

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. 2015-037

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 petitioners.

26
27 No appearance by City of Brookings.

28
29 H.M. Zamudio, Medford, filed the response brief and argued on behalf of
30 intervenor-respondent. With her on the brief was Huycke O'Connor Jarvis,
31 LLP.

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

35
36 HOLSTUN, Board Member, concurring.

37
38 REMANDED

10/06/2015

1 You are entitled to judicial review of this Order. Judicial review is
2 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city council order on remand that approves an application for an annexation, comprehensive plan amendment, zone change, and shorelands boundary amendment.

MOTION TO INTERVENE

Intervenor-respondent Mahar/Tribble, LLC, the applicant below, (intervenor) moves to intervene. The motion is granted.

FACTS

The city’s decision is a response to our remand in *Oregon Coast Alliance v. City of Brookings*, __ Or LUBA __ (LUBA No. 2014-087, January 6, 2015). As relevant here, the original decision approved annexation of two parcels totaling 13.33 acres in size, and rezoned the land from light commercial and industrial to two-family residential (R-2). Under the proposed zoning, the subject property could be developed with 59 to 60 single-family dwellings. The long axis of the subject property borders the Chetco River estuary to the south. The parcels are vacant but have historically been used for mining and construction staging. Ferry Creek traverses the property within a culvert to empty into the Chetco River. The southern portion of the property is located within the 100-year floodplain.

In relevant part, LUBA remanded the city’s initial decision for additional findings under Statewide Planning Goal 16 (Estuarine Resources),¹

¹ Goal 16 is

“To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and [t]o

1 Implementation Requirement 1.² Specifically, we remanded for the city to
2 evaluate the potential adverse impacts on the estuary caused by residential
3 development allowed under the new plan and zoning designations, in light of
4 testimony from federal agencies and others regarding potential impacts of

protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries.”

² Goal 16, Implementation Requirement 1, provides:

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

“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, navigation and other existing and potential uses of the estuary; and
- “d. The methods which could be employed to avoid or minimize adverse impacts.”

1 residential uses on estuarine resources.³ On remand, the city conducted a
2 hearing and adopted additional findings addressing that remand issue. This
3 appeal followed.

4 **ASSIGNMENT OF ERROR**

5 Petitioner argues that the city misconstrued Goal 16 and adopted
6 inadequate findings not supported by substantial evidence in concluding that
7 residential use of the property allowed under the plan and zoning amendments
8 would not impact the adjacent estuary.

9 **A. Applicable Law**

10 Initially, the parties disagree about the applicable law and the standard of
11 review. Intervenor notes that the city has implemented Goal 16 in relevant part
12 by adopting City of Brookings Comprehensive Plan, Goal 16, Policy 10, which
13 includes the same operative language as Goal 16, Implementation Requirement

³ We stated:

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

1 1. *See* n 2. Intervenor argues that the proper issue on remand, and therefore the
2 proper issue in this appeal, is consistency with Policy 10, not consistency with
3 Goal 16 itself. Because Policy 10 is the applicable law, intervenor argues, any
4 city council interpretations of the language of Policy 10 are entitled to
5 deferential review under ORS 197.829(1)⁴ and *Siporen v. City of Medford*, 349
6 Or 247, 243 P3d 776 (2010) (LUBA must affirm local government
7 interpretations of local legislation unless the interpretation is “implausible”).

8 The short answer is that the challenged decision involves an annexation
9 and comprehensive plan amendment, and therefore the decision must comply
10 with Goal 16 (as well as Policy 10). *See* ORS 197.175(1) (local governments
11 shall plan and zone, including annexation of unincorporated territory, in
12 accordance with the goals); ORS 197.835(6) (LUBA shall reverse or remand an
13 amendment to the comprehensive plan if the amendment is not in compliance
14 with the goals). Because in relevant part both Policy 10 and Goal 16 impose
15 identical requirements, there is no practical difference in applying one or the
16 other. In either case, our standard of review is the same. Even if the city
17 council interpreted the language of Policy 10 rather than the identical language

