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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

OREGON DEPARTMENT OF TRANSPORTATION,
Petitioner,

vs.

CITY OF KLAMATH FALLS,
Respondent,

and

SOUTHVIEW PROPERTIES DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2000-147

FINAL OPINION
AND ORDER

Appeal from City of Klamath Falls.

Bonnie E. Heitsch, Assistant Attorney General, Salem, and Katherine A. Dreyfus, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With them on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

No appearance by City of Klamath Falls.

D. Daniel Chandler, Vancouver, WA, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson and Wyatt, PC.

BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED

04/17/2001

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

NATURE OF THE DECISION

The Oregon Department of Transportation (ODOT) appeals a decision of the City of Klamath Falls approving an amendment to a planned unit development (PUD).

MOTION TO INTERVENE

Southview Properties Development, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In 1979, the city approved the Southview PUD, which originally consisted of approximately 560 acres located in the southwest quadrant of the city. An additional 40 acres of nearby land were zoned single-family residential at the same time the PUD was approved. The same decision also brought these properties into the Klamath Falls urban growth boundary (UGB). The 1979 PUD was divided into low, medium, and high density residential areas, and included a commercial and special reserve area.

Highway 140 borders part of the subject property on the west. The 1979 PUD proposed access to Highway 140 at its intersection with Orindale Road. Highway 140 continues southeast of that intersection, where it connects with Highway 66, running east-west. Highway 140/66 continues a short distance east, where it connects with Highway 97, which runs northeast into the city and south into California. The 1979 PUD also proposed the extension of roads from Riverside Drive and Lindley Way to provide connections to the east, where the downtown and developed areas of the city are situated.

In 1981, the city adopted its comprehensive plan, which included the Southview PUD. In 1995, the city substantially rewrote its Community Development Ordinance (CDO). The revised CDO repealed the provisions of the existing zoning code and many prior ordinances, but it specifically preserved approval of the Southview PUD. In 1998, the city adopted its transportation system plan (TSP), pursuant to OAR 660, division 12. The TSP

1 assumes little or no population growth in the southwest quadrant of the city, and does not
2 plan for any transportation facilities that may be necessitated by the Southview PUD.

3 In 1999, intervenor, the successor-in-interest to the applicants for the original PUD,
4 applied for an amendment to the PUD. The proposed amendment incorporates the 40 acres
5 of single-family residential property into the PUD, and substantially changes the uses and
6 traffic patterns within the PUD. The proposed amendment eliminates some of the eastern
7 road connections proposed in the 1979 PUD, but retains a connection to Lindley Way. The
8 application, including a traffic impact analysis (TIA), was complete in April 2000. The
9 planning commission held a hearing and approved the application, and on appeal the city
10 council also held a hearing and approved the application. This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 ODOT argues that the city misconstrued CDO 12.370(2) by treating the application
13 as an amendment to an existing PUD rather than the establishment of a new PUD.¹
14 According to ODOT, the decision results in such sweeping changes to the 1979 PUD that it
15 cannot properly be classified as an amendment. ODOT argues that if the application is
16 understood to “establish” a new PUD, then the city must consider traffic generated by the
17 entire PUD, without discounting for traffic that could have been generated under the 1979
18 PUD.

19 Although the city’s decision does not expressly construe CDO 12.370(2), the city
20 treated the application as one for an amendment of an existing PUD:

21 “We find that the approved [1979 PUD] has not been vacated and is still valid.
22 Thus, in evaluating the master plan amendment we are evaluating the *change*
23 in the plan, not the overall desirability of development of this 600-acre parcel,

¹CDO 12.370(2) provides:

“Planned Unit Development zones shall be established, amended or removed from the zoning map of the City of Klamath Falls in the manner prescribed in Sections 11.400 to 11.440 and in accordance with the requirements of Section 12.375.”

1 which is in the city’s Urban Growth Boundary. We are not required to revisit
2 the assumptions and underpinnings of the 1979 approval of the original master
3 plan. We find that the proposed amendments better meet the objectives of the
4 comprehensive plan than the original proposal.” Amended Record 14
5 (emphasis in original).

6 Although we agree with ODOT that the application substantially changes the original
7 PUD, we find nothing in CDO 12.370(2) that requires substantial amendments to existing
8 PUDs to be treated as establishing new PUDs. See *Urquhart v. Lane Council of*
9 *Governments*, 80 Or App 176, 721 P2d 870 (1986) (plan amendment not affecting an
10 acknowledged Goal 5 inventory need not rejustify the adequacy of the Goal 5 inventory, to
11 comply with the goals).

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 Under this assignment of error, ODOT raises four subassignments of error asserting
15 that the city violated the Transportation Planning Rule (TPR).² OAR 660-012-0060(1)
16 requires that any plan or land use regulation amendment that significantly affects a
17 transportation facility be mitigated, in one or more of four ways specified in the rule.³ OAR

²The TPR, OAR 660, division 12, was adopted by the Land Conservation and Development Commission (LCDC) to implement Statewide Planning Goal 12 (Transportation).

³OAR 660-012-0060(1) provides:

“Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:

- “(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
- “(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
- “(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or

1 660-012-0060(2) describes when a plan or land use regulation amendment significantly
2 affects a transportation facility.⁴ The present case involves whether the amendment to the
3 Southview PUD “[w]ould reduce the performance standards of the facility below the
4 minimum acceptable level identified in the TSP.” OAR 660-012-0060(2)(d).

5 A threshold issue in conducting this analysis is deciding how much of the traffic
6 expected to be generated by the PUD must be considered in determining whether the
7 amendment significantly affects a transportation facility. Although the parties dispute the
8 precise traffic estimates, it appears that the amended PUD allows uses that would generate
9 approximately 20,000 average daily trips (ADTs) at full buildout, an increase of
10 approximately 1,690 ADTs over the 1979 PUD. For reasons that are not entirely clear, the
11 city’s TSP does not reflect any transportation improvements within the Southview PUD and
12 does not plan for the approximately 18,000 ADTs that could be generated by uses allowed
13 under the 1979 PUD. ODOT argues that because the TSP does not plan for the traffic
14 impacts from the 1979 PUD, *all* of the traffic impacts generated by the amended PUD must
15 be considered in determining whether the amendment significantly affects transportation
16 facilities, rather than the net increase over the 1979 PUD. Intervenor responds that

“(d) Amending the TSP to modify the planned function, capacity and performance standards as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.”

⁴OAR 660-012-0060(2) provides:

“A plan or land use regulation amendment significantly affects a transportation facility if it:

- “(a) Changes the functional classification of an existing or planned transportation facility;
- “(b) Changes the standards implementing a functional classification system;
- “(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility;
or
- “(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP.”

