek should also be included within the shorelands boundary under Criterion
3 3, because the creek constitutes “[n]atural or man-made riparian resources[.]”

4 Intervenor responds, initially, that no issue was raised below that the
5 upland portion of Ferry Creek should be included within the shoreland
6 boundary under Criterion 3 or for any other reason. Petitioner contends that
7 the issue was raised at Record 249-51. However, our review of Record 249-51
8 does not show that an issue was raised regarding whether the upland portion of
9 Ferry Creek should be included within the shoreland boundary based on
10 Criterion 3 or any other identification standard. The only reference to Ferry
11 Creek is in regards to flooding, and the only arguments regarding Criterion 3
12 did not concern Ferry Creek.

13 Even if the issue was not waived, we also agree with intervenor that
14 petitioner had not demonstrated that the city erred in failing to include the
15 upland portion of Ferry Creek within the shorelands boundary as “[n]atural or
16 man-made riparian resources[.]” While “riparian resources” are not limited to
17 areas with “vegetation necessary to stabilize the shoreline and to maintain
18 water quality and temperature necessary for the maintenance of fish habitat and
19 spawning areas,” petitioner has not established that the upland portion of a
20 piped creek that has no apparent hydrologic or other connection with the
21 adjacent land it traverses has “riparian resources” within the meaning of
22 Criterion 3.

23 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 City of Brookings Municipal Code (BMC) 17.144.020 requires the
3 application for annexation to include written findings of fact that address a
4 number of considerations, including:

5 “Urban services needed and necessary to serve the territory
6 proposed to be annexed, including the availability of the same
7 relative to capacity, condition and cost of extension and/or
8 improvement to urban standards and an estimated timeline for any
9 required improvements. City staff will provide written information
10 regarding existing infrastructure and any improvements that would
11 be necessary to serve the territory proposed to be annexed, as well
12 as any other properties within the urban growth area that would
13 also be served by these improvements in the future.” BMC
14 17.144.20(J)(5).

15 The application included findings to address BMC 17.144.20(J)(5). With
16 respect to water service, the findings state that “[t]here is adequate water
17 supply available to serve the project. The main water supply line for the City
18 of Brookings runs in a right of way in the * * * Chetco River Road which
19 fronts” the property. Record 426. Based on those findings, which the city
20 council adopted by incorporation, the city council concluded that “the site can
21 feasibly and will be served by urban services that are appropriate for urban
22 intensity development of the site.” Record 64.

23 On appeal, petitioner argues that the applicant and city failed to evaluate
24 the availability of water service “relative to capacity,” as BMC 17.144.20(J)(5)
25 requires. Petitioner argues that a determination of the availability of water
26 “relative to capacity” requires evidence and findings addressing how much
27 water residential development of the property would use, compared to the
28 city’s capacity. Petitioner cites to testimony below that the city has recently
29 curtailed water supplies to the city golf course and other uses within the city,

1 and argues that the mere proximity of the city main water line to the subject
2 property does not mean that the city water system has the actual capacity to
3 serve the subject property while meeting the city’s other obligations.

4 Intervenor responds, first, that BMC 17.144.20(J)(5) is an application
5 requirement, not an approval standard, and that the annexation approval
6 standards are located at BMC 17.144.030. BMC 17.144.030(B) requires a
7 finding that “adequate level of urban services and infrastructure to
8 accommodate anticipated future development either is available, or can
9 reasonably be made available,” and in relevant part defines “adequate level of
10 urban services” to include “water service” that meets the requirements in the
11 city’s public facilities plan. Intervenor contends that because petitioner cites
12 only to an application requirement rather than the related approval standard,
13 LUBA should reject this assignment of error for that reason alone.

14 We disagree with intervenor that petitioner’s reliance on BMC
15 17.144.20(J)(5) or failure to cite BMC 17.144.030(B) warrants summary
16 rejection of this assignment of error. The city council’s findings address BMC
17 17.144.20(J)(5), adopt by incorporation the findings required by that provision,
18 and conclude based on those findings that the property can be served by
19 appropriate urban services. Record 64. Based on those same incorporated
20 findings, the city council found compliance with BMC 17.144.030(B), and
21 concluded in relevant part that the water main in the right-of-way “is expected
22 to be adequate in condition and capacity to [serve the] R-2 development on the
23 subject property.” Record 65. Because the city council treated BMC
24 17.144.20(J)(5) as more than an application or informational requirement, and
25 the findings and evidence relied upon to address both BMC 17.144.20(J)(5)

1 and BMC 17.144.030(B) are the same, we decline to summarily reject this
2 assignment of error as intervenor suggests.