⁴ ORS 197.829 provides, in relevant part:

“(1) The Land Use Board of Appeals shall affirm a local governments interpretation of its comprehensive plan and land use regulations, unless the board determines that the local governments interpretation:

“* * * * *

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 of Goal 16, the city’s interpretation of Policy 10 cannot be contrary to the Goal
2 16 language that Policy 10 implements. ORS 197.829(1)(d). But the point is
3 academic in any case, because LUBA’s remand involved Goal 16, not Policy
4 10, and the city’s decision on remand addresses Goal 16, not Policy 10. For
5 purposes of the scope of remand and the scope of the issues in this appeal, the
6 “applicable law” is Goal 16.

7 **B. Evaluation of Impacts That Would Potentially**
8 **Alter the Estuary**

9 As noted, Goal 16, Implementation Requirement 1, requires that “actions
10 which would potentially alter the estuarine ecosystem shall be preceded by a
11 clear presentation of the impacts of the proposed alteration.” *See* n 2. The
12 impact assessment “need not be lengthy or complex, but it should enable
13 reviewers to gain a clear understanding of the impacts to be expected,” and
14 should include (1) information on the type and extent of expected alterations,
15 (2) types of resources affected, (3) expected extent of impacts on water quality
16 and other physical characteristics of the estuary, and (4) methods which could
17 be employed to avoid or minimize adverse impacts. *Id.*

18 Implementation Requirement 1 does not specify exactly what the local
19 government must do with the impact assessment, but presumably the local
20 government must use the information provided in the impact assessment to
21 ensure that proposed development is consistent with Goal 16, as relevant here
22 to “protect” the environmental values of the estuary. *See* n 1. The Goals define
23 “protect” to mean to “[s]ave or shield from loss, destruction, or injury or for
24 future intended use.” *See Columbia Riverkeeper v. Clatsop County*, 238 Or
25 App 439, 464-65, 243 P3d 82 (2010) (“protect” as applied in the context of
26 development proposed in a Goal 16 natural management unit means “inhibiting

1 development that causes significant adverse impacts on the protected
2 resource”). In that context, we understand Implementation Requirement 1 to
3 require the local government to (1) review an impact assessment that
4 adequately identifies potential adverse impacts on the estuary’s physical
5 processes or biological values from development allowed under the proposed
6 amendments, and (2) ensure that such impacts are avoided or minimized, if
7 necessary by adopting one or more of the methods to avoid or minimize
8 adverse impacts identified in the impact assessment.

9 On remand, intervenor’s attorney submitted a legal memorandum to
10 address compliance with Goal 16 and Implementation Requirement 1. Record
11 96-100. That legal memorandum was apparently intended to constitute the
12 “impact assessment” required by our remand and Implementation Requirement
13 1. The city council adopted the language of the legal memorandum largely
14 verbatim as its findings addressing the Goal 16 remand issue. The adopted
15 findings open with a statement that residential development of the subject
16 property “will have no significant adverse impact on Chetco River
17 resources[.]”⁵ The remainder of the Goal 16 findings explain the basis for that

⁵ The city’s findings state, in relevant part:

“The Council finds that the approval of the Application and any
resulting future development of the subject property will have no
significant adverse impact on Chetco River estuarine resources.
* * *

“The Council finds that the approval of the Application will not
alter the Chetco River estuarine ecosystem and that the estuary
resources shall be protected. First, no activities contemplated by
Goal 16 are proposed, anticipated or probable as a result of the
approval. Such activities include dredging, fill, in-water structures,

1 conclusion: essentially that no development activities will occur within the
2 estuary boundary or in the riparian buffer between the estuary and residential
3 development, with the possible exception of storm water conveyance from the
4 residential development's impervious surfaces, which "shall be conducted in
5 accordance with City standards and other applicable agencies minimizing
6 potential adverse impacts on the estuarine resource." Record 10.