1 OAR 660-012-0060, by its terms, applies only to *amendments* that significantly affect a
2 transportation facility and does not require a reevaluation of the existing zoning.

3 We generally agree with intervenor’s reading of OAR 660-012-0060. The rule
4 applies only to “amendments” that “significantly affect” a transportation facility. As applied
5 here, the challenged amendment can “significantly affect” a transportation facility within the
6 meaning of the rule only if it “[w]ould reduce the performance standards of the facility below
7 the minimum acceptable level identified in the TSP.” OAR 660-012-0060(2)(d). Implicit in
8 OAR 660-012-0060(2)(d), and perhaps OAR 660-012-0060 as a whole, is an element of
9 causation. The uses allowed by the proposed amendment must play a causative role in
10 reducing the applicable performance standards below the minimum acceptable level, in order
11 for the amendment to significantly affect a facility under OAR 660-012-0060(2)(d). *See*
12 *Dept. of Transportation v. Coos County*, 158 Or App 568, 572, 976 P2d 68 (1999) (an
13 amendment that impacts a facility already below the minimum acceptable level of service
14 does not significantly affect the facility within the meaning of OAR 660-012-0060(2)(d)).
15 Thus, the focus of inquiry under OAR 660-012-0060(2)(d) is on transportation impacts from
16 uses allowed by the proposed *amendment*, not on impacts from uses already allowed under
17 the existing plan or zoning.⁵ It would be inconsistent with that principle to read the rule, as
18 ODOT urges, to require consideration of traffic impacts from uses allowed under the
19 amendment, where those impacts essentially replace impacts from uses that are already
20 authorized under the existing plan and code. In other words, the focus under OAR 660-012-
21 0060(2)(d) is on the *net difference* in impacts on transportation facilities between the
22 unamended plan and zoning code and the amended plan and zoning code. In the present

⁵We do not understand ODOT to dispute that application to the city to develop the subject property under the *unamended* 1979 PUD, generating as many as 18,000 ADTs at full buildout, would not trigger inquiry under OAR 660-012-0060.

1 case, that difference is measured as a net increase in ADTs.⁶ Therefore, the city did not err
2 in evaluating only the 1,690-ADT net increase caused by the proposed amendment, for
3 purposes of OAR 660-012-0060(2)(d).⁷

4 The fact that the city's TSP fails to take into account the transportation impacts from
5 future development of the subject property does not change the foregoing analysis.
6 According to the parties, the TSP assumes zero or near zero population growth in the area of
7 the city including the subject property, and thus no need for new or improved transportation
8 facilities. That assumption, like any assumption about future events, may prove to be
9 erroneous, and the development of the subject property may ultimately require the city to
10 amend its TSP or take other steps to plan for and ensure the construction of needed
11 improvements. *Urquhart*, 80 Or App at 181. However, petitioner has not demonstrated that
12 any inadequacy in the city's current TSP requires that the city consider impacts that would
13 not otherwise be considered under OAR 660-012-0060.

14 Consequently, we address petitioner's arguments under the following subassignments
15 of error based on the net increase in traffic impacts generated by the proposed amendment.

16 **A. First, Second and Third Subassignments of Error**

17 Under the first and second subassignments of error, ODOT argues that the city
18 misconstrued and misapplied the TPR, by considering unplanned transportation
19 improvements as the basis for its conclusions under OAR 660-012-0060(1) and (2). In the

⁶ODOT points out that the amended PUD alters the location and number of access points to the PUD, with the potential that the amended PUD could channel more traffic onto particular transportation facilities (e.g. Highway 140) than the 1979 PUD would. If so, we understand ODOT to argue, that difference should be considered for purposes of OAR 660-012-0060(1) and (2), in addition to the net increase in ADTs. ODOT may be correct, as an abstract proposition. However, ODOT has not established that the differential impact on particular facilities between the 1979 PUD and the amended PUD is such that all or any part of the 18,000 ADTs attributable to the 1979 PUD should be considered under OAR 660-012-0060(1) and (2).

⁷As we explain below, the city appropriately considered the ADTs allowed under the 1979 PUD as part of the background traffic over the relevant planning period, for purposes of determining whether the amendment significantly affects transportation facilities under OAR 660-012-0060(2)(d).

1 third subassignment of error, ODOT argues that the city erred in considering improvements
2 anticipated in the TSP that are predicated on a refinement plan to the TSP, when that
3 refinement plan has not yet been completed.

4 The TIA analyzed the capacity of 10 intersections potentially affected by the
5 proposed amendment through the relevant planning period, in this case through the year
6 2020.⁸ The TIA first analyzed whether these intersections would remain adequate through
7 2020, based on existing traffic and projected increases in background traffic, including the
8 traffic that would be generated by the 1979 PUD. Based on increased background traffic, the
9 TIA concluded that five state transportation facilities would not meet the applicable
10 performance standards through 2020.⁹ The TIA then assumed that a number of
11 improvements would be made to these intersections, including signalization, lane
12 construction and interchange reconstruction.¹⁰ Finally, the TIA factored in the additional

⁸The planning period for TSPs adopted under OAR 660, division 12 is “the twenty-year period beginning with the date of adoption of a TSP.” OAR 660-012-0005(17). The city’s TSP was adopted on October 20, 1998. It is not clear why the TIA chose 2020 as the relevant planning period, or what consequences that choice has for the TIA’s analysis, but no party raises an issue regarding that choice.

⁹The five facilities are the intersections of Riverside Drive/Highway 97, Highway 66/140, Highway 140/66/97 southbound ramps, Highway 140/66/97 northbound ramps, and Highway 140/Orindale Road. Amended Record 428. The relevant performance standards for these intersections, for purposes of OAR 660-012-0060(2)(d), are found in the Oregon Highway Plan (OHP). The OHP expresses performance standards in terms of volume to capacity ratio (V/C ratio). V/C ratio is defined as “the peak hour traffic volume (vehicles/hour) on a highway section divided by the maximum volume that the highway section can handle.” OHP Policy 1F. The V/C ratio performance standard for the intersections at issue is .75, *i.e.* the standard is met if the volume of peak hour traffic is no higher than .75 of the maximum volume.

¹⁰The TIA states in relevant part:

“The minor street left-turn movements at the Riverside [Drive]-Main Street/Highway 97 southbound ramps intersection will experience excessive delays and the V/C ratio will exceed ODOT’s 0.80 maximum. The construction of a traffic signal at this location would improve operations to acceptable levels * * *.

“The Highway 66/Highway 140 intersection will exceed ODOT’s maximum [V/C] ratio of 0.75 during the p.m. peak hour. Construction of a channelized westbound right-turn lane will lower the V/C to 0.72.