3 On the merits, intervenor argues that findings concluding that the city's
4 water system is "adequate" to serve the subject property are sufficient to satisfy
5 both BMC 17.144.20(J)(5) and BMC 17.144.030(B), and statements to that
6 effect in the record constitute substantial evidence supporting those findings.
7 Intervenor cites to a "Water/Sewer/Storm Drain Service Availability Request"
8 completed by the city that notes the 14-inch water main nearby and includes a
9 check for "Yes" under the question "Adequate?" Record 422. Further,
10 intervenor cites to a summary of issues discussed at a pre-application
11 conference, prepared by the city's public works director, which lists a number
12 of "[i]ssues which must be resolve[d,]" including "1. Water availability in the
13 development area is adequate with a 14[-inch] water main in North Bank
14 Chetco River Road." Record 475.

15 However, the findings and the evidence cited to us do not appear to
16 squarely address the "availability" of water "relative to capacity," which is
17 information and findings required by BMC 17.144.20(J)(5), and presumably
18 information necessary to determine that adequate levels of water supply are
19 "available" for purposes of BMC 17.144.030(B). It is impossible to tell from
20 the conclusory findings that the water supply is "adequate" and statements to
21 that effect in the record whether the city in fact considered the availability of
22 water to serve the annexation area "relative to capacity." The "Availability
23 Request" checklist at Record 422 does not appear to consider that question, and
24 the pre-application conference summary of issues prepared by the public works
25 director at Record 475 is contradictory, seeming to indicate both that the water

1 supply is “adequate” and also that the adequacy of water remains an “[i]ssue
2 which must be resolve[d].”

3 Accordingly, we agree with petitioner that remand is necessary for the
4 city to adopt more adequate findings, supported by substantial evidence,
5 considering the availability of the city water supply to serve the annexation
6 territory relative to capacity.

7 The third assignment of error is sustained.

8 **FOURTH ASSIGNMENT OF ERROR**

9 Statewide Planning Goal 16 (Estuarine Resources), Implementation
10 Requirement 1, states in relevant part that:

11 “Unless fully addressed during the development and adoption of
12 comprehensive plans, actions which would potentially alter the
13 estuarine ecosystem shall be preceded by a clear presentation of
14 the impacts of the proposed alteration. Such activities include
15 dredging, fill, in-water structures, riprap, log storage, application
16 of pesticides and herbicides, water intake or withdrawal and
17 effluent discharge, flow-lane disposal of dredged material, and
18 other activities which could affect the estuary’s physical processes
19 or biological resources.”¹

¹ Implementation Requirement 1 goes on to state:

“The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

- “a. The type and extent of alterations expected;
- “b. The type of resource(s) affected;
- “c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use,

1 During the proceedings below, a number of persons and federal agencies
2 submitted comments expressing concerns about impacts on estuarine resources
3 of residential development allowed under the proposed zoning, resources that
4 include threatened salmon species in the Chetco River Estuary. For example,
5 the National Marine Fisheries Service (NMFS) told the city that “development
6 of lots on these parcels will adversely affect our trust resources[,]” which
7 include several fish species. Record 236. The city’s findings addressing Goal
8 16 do not address those comments, but simply conclude that “the application
9 has taken appropriate precautions to prevent any alteration of the estuarine
10 ecosystem.”²

navigation and other existing and potential uses of the
estuary; and

“d. The methods which could be employed to avoid or
minimize adverse impacts.”

² The City Council findings quote Goal 16, Implementation Requirement 1,
and then state:

“The City Council concludes the proposed amendments are
adjacent to (and to a small degree include) properties identified as
estuarine resources. The Council concludes the City and County
had adopted similar maps for estuarine resources at the subject
property and they are based upon the Mean Higher High Water
Line (MHHWL). The Council concludes the Application includes
more precise mapping of the MHHWL on the subject properties
but that the improved precision is consistent with the smaller scale
maps adopted by the city. The Council, therefore, concludes the
Applicant’s mapping is a refinement to the estuary-wide mapping
and no amendments of any material degree are proposed, the
Application makes no change to the City’s adopted and
acknowledged Goal 16 program and the application has taken
appropriate precautions to prevent any alteration of the estuarine
ecosystem.” Record 78.