7 On appeal, petitioner advances a single assignment of error arguing
8 variously that the city misconstrued Goal 16's requirements for an evaluation
9 of potential adverse impacts, failed to evaluate all potential adverse impacts,
10 and adopted findings regarding potential adverse impacts on the estuary's
11 physical or biological resources that are supported by only the statements of

riprap, log storage, application of pesticides and herbicides, water intake or withdrawal and effluent discharge, flow-lane disposal of dredged materials or other activities that could affect the estuary's physical processes or biological resources. * * *

"The Council further finds that no future development on the subject property will occur within the Estuary Boundary. Furthermore, a riparian buffer between the Estuary Boundary and future development on the subject property shall be maintained providing protection from possible adverse impacts generally associated with residential development * * *. The application of pesticides and herbicides shall not be allowed within the riparian buffer. Future development of the subject property shall be served by municipal water and sewer services. Accordingly, no water intake or effluent discharge into the estuarine resourced shall occur. Storm water conveyance shall be conducted in accordance with City standards and other applicable agencies minimizing potential adverse impacts on the estuarine resource. The maintenance of the riparian buffer along the Estuary Boundary will preserve the aesthetic and recreational characteristics of the estuarine resource. * * *"

Record 9-10.

1 intervenor’s attorney rather than any expert opinion, while failing entirely to
2 address the testimony of actual experts.

3 **C. Misconstruction of Law**

4 **1. Significant Adverse Impacts**

5 Citing the first sentence of the findings quoted at n 5, petitioner first
6 argues that the city erred in evaluating only “significant adverse impacts,”
7 instead of evaluating actions that would “potentially alter” the estuarine
8 ecosystem, as Goal 16 requires. Petitioners contend that there is a huge
9 difference between identifying and evaluating *significant* adverse impacts and
10 identifying and evaluating *potential* adverse impacts.

11 However, it is not clear to us that the city’s findings limit the impacts
12 assessment only to “significant” adverse impacts, and thereby failed to evaluate
13 “potential” adverse impacts. Despite its initial placement in the findings, the
14 sentence petitioner cites reads more like a conclusion than a statement of the
15 *scope* of the assessment. Nothing else in the findings cited to us suggests that
16 the city believed that the scope of the assessment was limited to “significant
17 adverse impacts.” The word “significant” and the phrase “significant adverse
18 impacts” do not appear elsewhere in the Goal 16 findings. And some of the
19 findings appear to evaluate “potential” adverse impacts. *See* Record 11
20 (“proposed downzoning of the subject property reduces the potential for
21 adverse impacts * * *”); (“future restoration of Ferry Creek could potentially
22 impact estuarine resources but there are sufficient safeguards in place to
23 prevent adverse impacts * * *”). Those findings suggest that the city
24 understood that the impact assessment is supposed to include evaluation of
25 potential adverse impacts. At the end of the analysis, the city ultimately
26 concludes that estuarine resources “will not be adversely impacted” by

1 residential development of the property.⁶ Record 11. The city’s impact
2 assessment has other problems, as described below, but petitioner has not
3 demonstrated that the city misconstrued Goal 16 to limit the scope of the
4 impact assessment to “significant” adverse impacts.

5 2. **Downzoning**

6 The city’s conclusion that residential development allowed under the
7 proposed R-2 zoning would not result in adverse impacts or that any impacts
8 would be minimized relies in part on a comparison with the commercial and
9 industrial uses potentially allowed on the subject property under the former
10 county zoning. The city found that commercial and industrial uses potentially
11 allowed under the county zoning “allows for a more intensive use of the subject
12 property than the proposed Two-Family Residential (R-2) City zoning
13 designation.” Record 11. Consequently, the city found, “the proposed
14 downzoning of the subject property reduces the potential for adverse impacts
15 on the estuarine resources in that industrial uses are often incompatible with
16 protection of environmental resources.” *Id.*

⁶ The final paragraph of the Goal 16 findings state, in relevant part:

“Based on the foregoing, the Council finds that there is substantial evidence in the record demonstrating that the Statewide Planning Goal 16 Estuarine Resources will not be adversely impacted from the approval of the Application and future development allowed consistent with the approval. Furthermore, the area designated for future development on the subject property is sufficiently buffered from the Estuary Boundary to mitigate unforeseen development impacts and to maintain the recreational and aesthetic characteristics of the estuary. * * *” Record 11.