“The southbound left-turn movement at the unsignalized intersection of Highway 140/Highway 97 southbound ramps is expected to operate at LOS [level of service] ‘F’ and a

1 daily trips generated by the amended PUD. The TIA ultimately concluded that, if the
2 assumed improvements occur, the proposed amendment would not cause the identified
3 facilities to violate the applicable performance standard through 2020, with the exception of
4 the Highway 140/66 intersection. The TIA notes that construction of additional lanes at that
5 intersection would bring it into compliance with the V/C standard.¹¹

6 Before the city, ODOT argued that the proposed amendment significantly affected
7 these five intersections, and the city was therefore required to adopt one or more of the
8 mitigations prescribed at OAR 660-012-0060(1). The city responded with the following
9 finding:

10 “Based on the traffic study, we find that in the year 2020, traffic will cause the
11 two ramps from Highway 97 to Highway 140/66 and at the Highway
12 140/Highway 66 intersection to violate ODOT’s level of service standard,
13 which is defined as a volume-to-capacity ratio. This LOS violation will occur
14 with or without the proposed development. Under *DLCD v. [City of]*

V/C ratio of 0.98. * * * While installation of a signal will mitigate that movement, the high volume of southbound right-turning vehicles will cause the V/C ratio to remain above acceptable levels. Analysis showed that the installation of a second southbound right-turn lane would lower the V/C ratio to 0.64, which is within acceptable levels.

“The critical northbound left-turn movement at the northbound ramps intersection at the Highway 140/Highway 97 interchange will operate above the maximum acceptable V/C ratio and at an LOS ‘F.’ * * * The installation of a signal while retaining the existing lane configuration will bring the intersection to within acceptable levels.

“* * * * *

“The intersection of Highway 140/Orindale Road is expected to operate at LOS ‘F’ and at a V/C ratio higher than the acceptable maximum. * * * The installation of a traffic signal will maintain acceptable operations at the intersection. The signal mitigation was assumed to occur with the installation of separate left-turn lanes on all four approaches and a separate westbound right-turn lane. Given these improvements, the intersection is expected to operate at a V/C ratio of 0.64.” Amended Record 428.

¹¹The TIA states, in relevant part:

“Upon completion of the Southview PUD, all intersections, except for that of Highway 140/Highway 66, will operate within acceptable levels of service and volume-to-capacity ratios. With the assumed volumes, the intersection of Highway 140/66 would exceed the maximum acceptable V/C ratio of 0.75 (although it will have an acceptable LOS ‘C’). The installation of separate right- and left-turn lanes on the southbound approach will reduce the V/C ratio to 0.74, under the maximum acceptable limit.” Amended Record 432.

1 *Warrenton*, [37 Or LUBA 933 (2000)], ODOT asserts that its level of service
2 allows no additional trips in a failing intersection. However, we find that the
3 adopted TSP prescribes solutions to each of the affected intersections.
4 Therefore while the amendment may significantly affect a transportation
5 facility, the TSP includes facility improvements pursuant to OAR 660-012-
6 0060(1)(b). There is no need to amend the TSP to include improvements
7 already identified.” Amended Record 17.

8 ODOT contends that the TIA and the city’s decision err in relying upon unplanned
9 future improvements to the five identified facilities to avoid a finding that the proposed
10 amendment significantly affects those facilities. According to ODOT, the TSP does not
11 identify, plan for or contain provisions for funding any of the improvements considered in
12 the TIA. Therefore, ODOT argues, the city cannot consider such speculative improvements
13 as a basis for avoiding the requirements of OAR 660-012-0060. *See DLCD v. City of*
14 *Warrenton*, 37 Or LUBA at 941-42 (OAR 660-012-0060 contemplates that mitigation
15 proposed as a condition of approving a plan amendment is considered under OAR 660-012-
16 0060(1), not as a basis to avoid a finding that the amendment significantly affects a facility
17 under OAR 660-012-0060(2)); *Citizens for Florence v. City of Florence*, 35 Or LUBA 255
18 (1998) (same).

19 We recently described in *Craig Realty Group v. City of Woodburn*, ___ Or LUBA
20 ___ (LUBA No. 99-131/135, February 2, 2001), slip op 5-6, how the analysis under
21 OAR 660-012-0060(2)(d) proceeds when the applicable TSP anticipates improvements to
22 affected facilities within the relevant planning period:

23 “* * * The city must first determine whether the city’s existing transportation
24 facilities are adequate to handle, throughout the relevant planning period, any
25 additional traffic that the proposed amendment will generate. If the answer to
26 that question is yes, then the proposed amendment will not significantly affect
27 a transportation facility for the purposes of OAR 660-012-0060(1), and no
28 further analysis is necessary. If the answer is no, then the city must consider
29 whether any new and improved facilities anticipated by the TSP will generate
30 sufficient additional capacity, and will be built or improved on a schedule that
31 will accommodate the additional traffic that will be generated by the proposed
32 amendment. If the answer to that question is yes, then, again, the proposal will
33 not significantly affect a transportation facility. If, however, the answer is no,
34 then the city must adopt one or more of the strategies set out in OAR 660-012-

1 0060(1) to make the proposed amendment consistent with ‘the identified
2 function, capacity and level of service of the [affected] facility.’”

3 As applied to the present case, the answer to the first question is clearly no. The affected
4 ODOT facilities, as they currently exist, are not adequate to handle the additional traffic
5 generated by the proposed amendment through the relevant planning period. Consequently,
6 the inquiry shifts to whether the affected facilities will be adequate to handle the additional
7 traffic, assuming construction of new or improved facilities that are anticipated by the TSP
8 during the relevant planning period.

9 In the instant case, intervenor argues that the city correctly relied upon improvements
10 to the Highway 97/140/66 interchange described in the TSP. The TSP states in relevant part
11 that:

12 “Major realignment of the interchange ramps and Highway 140 should be
13 constructed to better accommodate traffic growth and truck traffic through the
14 Highway 97 interchange. A number of improvement options have been
15 discussed and studied in the past. Figure 9-6 illustrates two of these options,
16 and Figure 9-7 summarizes the recommended improvements. These street
17 and interchange improvements are likely needed some time between year
18 2000-2005. An interchange refinement study should be completed to identify
19 the land use/transportation issues and impacts, and a final plan for
20 construction of interchange-related improvements.” TSP 9-21.

21 TSP Figures 9-4, 9-6 and 9-7 depict several options for improving the Highway
22 97/140/66 interchange, and set forth a development time frame for those improvements.
23 Table F-2 discusses financing of those improvements. We agree with intervenor that the city
24 can rely on these anticipated improvements for purposes of OAR 660-012-0060(2)(d),
25 notwithstanding that the contemplated refinement plan has not yet been completed. *Craig*
26 *Realty Group*, slip op 8. However, the city did not do so. Instead, the TIA and the city
27 incorrectly relied upon improvements that are not identified in the TSP to conclude that the
28 proposed amendment does not significantly affect the five state facilities.