1 On appeal, petitioner argues that the city council findings “fail to
2 acknowledge *any* impacts from the proposal, but the City failed to respond to
3 any comments and concerns submitted by federal agencies, citizens, and
4 environmental organizations about impacts to the estuarine environment[.]”
5 Petition for Review 33. Petitioner argues that the city’s findings focus on more
6 precise mapping of estuarine resources, an irrelevant issue for purposes of
7 Implementation Requirement 1. Finally, petitioner notes that the applicant had
8 formerly proposed to replace the Ferry Creek piping, which federal agencies
9 determined would require consultation under the Endangered Species Act
10 (ESA) because the proposal may affect listed species. Petitioner argues that if
11 a proposal to replace the Ferry Creek piping required ESA consultation due to
12 impacts on estuarine resources, then the current proposal to place fill in the
13 floodplain and zone the property to allow construction of a large residential
14 development adjacent to estuarine resources with listed species must also
15 address whether those actions could potentially alter the estuarine ecosystem
16 under Goal 16.

17 Intervenor argues that the fourth assignment of error is not sufficiently
18 developed to respond to, and that intervenor is unable to discern petitioner’s
19 argument. Intervenor notes that the city’s decision does not amend the city’s
20 comprehensive plan provisions related to Goal 16, or approve any development
21 or construction that could impact estuarine resources, and argues that petitioner
22 identifies no “action” approved by the city’s decision that could violate Goal
23 16.

24 We disagree with intervenor that the fourth assignment of error is
25 insufficiently developed to allow a response. Petitioner’s argument seems
26 reasonably clear to us: the city’s findings regarding Implementation

1 Requirement 1 are inadequate, because they do not address issues raised below
2 regarding impacts on adjacent estuarine resources caused by development
3 allowed under the proposed residential zoning. It is true that the decision
4 approves no actual development or construction; such approvals, if any, will
5 occur based on the R-2 zoning adopted in the present decision and other
6 acknowledged land use regulations. But Goal 16 will not apply to such
7 decisions made under acknowledged zoning and land use regulations. The time
8 to determine whether development allowed under proposed R-2 zoning
9 complies with Goal 16 is when the zoning is adopted.

10 Issues were raised below by NMFS and others regarding the adverse
11 impacts on adjacent estuarine resources caused by residential development
12 allowed under the proposed R-2 zoning. Such testimony appears to concern
13 “activities which could affect the estuary’s physical processes or biological
14 resources” for purposes of Implementation Requirement 1. However, the city’s
15 findings do not address that testimony, or conduct any kind of impact
16 assessment of the kind described in Implementation Requirement 1. The
17 findings state only that the applicant “has taken appropriate precautions to
18 prevent any alteration of the estuarine ecosystem,” but without identifying
19 those potential alterations or what measures have been adopted to prevent
20 them. We agree with petitioner that the city’s findings regarding Goal 16 are
21 inadequate to demonstrate that the proposed amendments are consistent with
22 the goal.

23 The fourth assignment of error is sustained.

24 **FIFTH ASSIGNMENT OF ERROR**

25 Statewide Planning Goal 6 (Air, Water and Land Resources Quality)
26 requires that “[a]ll waste and process discharges from future development,

1 when combined with such discharges from existing developments, shall not
2 threaten to violate, or violate, applicable state or federal environmental quality
3 statues, rules and standards.”

4 Petitioner argues that intervenor failed to initiate consultation with
5 federal agencies to determine whether intervenor’s proposed actions that are
6 subject to federal regulatory authority will comply with all applicable federal
7 environmental laws, including the ESA. Petitioner refers specifically to
8 intervenor’s stated intention to renew efforts to obtain federal agency approval
9 to replace the Ferry Creek piping.

10 Intervenor responds that the city’s decision does not authorize
11 replacement of the Ferry Creek piping, and that any future effort to seek federal
12 approval to do so will be pursuant to a federal permit process unrelated to the
13 present application to annex the property and to apply city plan and zoning
14 designations. We agree with intervenor that petitioner’s argument does not
15 establish that the city’s decision is inconsistent with Goal 6. Petitioner’s
16 argument is based solely on a possible future proposal to replace the Ferry
17 Creek piping, but that action is not authorized in the present decision. We note
18 that the city adopted findings concluding that the proposed plan and zoning
19 amendments are consistent with Goal 6. Record 68. Petitioner does not
20 acknowledge or challenge those findings.

21 The fifth assignment of error is denied.

22 The city’s decision is remanded.