1 Petitioner takes issue with that approach, arguing that it is irrelevant for
2 purposes of the impact assessment whether a hypothetical use under the former
3 rural commercial/industrial zoning is more or less intensive than the urban
4 residential development allowed under the proposed amendments. According
5 to petitioner, the relevant question is whether the proposed actions, here urban-
6 density residential development allowed under the proposed R-2 zoning, will
7 have potential adverse impacts on estuarine resources and, if so, what methods
8 can avoid or minimize those impacts.

9 We agree with petitioner that the city erred to the extent it relied upon a
10 comparison between the impacts resulting from hypothetical rural commercial
11 or industrial uses allowed under the former county Commercial/Industrial zone,
12 and the impacts of urban residential development uses allowed under the city
13 R-2 zone, to support its conclusion that residential development of the property
14 under the R-2 zone would not result in potential adverse impacts. Under Goal
15 16, Implementation Requirement 1, potential adverse impacts of the proposed
16 action—here, urban residential development allowed under the R-2 zone—
17 must be identified and evaluated, and if necessary avoided or minimized,
18 regardless of whether such impacts would be greater or lesser in extent or
19 intensity compared to the impacts of hypothetical uses allowed in the former
20 county zone.

21 Intervenor argues that any error the city committed in comparing
22 hypothetical commercial or industrial uses of the property with residential
23 development is harmless, because the finding plays no role in the city’s impact
24 assessment, and does not undermine the city’s other findings with respect to
25 Goal 16. It is certainly not clear what role, if any, the comparison drawn in the
26 city’s findings plays in the city’s analysis or the ultimate conclusions

1 compliance with Goal 16. However, we cannot say for sure that the
2 comparison played no role in the impact assessment or is otherwise harmless
3 error. Because the decision must be remanded in any event, for the reasons
4 described below, on remand the city should also re-evaluate the impacts
5 assessment and adopt conclusions regarding compliance with Goal 16 without
6 that comparison.

7 **D. Failure to Evaluate All Potential Adverse Impacts**

8 Next, petitioner contends that the city failed to evaluate all potential
9 adverse impacts on the estuary from residential development of the property,
10 and with respect to those impacts addressed, adopted inadequate findings that
11 are not supported by substantial evidence.

12 A recurring theme in petitioner’s arguments is that the impact assessment
13 consists of a memorandum prepared by intervenor’s attorney, and that
14 memorandum is not based on any expert or professional opinion regarding
15 potential impacts on estuarine resources from development of the property. As
16 noted, during the initial proceedings, federal agencies and other undisputed
17 experts on the physical processes and biological resources of the Chetco
18 estuary submitted testimony to the effect that residential development of the
19 subject property could adversely impact the adjacent estuarine resources, in
20 particular endangered salmon species. Some of the most focused testimony
21 was offered by National Marine Fisheries Service, including:

22 “* * * The development of lots on these parcels will adversely
23 affect our trust resources * * * The SONCC [Southern Oregon
24 Northern California Coast] coho salmon recovery plan * * *
25 analyzed current and historic habitat and fish abundance trends. It
26 found the key limiting stresses are ‘lack of floodplain and channel
27 structure and ‘degraded riparian forest conditions.’ One of the key

1 limiting threats was ‘urban/residential/industrial development.’”
2 Record 236-37 (LUBA No. 2014-087).

3 On remand petitioner submitted portions of the above-referenced SONCC coho
4 salmon recovery plan, and cited it for the proposition that increased impervious
5 surface areas (roads, parking lots, rooftops etc.) resulting from urban
6 development adjacent to estuaries contribute pollution to the estuaries that
7 harms salmon. Record 337, 414; *see also* NMFS comment quoted at n 7. As
8 noted, LUBA remanded the city’s original decision to the city to adopt findings
9 that, among other things, address the comments made by NMFS and other
10 agencies and organizations regarding impacts of residential development on
11 estuarine resources. *See* n 3.