29 The TIA assumed that several improvements would be made to each of the five
30 intersections at issue. *See* n 10. For the Highway 97/Riverside Drive/Main Street

1 southbound ramps, the TIA assumed installation of traffic lights. For the Highway 140/66
2 interchange, the TIA assumed the construction of a “channelized westbound right-turn lane”
3 at that intersection.¹² Amended Record 428. For the Highway 140/97 southbound ramp, the
4 TIA assumed installation of a signal and construction of a second right-turn lane. For the
5 Highway 140/97 northbound ramp, the TIA assumed installation of a signal. For the
6 Highway 140/Orindale Road interchange adjacent to the subject property, the TIA assumed
7 installation of signals, installation of separate left-turn lanes on all four approaches and a
8 separate westbound right-turn lane. The TIA concluded that when the traffic allowed by the
9 amended PUD was added to these improved intersections, all but the Highway 140/66
10 intersection would operate within the prescribed V/C ratio. Amended Record 432.

11 The difficulty with relying on these assumed improvements is that none of them, as
12 far as we can tell, are contemplated by the TSP. The portions of the TSP directed to our
13 attention discuss only the Highway 140/66 and Highway 140/97 interchanges, and the
14 improvements recommended there do not appear to correspond to the improvements that the
15 TIA assumes will be in place. For example, we see nothing in the TSP that contemplates a
16 channelized westbound right-turn lane for the Highway 140/66 intersection, or a second
17 right-turn lane for the Highway 140/66/97 southbound ramps. It may be that the
18 improvements anticipated in the TSP would provide greater additional capacity than those
19 assumed by the TIA. Whether or not such is the case, the point is that improvements
20 anticipated by the TSP or other applicable planning documents have a planning basis and
21 some probability of being constructed within the relevant time frame. The improvements
22 assumed by the TIA are entirely speculative. The city cannot avoid the requirements of
23 OAR 660-012-0060(1) by assuming the existence of unplanned future transportation

¹²The TIA also assumed, as part of its analysis of background traffic, that the Highway 140/66 intersection would be improved with a traffic signal, because a signal is warranted under existing conditions. Amended Record 428. We note that one of the options considered in the TSP is signalization of that intersection. TSP, Figure 9-6.

1 improvements. Consequently, we agree with ODOT’s argument under the first and second
2 subassignments of error that the city erred in taking into account improvements that are not
3 identified in the TSP, to conclude that the proposed amendment does not significantly affect
4 the facilities at issue.

5 The city also found that, if the amendment does significantly affect the intersections,
6 the amendment nonetheless demonstrates compliance with OAR 660-012-0060(1), because
7 the TSP already identifies solutions to the affected intersections, and therefore the
8 requirements of OAR 660-012-0060(1)(b) are met. Amended Record 17. OAR 660-012-
9 0060(1)(b) provides that, where an amendment significantly affects a facility, the city may
10 demonstrate compliance with the rule by “[a]mending the TSP to provide transportation
11 facilities adequate to support the proposed land uses[.]” As noted above, the city may
12 consider improvements that are already anticipated by the TSP in determining whether an
13 amendment significantly affects a transportation facility under OAR 660-012-0060(2)(d).
14 Consideration of such improvements may lead to a conclusion that the amendment does not
15 significantly affect the facility. *Craig Realty Group*, slip op 5. If it does not lead to that
16 conclusion, then the city must apply one or more of the strategies at OAR 660-012-0060(1).
17 *Id.* at 5-6. Under this framework, improvements anticipated in the TSP are considered when
18 applying OAR 660-012-0060(2)(d) rather than as mitigatory strategies under OAR 660-012-
19 0060(1)(b). In any case, the TIA on which the city based its findings under OAR 660-012-
20 0060(1) and (2) did not consider the improvements anticipated in the TSP. Neither the TIA
21 nor the city actually considered whether the improvements anticipated in the TSP
22 demonstrate that the amendment does not significantly affect the five intersections. Remand
23 is necessary for the city to conduct the analysis under OAR 660-012-0060(2)(d) without
24 consideration of improvements that are not contemplated in the TSP.

25 Intervenor’s response brief essentially concedes much of the foregoing, but argues
26 that the city’s decision should be affirmed on a different basis. Intervenor argues that

1 OAR 660-012-0060(2)(d) includes a causation element, which requires a finding that the
2 proposed amendment “would reduce” a facility below the applicable standard, before it could
3 “significantly affect” that facility within the meaning of the rule. *Dept. of Transportation v.*
4 *Coos County*, 158 Or App at 572. Intervenor argues that such a causation element cannot be
5 met in this case, because the undisputed facts are that the five affected facilities will violate
6 the V/C standard sometime prior to 2020, even without considering the impacts of the
7 proposed amendment. Under those circumstances, intervenor contends, the impacts of the
8 proposed amendment cannot “reduce” these facilities below the applicable standard, within
9 the meaning of OAR 660-012-0060(2)(d). According to intervenor, any conclusion that the
10 amendment significantly affects these facilities under OAR 660-012-0060(2)(d) rests on the
11 view that the applicable performance standard is no further degradation, a view that was
12 rejected in *Dept. of Transportation v. Coos County*.

13 Following the court’s decision in *Dept. of Transportation v. Coos County*, LCDC
14 amended OAR 660-012-0060(2)(d) to refer to “performance standard” rather than “level of
15 service.” ODOT concurrently amended the OHP to express its performance standards for
16 state highways as a V/C ratio rather than level of service. In addition, the OHP was amended
17 to state that where the facility is in violation of the V/C standard, the applicable performance
18 standard is to “avoid further degradation.”¹³ In intervenor’s view, the OHP “avoid further
19 degradation” standard is an impermissible attempt by ODOT to overturn the result in *Dept.*
20 *of Transportation v. Coos County*. Intervenor notes that, in *DLCD v. City of Warrenton*, the

¹³OHP Action 1F.6 provides, in pertinent part:

“For purposes of evaluating amendments to * * * acknowledged comprehensive plans and land use regulations subject to OAR 660-012-0060, in situations where the [V/C ratio] for a highway segment, intersection or interchange is above the standards [established in the OHP] and transportation improvements are not planned within the planning horizon to bring performance to standard, the performance standard is to avoid further degradation. If an amendment * * * to [an] acknowledged comprehensive plan or land use regulation increases the [V/C ratio] further, it will significantly affect the facility.” OHP 79.