12 The findings adopted on remand do not address the NMFS comments or
13 similar evidence submitted during the initial and remand proceedings. As
14 explained, the findings regarding Goal 16 were adopted from a memorandum
15 prepared by intervenor’s attorney. Intervenor submitted no expert or
16 professional testimony regarding, for example, the impacts of non-point source
17 pollution or stormwater runoff from the property on salmon or other estuarine
18 biological resources. Neither did intervenor identify methods that “could be
19 employed to avoid or minimize adverse impacts.”

20 Intervenor argues, and we generally agree, that Goal 16, Implementation
21 Requirement 1 does not necessarily require that the impacts assessment be
22 prepared by experts or based on expert testimony. Implementation
23 Requirement 1 states that the impact assessment “need not be lengthy or
24 complex[.]” Nonetheless, the impact assessment must suffice to “enable
25 reviewers to gain a clear understanding of the impacts to be expected[.]” and
26 what methods can be employed to “avoid or minimize adverse impacts.” The

1 nature of some types of potential adverse impacts may be such that some
2 technical expertise is necessary to provide substantial evidence to support the
3 conclusions drawn about the likelihood of those impacts and the “methods
4 which could be employed to avoid or minimize adverse impacts.”

5 In the present case, we understand the record to include the statements of
6 subject-matter experts to the effect that residential development of the subject
7 property may adversely impact endangered salmon species in the adjacent
8 estuary, in part through pollution resulting from stormwater runoff from the
9 development’s impervious surfaces. Whether or not pollution from stormwater
10 runoff from the subject property could adversely impact endangered salmon
11 species, and if so what measures may be necessary to avoid or minimize such
12 impacts, are the kind of questions that likely require some level of scientific or
13 professional expertise to answer. The mere statements of the applicant’s
14 attorney do not provide the required evidentiary foundation necessary to
15 support conclusions regarding such technical questions, even if the city’s
16 findings had attempted to address them.

17 With that observation, we turn to petitioner’s specific arguments.

18 **1. Impacts from Stormwater Runoff**

19 As explained, the city’s findings do not specifically address the NMFS
20 testimony and other testimony to the effect that residential development of the
21 property may adversely impact estuarine resources, including endangered coho
22 salmon.⁷ As we understand that testimony, one source of potential impacts

⁷ NMFS specifically testified with respect to stormwater runoff:

“Stormwater runoff from impervious surfaces delivers a wide variety of pollutants to aquatic ecosystem. Of particular concern

1 identified is pollution from residential development’s impervious surfaces
2 delivered to the estuary via stormwater runoff or non-point sources.

3 The city’s only finding regarding this issue is:

4 “Storm water conveyance shall be conducted in accordance with
5 City standards and other applicable agencies minimizing potential
6 adverse impacts on the estuarine resource.” Record 10; *see* n 5.

7 Petitioner argues, and we agree, that this single-sentence finding is conclusory
8 and inadequate to evaluate the impacts of polluted storm water, or to identify
9 methods “to avoid or minimize adverse impacts,” within the meaning of Goal
10 16, Implementation Requirement 1. The finding does not address testimony
11 regarding impacts of runoff from impervious surfaces on estuarine resources,
12 particularly endangered salmon. The finding makes no attempt to describe the
13 “type and extent of alterations expected” with respect to water quality and other
14 physical or biological characteristics of the estuary. The finding relies entirely
15 on compliance with stormwater development standards to minimize adverse
16 impacts, but does not discuss those standards or explain why they are sufficient
17 to avoid or minimize expected adverse impacts.

are metals (e.g. copper and zinc) and petroleum-related compounds (polynuclear aromatic hydrocarbons). These pollutants are a source of potent adverse effects to our trust resources, especially coho salmon. These pollutants also accumulate in the prey and tissues of juvenile salmon where, depending on the level of exposure, they cause a variety of lethal and sublethal effects.” Record 151.