1 Board rejected a similar challenge to the OHP “avoid further degradation” standard.¹⁴
2 Intervenor urges us to overturn that aspect of *DLCD v. City of Warrenton* and hold that the
3 OHP standard is invalid as an impermissible amendment to OAR 660-012-0060(2)(d).
4 According to intervenor, if the OHP standard is invalid, then the city’s decision in the present
5 case must be affirmed, because each of the intersections at issue would violate the V/C
6 standard sometime prior to 2020 even without the impacts of the proposed amendment.

7 Intervenor presents essentially the same arguments we considered and rejected in
8 *DLCD v. City of Warrenton*, and provides no reason to overrule that decision. Moreover, we
9 disagree with the premises underlying intervenor’s causation analysis. It is important to
10 recognize that *Dept. of Transportation v. Coos County* involved facilities that were *already*
11 below the applicable standard at the time of the challenged decision, and the proposed
12 amendment therefore could not reduce the facilities below the standard. In that
13 circumstance, intervenor is correct that the causation element inherent in OAR 660-012-
14 0060(2)(d) cannot be present unless the performance standard itself is one of no further
15 degradation. In the present case, the affected facilities are currently in compliance with the
16 V/C standard, but are projected to violate the V/C standard sometime during the relevant
17 planning period, as a result of a combination of impacts from the proposed amendment and
18 increases in background traffic. In other words, the proposed amendment will cause these
19 facilities to violate the V/C standard sooner than they otherwise might. If the proposed
20 amendment will cause the facility to violate the V/C standard in year 2010, for example, the
21 causation element in OAR 660-012-0060(2)(d) is present, notwithstanding that the facility

¹⁴We stated in *DLCD v. City of Warrenton*:

“[W]hile the question is a close one, we agree with petitioners that one of the applicable ‘performance standards’ the city must apply is a requirement that a proposed amendment not ‘further degrade’ an already failing transportation facility. * * * Nothing in the TPR or in *Dept. of Transportation v. Coos County*, to the extent that case is relevant to the current rule, restricts the Oregon Transportation Commission’s ability to define the relevant performance standard as one of no further degradation. * * *” 37 Or LUBA at 946.

1 would fail anyway in the year 2020 due to increased background traffic. We therefore
2 disagree with intervenor’s premise that the validity of the OHP “avoid further degradation”
3 standard is essential to the causation analysis under OAR 660-012-0060(2)(d), as applied to
4 the facts in this case.¹⁵

5 The first and second subassignments of error are sustained; the third subassignment
6 of error is denied.

7 **D. Fourth Subassignment of Error**

8 Under this subassignment of error, ODOT argues that the city erred by not making a
9 determination whether the PUD amendment allows a level of travel inconsistent with the
10 functional classification of Lindley Way, and further that the city improperly deferred
11 analysis required by the TPR to future decisions.

12 Lindley Way is currently a dead-end local street located to the east of the Southview
13 PUD. Both the original and amended PUD envision an eventual connection to Lindley Way,
14 and the TIA assumes that approximately 25 percent of traffic generated by the PUD will use
15 Lindley Way. The city’s finding regarding Lindley Way states:

16 “Pursuant to OAR 660-012-0060(2)(c) we find that there is no collector-level
17 connection between the project and Riverside Drive. If a reviewing body
18 finds that the amendment may thus ‘allow’ levels of travel inconsistent with
19 the functional classification of Lindley Way or Autumn Road, we impose the
20 Development Restriction pursuant to OAR 660-012-0060(1)(a). We find that
21 the restriction will limit land uses until such time as a connection is
22 established. The connection will necessarily be accompanied or preceded by
23 an amendment to the relevant Transportation System Plan.” Amended Record
24 16-17.

25 The “development restriction” this finding refers to is Condition P, which states:

¹⁵The OHP “avoid further degradation” standard might be essential with respect to the Highway 140/66 intersection, which, as the TIA notes, currently violates the V/C standard. However, the TIA assumes as part of its analysis of background traffic that this intersection will be signalized, an improvement that is contemplated in the TSP. As we explained above, the city should factor in improvements anticipated in the TSP in determining whether the amendment significantly affects facilities under OAR 660-012-0060(2)(d). It is not clear whether, if that improvement is factored in, the Highway 140/66 intersection currently violates the V/C standard.

1 “Development proposed east of the Private Open Space Reserve will not be
2 permitted until eastern access to the site is provided, provided however, that
3 this condition shall not apply to the proposed Lindley Way Mixed Use
4 Districts as shown on the revised master plan.” Amended Record 19.

5 Thus, the city’s decision concludes that, if the amendment significantly affects
6 Lindley Way within the meaning of OAR 660-012-0060(2)(c) by allowing uses that would
7 result in levels of traffic inconsistent with its functional classification as a local street, the
8 city has imposed a mitigatory strategy as permitted under OAR 660-012-0060(1)(a), by
9 prohibiting development of the eastern half of the PUD until the connection with Lindley
10 Way is constructed. The city presumes that full development of the PUD will require a
11 collector between the PUD and areas of the city to the east, and that Lindley Way will be
12 improved and the TSP amended to reflect an upgrade to collector classification prior to or
13 concurrent with connecting the PUD with Lindley Way.

14 ODOT argues that it is clear that the amended PUD will allow uses inconsistent with
15 the functional classification of Lindley Way and therefore significantly affect that facility
16 under OAR 660-012-0060(2)(c). *See* n 4. Consequently, ODOT argues, the city erred in
17 failing to make that determination. Further, ODOT contends, the city’s condition delaying
18 development on the eastern half of the PUD until Lindley Way is upgraded to a collector
19 satisfies neither OAR 660-012-0060(1)(a) nor (b), and improperly defers compliance with
20 the rule to a future decision. *See Concerned Citizens v. Jackson County*, 33 Or LUBA 70,
21 117-18 (1997) (county errs in approving an urban growth boundary amendment conditioned
22 on future amendments to the TSP under OAR 660-012-0060(1)(b), because the UGB
23 amendment would become final before compliance with Goal 12 is assured).

24 Intervenor explains that the city’s uncertainty as to whether the proposed amendment
25 significantly affects Lindley Way stems from the fact that both the 1979 PUD and the
26 amended PUD contemplate a connection to Lindley Way. Intervenor submits that the
27 amended PUD does not affect Lindley Way any more than did the 1979 PUD, and therefore
28 the amendment does not “significantly affect” Lindley Way under OAR 660-012-0060(2)(c).

1 In any case, intervenor argues, Condition P is an appropriate mitigatory strategy allowed
2 under OAR 660-012-0060(1)(a), and the city's decision does not impermissibly defer
3 compliance with the TPR. Intervenor contends that *Concerned Citizens* is inapposite,
4 because the ultimate question in that case was compliance with Goal 12, and the present
5 decision, unlike the UGB amendment in *Concerned Citizens*, is not required to comply with
6 statewide planning goals.

7 It is not clear to us that, as intervenor argues, the proposed amendment affects
8 Lindley Way no more than did the 1979 PUD. The amended PUD eliminates two of the
9 three connections to the east proposed in the 1979 PUD, and apparently contemplates that
10 Lindley Way will handle all the traffic of the eliminated eastern connections. Further, the
11 amended PUD increases peak hour trips generated over those generated in the 1979 PUD.
12 The TIA quantifies impacts from those additional trips on intersections directly to the east
13 that presumably connect through Lindley Way. Amended Record 431. However, the TIA
14 does not address impacts on Lindley Way, and neither does the city's decision. Instead of
15 determining whether or not the proposed amendment significantly affects Lindley Way under
16 OAR 660-012-0060(2)(c), the city proceeded under the assumption that it does, and
17 attempted to comply with OAR 660-012-0060(1)(a) by limiting uses allowed in the PUD
18 until such time as the TSP is amended to provide for improvements and a functional
19 classification for Lindley Way as a collector.

20 We disagree with ODOT that the city *must* adopt a determination under OAR 660-
21 012-0060(2)(c) with respect to Lindley Way, and cannot proceed under the assumption that
22 the amendment significantly affects that facility under that provision. The difficulty in
23 failing to adopt a determination under OAR 660-012-0060(2)(c) is that that analysis informs
24 the city to what extent the amendment significantly affects Lindley Way and therefore what
25 levels of mitigation under OAR 660-012-0060(1)(a) through (d) may be appropriate. The
26 city's condition avoids that difficulty. The condition imposed here effectively prevents the

1 PUD from impacting Lindley Way *at all* unless and until it is improved as a collector and
2 connected to the PUD. We do not understand ODOT to argue that the city’s condition is
3 insufficient to ensure that uses allowed by the amendment and as limited by the condition are
4 “consistent with the planned function, capacity, and performance standards” of Lindley Way.
5 OAR 660-012-0060(1)(a).

6 Further, we disagree with ODOT that the city impermissibly deferred findings of
7 compliance with the rule. It is true that the city’s condition may terminate if future decisions
8 amend the TSP to improve Lindley Way, which is precisely the type of mitigation addressed
9 under OAR 660-012-0060(1)(b). Had the city simply found compliance or deferred finding
10 compliance with the TPR based on the expectation of such future decisions, as was the case
11 in *Concerned Citizens*, ODOT would be correct, because the city would not have ensured *in*
12 *this decision* that allowed land uses are consistent with the functional classification of
13 Lindley Way. However, the challenged decision instead limits allowed land uses under
14 OAR 660-012-0060(1)(a), which ensures that allowed uses are consistent with Lindley
15 Way’s classification. That limitation is permanent unless and until the requisite
16 improvements and amendments take place. That future circumstances may terminate that
17 limitation does not impermissibly defer compliance with the rule to a future decision.

18 The fourth subassignment of error is denied.

19 The second assignment of error is sustained, in part.

20 **THIRD ASSIGNMENT OF ERROR**

21 Under this assignment of error, ODOT challenges the evidentiary support for several
22 key findings adopted by the city.¹⁶

¹⁶Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). Where the Board concludes that a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). A local government may rely on the opinion of an expert if, considering all the relevant evidence in the record, a reasonable person could have chosen to rely on the expert’s

1 ODOT’s evidentiary challenges are based partially on its assumption that the city’s
2 code and the TPR require the city to consider impacts attributable to the 1979 PUD in
3 addition to the impacts attributable to the amendment. As we explained under the second
4 assignment of error, that assumption is erroneous.

5 **A. First Subassignment of Error**

6 Under this subassignment of error, ODOT challenges the evidence supporting the
7 city’s conclusion that the traffic allowed under the 1979 PUD, what the parties refer to as the
8 “baseline,” is only slightly less than that allowed under the amended PUD. ODOT explains
9 that the city’s conclusion is based on the calculation that the 1979 PUD and the amended
10 plan both provide for approximately 1,330 housing units. ODOT questions that assumption,
11 arguing that the 1979 PUD did not include a calculation of housing units, and the residential
12 districts depicted in the 1979 PUD (low, medium and high density) do not correlate with the
13 districts depicted in the amended PUD (hi-density, multi-family, mixed use, clustered
14 residential, etc.). ODOT further submits that considering the many other substantive changes
15 in the amended PUD, including additional commercial acreage, the addition of 40 acres, and
16 significant changes to the road network, the TIA’s estimation that the 1979 PUD would
17 generate approximately 18,000 ADTs as compared to the approximately 20,000 ADTs that
18 will be generated by the amended PUD is not supported by substantial evidence.

19 In response, intervenor cites to evidence at Amended Record 225 supporting the
20 estimation that the 1979 PUD and amended PUD both provide for approximately 1,330
21 residential units. A reasonable person could rely upon this information to calculate the
22 comparative traffic impacts between the 1979 and amended PUDs. ODOT has not shown
23 that the differences between the 1979 and amended PUDs are such that the TIA’s traffic
24 generation estimates are not supported by substantial evidence.

conclusions. *Bates v. Josephine County*, 28 Or LUBA 21, 29 (1994). That a petitioner may disagree with the local government’s conclusions provides no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993).

1 The first subassignment of error is denied.

2 **B. Second Subassignment of Error**

3 ODOT challenges the evidentiary support for the city’s finding of compliance with
4 CDO 11.415(3), which requires that, in adopting a zone change, the city determine that “[t]he
5 property affected by the proposed change of zone is properly related to streets to adequately
6 serve the type of traffic generated by such uses that may be permitted therein.” ODOT
7 argues that the city’s findings under CDO 11.415(3) with respect to the Highway
8 140/Orindale Road intersection assume improvements that ODOT has not agreed to allow.
9 Because that assumption is unfounded, ODOT argues, the city’s finding that the Highway
10 140/Orindale Road intersection is adequate to serve traffic generated by the PUD is not
11 supported by substantial evidence.

12 The city’s findings state:

13 “The subject site is provided access off of Highway 140, a statewide facility.
14 The proposed full service intersection on Highway 140 will include
15 acceleration/deceleration lanes, left turn lanes and ultimately a traffic signal
16 when ODOT determines that warrants are met. These measures will insure
17 traffic safety. Please refer to Traffic memo in Exhibit A.” Amended Record
18 11.

19 “* * * we find, based on the application materials and testimony, that the
20 applicant has deeded access at that location, and that the applicant is entitled
21 to reasonable access at that location pursuant to ORS 374.310(3). The
22 applicant has filed for an approach road permit with ODOT. The
23 configuration of that access, and whether or not it will be signalized will be
24 determined in that process.” Amended Record 16.