NMFS stated its understanding that the applicant will route all drainage from impervious surfaces into a detention area and bio-filtration swale, but stated that the capacities and efficiencies of the system are not available. NMFS recommended that an environmental engineer design and build stormwater treatment facilities effective at treating 2.5 inches of rain in a 24-hour period. *Id.*

1 Intervenor responds that the city implicitly concluded that stormwater
2 runoff could potentially affect estuarine resources, but concluded that a
3 stormwater conveyance system that complied with the city’s standards and
4 other applicable agency requirements would minimize any potential adverse
5 impacts. Intervenor contends that that conclusion is supported by substantial
6 evidence, citing to Record 312-13 and NMFS’ comments at Record 151
7 (quoted at n 7), to support the proposition that a properly sized stormwater
8 system with a detention facility and bio-filtration swale could minimize adverse
9 impacts from stormwater runoff.

10 However, intervenor cites to nothing in the record or the city’s code that
11 requires or ensures that the stormwater system will include a bio-filtration
12 swale or will be sized to ensure that adverse impacts of pollution in stormwater
13 runoff on the estuary are minimized. Record 312-13 is a portion of the city’s
14 public facilities plan that discusses the city’s stormwater conveyance system.
15 One of the strategies listed is to require an onsite detention system for
16 development, with the goal of ensuring that post-development runoff is no
17 greater than pre-development runoff. But nothing cited to us *requires* a bio-
18 filtration swale or other measures to filter pollutants from the stormwater
19 system before it empties into the estuary. While the NMFS’ comments quoted
20 at n 7 assumed that a bio-filtration swale would be constructed as part of the
21 stormwater system, nothing cited to us in the decision or the city’s code
22 requires construction of a bio-filtration swale. Further, NMFS (and others)
23 recommended that an environmental engineer design and build stormwater
24 treatment facilities with the capacity of treating 2.5 inches of rain in a 24-hour
25 period. The decision does not address that recommendation, or adopt any

1 conditions regarding stormwater facilities or the type or capacity of such
2 facilities.

3 In sum, we agree with petitioner that the city’s findings regarding
4 potential adverse impacts from stormwater runoff are inadequate. The findings
5 fail to describe the expected extent of impacts of storm water runoff on water
6 quality and living resources, and failed to identify methods that are sufficient to
7 “avoid or minimize adverse impacts.” We do not mean to foreclose the
8 possibility that compliance with city stormwater standards or other applicable
9 standards could “minimize adverse impacts” in a way that would comply with
10 Goal 16. But the city has not adequately explained why that is the case.

11 **2. Impacts from Pesticides and Herbicides**

12 Petitioner and others testified below that pesticides and herbicide runoff
13 from residential development can harm salmon. The city’s only finding in
14 response is that “[t]he application of pesticides and herbicides shall not be
15 allowed within the riparian buffer.” Record 10. Petitioner challenges that
16 finding, first noting that the city did not impose a condition of approval that
17 prohibits application of pesticides and herbicides within the 75-foot riparian
18 buffer. Second, petitioner argues that the finding does not address pesticide
19 and herbicide runoff from the residential development itself.

20 Intervenor responds that the city implicitly concluded that pesticide and
21 herbicide runoff from the residential development would not adversely impact
22 the estuarine resources or that any impacts would be minimized by the 75-foot
23 riparian buffer.

24 We agree with petitioner that the city’s findings regarding impacts of
25 pesticide and herbicide runoff are inadequate. As petitioner notes, the city
26 failed to impose any conditions restricting pesticide or herbicide use in the

1 riparian buffer. And there are no findings, implicit or explicit, that address
2 issues raised regarding pesticide and herbicide runoff from the residential
3 development. Intervenor cites to no evidence that the riparian buffer will
4 function to filter pesticides and herbicide runoff and prevent or minimize
5 adverse impacts from that runoff.