25 The parties disagree as to what CDO 11.415(3) requires. ODOT appears to
26 understand CDO 11.415(3) to be a local version of OAR 660-012-0060. Intervenor assigns
27 CDO 11.415(3) a more limited role requiring the city to find only that Highway 140’s
28 functional classification is appropriate. The city’s findings appear to understand
29 CDO 11.415(3) to be satisfied in this case because intervenor has shown a right of access to
30 the highway and that it is feasible to improve the Highway 140/Orindale Road interchange to

1 adequately serve the development, leaving the actual configuration of such improvements to
2 the ODOT access permit process. The city conditioned its approval on the applicant
3 obtaining an ODOT access permit.

4 In *Terra v. City of Newport*, 36 Or LUBA 582 (1999), we addressed a similar
5 evidentiary issue under a similar standard requiring that transportation facilities can
6 “adequately accommodate the proposed use.” The city in that case found it was feasible to
7 improve a proposed intersection with a state highway to accommodate the proposed use, and
8 imposed a condition requiring the applicant to comply with any improvements imposed by
9 ODOT. We rejected the petitioners’ argument that, in the absence of evidence that ODOT
10 agreed to the proposed improvements, the city’s finding of compliance with the code
11 standard lacked evidentiary support. 36 Or LUBA at 591-92. The city in the present case
12 has taken a similar approach in determining that improvements necessary for adequacy are
13 feasible and conditioning its approval on meeting ODOT’s requirements. ODOT has not
14 established that compliance with CDO 11.415(3) requires anything more.

15 The second subassignment of error is denied.

16 **C. Third Subassignment of Error**

17 ODOT contends that the TIA is flawed in several respects and thus provides
18 inadequate evidentiary support for key aspects of the city’s finding of compliance with
19 CDO 11.415(3).

20 ODOT argues, first, that the TIA considered only the impact of the additional traffic
21 generated by the PUD amendment rather than the entire PUD. As we explained under the
22 first assignment of error, the city conducted the proper analysis.

23 ODOT argues, next, that the TIA improperly assumes a connection to Lindley Way
24 when that connection does not currently exist. However, as explained above, the city
25 imposed a condition prohibiting development of the eastern half of the PUD until a
26 connection and necessary improvements to Lindley Way are constructed. ODOT does not

1 explain why, given that condition, the city’s finding of compliance with CDO 11.415(3) is
2 not supported by substantial evidence.

3 ODOT next argues that the TIA improperly assumed that 18 percent of trips
4 generated by the PUD would be “diverted” to commercial development proposed on a 15-
5 acre parcel adjacent to the subject property, near the intersection of Highway 140/Orindale
6 Road. The 15-acre parcel is currently outside the city limits, outside the UGB and zoned for
7 natural resource use. ODOT argues that the TIA erred to the extent it relied on future
8 commercial development of the 15-acre parcel to divert traffic, because such development
9 has not been approved. ODOT acknowledges that, as the city found, the TIA performs
10 separate calculations of traffic volumes with and without development of the 15-acre parcel.
11 Nonetheless, ODOT contends that the assumption of diverted trips remains a constant in the
12 TIA’s analysis. However, ODOT does not explain why the assumption of diverted trips is a
13 constant in the analysis, if the TIA calculated traffic impacts with and without commercial
14 development of the 15-acre parcel. Absent a demonstration that the city relied upon the
15 TIA’s calculations assuming commercial development of the 15-acre parcel, ODOT’s
16 arguments do not establish that the city’s findings are unsupported by substantial evidence.

17 Next, ODOT argues that the TIA improperly calculated the trip generation rate for
18 proposed commercial development within the PUD. ODOT explains that commercial uses
19 generate four times the number of vehicle trips than are generated by office uses. According
20 to ODOT, the TIA assumed the development of approximately 117,000 square feet of
21 commercial/retail uses and approximately 139,000 square feet of office uses in the
22 commercial and mixed-use districts within the amended PUD. Amended Record 414. The
23 city found that this assumed mix of office and commercial uses is based on a study by
24 Hobson & Johnson, Inc., and represents the most likely development scenario. Amended
25 Record 16. ODOT argues that the Hobson & Johnson study examined only retail
26 commercial uses and does not support the assumption that office uses will comprise 139,000

1 square feet of development within the PUD. Because nothing in the decision requires a
2 particular mix of uses or any office uses at all, ODOT argues, the TIA should have assumed
3 that commercial/retail and mixed use districts would be developed with commercial/retail
4 uses, and calculated the number of vehicle trips generated accordingly.

5 Intervenor responds that the Hobson & Johnson study evaluated the need for office
6 space as well as retail commercial uses, and identified a need for approximately 130,000
7 square feet of office, business, and personal service uses. Amended Record 170. Although
8 there does not appear to be an exact relationship between the figures in the Hobson &
9 Johnson study and the TIA, we agree with intervenor that the study generally supports the
10 TIA's assumptions that office uses are likely to be a large component of the PUD's
11 commercial and mixed-use zones. ODOT does not explain why CDO 11.415(3) requires that
12 the TIA must ignore likely development scenarios and base its trip generation figures on an
13 assumption that only commercial/retail uses will be developed within the commercial/retail
14 and mixed use zones.

15 Finally, ODOT argues that the TIA is flawed by its assumption that unfunded and
16 unplanned transportation improvements will be constructed prior to 2020, and that flaw
17 undermines the evidentiary support for the city's finding of compliance with CDO 11.415(3).
18 ODOT repeats here the theme it sounded under the second assignment of error, regarding
19 OAR 660-012-0060. As we explained above, OAR 660-012-0060 requires that the city
20 determine whether the amendment significantly affects transportation facilities without
21 considering potential improvements that are not anticipated by the applicable TSP.
22 However, ODOT does not explain why the same constraint governs CDO 11.415(3). ODOT
23 does not contend that the code provision implements the TPR or is otherwise subject to the
24 same analysis imposed by the rule. As we discussed in the second subassignment of error,
25 the city applied CDO 11.415(3) only to the Highway 140/Orindale Road intersection, and not
26 to more distant intersections. ODOT does not assign error to that limited scope of analysis,

1 or explain why the TIA’s assumptions regarding improvements to other intersections affect
2 the city’s conclusions under CDO 11.415(3).

3 The third subassignment of error is denied.

4 **D. Fourth Subassignment of Error**

5 ODOT challenges the evidentiary support for the city’s finding of compliance with
6 CDO 11.415(4), which requires that:

7 “The proposed change of zone will have no adverse effect on abutting
8 property or the permitted uses thereof.”