6 **3. Riparian Buffer Reduction**

7 OAR 660-023-0090(5) requires local governments to set back
8 development at least 75 feet from the riparian bank of rivers such as the Chetco
9 River. The city accordingly required intervenor to provide a 75-foot wide
10 riparian buffer. As described above, the city’s impact assessment relied in part
11 upon that 75-foot riparian buffer to conclude that certain impacts would be
12 avoided or minimized.

13 Petitioner cites to testimony that intervenor has discussed the possibility
14 of seeking adoption of a city ordinance that would allow the 75-foot riparian
15 buffer to be reduced in width. OAR 660-023-0090(8)(e) authorizes a local
16 government to adopt an ordinance that authorizes permanent development
17 within the riparian buffer, to occupy up to 50 percent of the width, as long as
18 the local government demonstrates that “equal or better protection for
19 identified resources will be ensured through restoration of riparian areas,
20 enhanced buffer treatment, or similar measures.” Petitioner argues that if the
21 city adopts such an ordinance, as intervenor has discussed with the city, then
22 the riparian buffer could be reduced in width as much as 50 percent. Given that
23 possibility, petitioner argues, the city’s impact assessment cannot rely upon the
24 75-foot-wide riparian buffer, but must take into account the possibility that in
25 the future the buffer could be reduced in width.

1 Intervenor responds, and we agree, that the impacts assessment need not
2 take into account the possibility that the city will in the future adopt an
3 ordinance under which intervenor could seek to reduce the width of the riparian
4 buffer. Further, we tend to agree with intervenor that even if the impacts
5 assessment were required to address that speculative possibility, the city might
6 well still be able to rely on a reduced riparian buffer as a partial basis to
7 conclude that adverse impacts will be avoided or minimized. As intervenor
8 notes, OAR 660-023-0090(8)(e) allows development within the riparian buffer
9 only if there is a demonstration of “equal or better protection” for riparian
10 resources.

11 **4. Placement of Fill in the Floodplain**

12 Much of the subject property is within the 100-year floodplain of the
13 Chetco River, and portions are within the floodway as identified on Federal
14 Emergency Management Agency (FEMA) maps. Intervenor previously
15 obtained a conditional letter of map revision (CLOMR-F) issued by FEMA,
16 which would allow intervenor to place fill on the property, apparently to raise
17 future development above the 100-year floodplain. The county, which had
18 jurisdiction over the property at the time, approved the fill.

19 During the proceedings below, petitioner argued that placing fill on the
20 subject property to raise building sites above the 100-year floodplain has the
21 effect of displacing floodwaters, and will thus impact functional habitat
22 elements of the floodplain. Petitioner contends that the county’s findings fail
23 to adequately address the adverse impacts of placing fill and displacing
24 floodwaters on estuarine functions.

25 The county’s only finding with respect to placement of fill is that “fill
26 being placed on the subject property is based upon a CLOMR-F previously

1 issued by FEMA and is not within the scope of the Council’s review of the
2 Application. In any event, no fill deposited on the subject property will be
3 placed within the Estuary Boundary.” Record 10.

4 On appeal, petitioner argues that the residential development allowed
5 under the R-2 zoning depends on placement of fill to raise building sites above
6 the floodplain, and that the potential adverse impacts of such fill placement
7 must be evaluated in the impacts assessment. We understand petitioner to
8 challenge the city’s finding that the placement of such fill is “not within the
9 scope of the Council’s review of the Application.”

10 Intervenor argues that placement of fill was authorized by the FEMA
11 decision and the unchallenged county decision, and that such fill must be
12 placed to support any commercial, industrial or residential development of the
13 subject property, regardless of the annexation and zone change approved in the
14 city council’s decision before LUBA. We understand intervenor to argue that
15 Implementation Requirement 1 requires the city to evaluate only potential
16 adverse impacts resulting from the proposed annexation and zone change to
17 allow residential development, not impacts that might result from earlier
18 federal and county decisions to approve fill, which were issued when the
19 property was under county jurisdiction and zoned for commercial and industrial
20 uses.

21 We agree with intervenor that the impact assessment is properly limited
22 to the “actions” that trigger Implementation Requirement 1: here, the
23 application for annexation and zone change before the city. The city is not
24 required to consider the potential adverse impacts of alterations approved in
25 earlier decisions not before the city. Accordingly, the city was not required to

1 address the potential adverse impacts of the previously approved fill in
2 approving the proposed annexation and zone change

3 **5. Ferry Creek**

4 Ferry Creek crosses the subject property entirely within a culvert.
5 Intervenor apparently intends to obtain future federal and state permits to
6 restore Ferry Creek to its natural streambed, including review under the
7 Endangered Species Act. Petitioner and others argued below that the impacts
8 assessment must take into account the potential adverse impacts on the estuary
9 of restoring Ferry Creek. The city found that “there is no requirement that the
10 owner restore the streambed” and that “restoration of the streambed is not
11 required for development of the subject property.” Record 11. While the city
12 recognized that future restoration of the streambed would likely create impacts
13 on the estuary into which Ferry Creek flows, the city concluded that review and
14 approval by federal and state agencies would be sufficient to avoid or minimize
15 adverse impacts on the estuary.

16 On appeal, petitioner argues that “the applicant’s proposal is predicated
17 on restoring Ferry Creek, [and hence] those impacts related to that restoration
18 must be disclosed at this point.” Petition for Review 26. Intervenor responds,
19 and we agree, that petitioner has not established that residential development
20 allowed under the proposed annexation and zone change is predicated on
21 restoration of Ferry Creek. As far as the record establishes, restoration of Ferry
22 Creek is not proposed as part of this application, or a necessary element of
23 residential development of the subject property under the new R-2 zoning.

24 The assignment of error is sustained, in part.

25 For the reasons described above, the decision must be remanded for the
26 city to conduct an impacts assessment free of the identified analytical errors,

1 and adopt more adequate findings and conditions, supported by substantial
2 evidence.

3 The decision is remanded.

4 Holstun, Board Member, concurring.

5 I agree the challenged decision must be remanded, because the city's
6 attempt to comply with Implementation Requirement 1 is inadequate. But I do
7 not agree with the majority's conclusion that the city erred by observing that
8 the potential adverse impacts of uses allowed by the commercial and industrial
9 zones that are being replaced are greater than the potential adverse impacts of
10 the uses that are allowed by the residential zone that is being applied.⁸

11 As a technical analytical matter, that the uses allowed in the R-2 zone
12 may have less potential for adverse impacts, compared with the uses allowed in
13 the existing commercial and industrial zones, has only a limited bearing on the
14 analysis required by Goal 16, Implementation Requirement 1. That is because
15 the potential adverse impacts of the R-2 zone must be identified, and the
16 methods that could be employed to avoid or minimize the adverse impacts must
17 be identified, even if the potential adverse impacts of uses allowed in the R-2

⁸ The finding that the majority concludes constitutes error is as follows:

“In addition to the foregoing, the Council acknowledges that the subject property has a current Curry County zoning of Commercial (C-1) and Industrial (I), which allows for a more intensive use of the subject property than the proposed Two-Family Residential (R-2) City zoning designation. Thus, the Council finds the proposed downzoning of the subject property reduces the potential for adverse impacts on the estuarine resource in that industrial uses are often incompatible with the protection of environmental resources.” Record 11.

1 zone are fewer than the potential adverse impacts of uses allowed in the
2 commercial and industrial zones. But the finding is stated almost as an
3 afterthought. I do not agree that it is reversible error for the city to point out
4 that in identifying potential adverse impacts from the uses authorized by the
5 proposed residential zoning, one begins with fewer potential adverse impacts
6 than one faces under the current commercial and industrial zoning. Again, that
7 finding is not adequate by itself to demonstrate the proposed rezoning complies
8 with Implementation Requirement 1. But in my view neither is the finding
9 inconsistent with Implementation Requirement 1 or a basis for remand.