9 The city’s findings under CDO 11.415(4) addressed impacts to all adjoining property
10 owners except ODOT and Klamath County.¹⁷ ODOT argues that the city failed to address
11 concerns raised by ODOT and Klamath County regarding adverse impacts on Highway 140
12 and on Lindley Way. Further, ODOT notes that the TIA assumes that Lindley Way will
13 carry 25 percent of the PUD’s traffic. ODOT argues that the Lindley Way connection is
14 opposed by the county and unlikely to ever materialize. If that connection never
15 materializes, ODOT argues, then the traffic Lindley Way would carry would instead use
16 Highway 140, causing additional adverse impacts to that facility.

17 Intervenor responds that the city’s decision prohibits development of the eastern half
18 of the PUD until the Lindley Way connection is made, effectively preventing the scenario

¹⁷The city’s findings under CDO 11.415(4) state:

“The proposed master plan amendment is not anticipated to have adverse effects on surrounding properties. Nearby land uses include the following: To the south is a vacant tract of county land that is currently under the same ownership and a tract of county land that is permitted for development of a golf course. To the southwest is a single-family residence located on a parcel adjacent to the site. Either single family, light commercial or special reserve will be provided adjacent to the site, ensuring an appropriate adjacent land use. To the east is City land zoned for single-family residences and Klamath County land that is developed for single-family residences and vacant property zoned for single and multi-family residences. The Southview PUD will not preclude either property from developing under the current zone. To the north is the Pine Valley PUD and City park property. The applicant is proposing to preserve the stand of trees as special reserve, containing approximately 20 acres adjacent to the park, thereby providing an appropriate buffer/transition.” Amended Record 11.

1 that ODOT posits. However, intervenor does not respond to ODOT’s more fundamental
2 argument that ODOT and Klamath County are the owners of abutting property for purposes
3 of CDO 11.415(4), and therefore the city must find that the proposed zone change “will have
4 no adverse impact” on those properties. Neither the city’s findings nor intervenor’s brief
5 explains why CDO 11.415(4) does not apply to property owned by ODOT and Klamath
6 County. Remand is necessary for the city to determine whether CDO 11.415(4) applies to
7 property owned by ODOT and Klamath County and, if so, whether the proposed zone change
8 will have adverse impacts on those properties within the meaning of the code provision.

9 The fourth subassignment of error is sustained.

10 The third assignment of error is sustained, in part.

11 **FOURTH ASSIGNMENT OF ERROR**

12 Under this assignment of error, ODOT asserts that the city’s decision violates
13 CDO 11.415(1) and 12.372(4), which require that the proposed PUD conform to the
14 comprehensive plan.¹⁸

15 ODOT argues that the PUD amendment is not in conformance with the TSP and,
16 because the TSP is part of the comprehensive plan, the PUD does not conform to the
17 comprehensive plan. ODOT argues, first, that the PUD adds two major thoroughfares in an
18 area where the TSP does not contemplate any streets. ODOT also argues that the PUD
19 proposes to generate approximately 20,000 ADTs in an area where the TSP contemplates an
20 increase of approximately 74 ADTs. Finally, ODOT argues that the PUD proposes that over
21 3,412 persons will reside within the PUD, in an area where the TSP contemplates zero

¹⁸CDO 11.415(1) and CDO 12.372(4) respectively require findings that:

“The change of zone is in conformance with the Comprehensive Plan and all other provisions of [CDO] Chapter 10-14 and any applicable street plans.”

“The master plan complies with the applicable portions of the Comprehensive Plan, [CDO] Chapters 10 to 14 and State and Federal Laws.”

1 population growth. ODOT notes that the projected population growth for the entire city over
2 15 years is only 5,700 persons, almost all of it projected to occur in other quadrants of the
3 city.

4 The city’s decision, at Amended Record 1-19, addresses whether the proposal
5 conforms with a number of comprehensive plan provisions. The decision does not explicitly
6 address conformance with the TSP. However, intervenor points out that the decision
7 interprets CDO 11.415(1) and 12.372(4) to allow the city to “balance” applicable
8 comprehensive plan provisions, with the ultimate inquiry being whether the proposed zone
9 and site plan does a better job of meeting applicable plan objectives than the original zone
10 and site plan.¹⁹

11 The city has significant discretion in how it interprets CDO 11.415(1) and 12.372(4).
12 ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992). ODOT
13 does not attempt to demonstrate that the city’s interpretations are not entitled to deference
14 under that standard of review. Nonetheless, ODOT is correct that the city’s findings do not

¹⁹Intervenor cites to the following language in the decision:

“CDO Section 11.415(1) requires that the change of zone be in conformance with the Comprehensive Plan and all other provisions of Chapter 10 to 14 and any applicable street plans. We interpret this provision to mean that conformance with the comprehensive plan means that the proposed amendments better meet the plan objectives than the original zoning. Like any comprehensive plan, many of the objectives can be considered inconsistent. Therefore we also interpret our plan and land use regulations to mean that the comprehensive plan objectives must be balanced.

* * * * *

“We interpret the term ‘applicable street plans’ in [CDO 11.415(1)] to mean the street plan approved for the original development and find that the proposed master plan amendment is consistent with that plan.

“* * * * *

“We find that [CDO 12.372(4)] requires a balancing of comprehensive plan objectives, and that on balance, the proposed plan is superior. * * * In particular, we note that the proposed plan provides for a viable mixed-use community, and that such a community will result in a tremendous reduction in vehicle miles traveled. This will provide environmental, transportation and energy benefits to the community.” Amended Record 14-15.

1 address conformance with applicable TSP provisions or consider the TSP in determining that
2 the proposed PUD better meets applicable plan objectives, compared to the 1979 PUD. The
3 city’s interpretation would seem to require such consideration. Neither the city’s decision
4 nor intervenor’s brief explains why conformance with pertinent TSP provisions need not be
5 considered and “balanced” against other plan provisions under CDO 11.415(1) and
6 12.372(4), as interpreted by the city.

7 The fourth assignment of error is sustained.

8 **FIFTH ASSIGNMENT OF ERROR**

9 ODOT challenges the evidentiary support for the city’s finding that the proposed
10 street plan provides adequate site circulation, as required by CDO 12.372(3).²⁰ According to
11 ODOT, the amended PUD proposes that the main east-west thoroughfare within the PUD
12 exit the southern PUD boundary into an area beyond the city limits and UGB, and then loop
13 back into the PUD. Amended Record 400. ODOT argues that this loop fails to provide
14 internal circulation within the PUD, and thus the proposed PUD violates CDO 12.372(3).²¹

15 Intervenor responds that the precise location of the thoroughfare need not be and is
16 not determined by the city’s decision. In any case, intervenor argues, the site plan at
17 Amended Record 400 was submitted as part of the application and, in response to ODOT’s
18 concerns, an amended site plan was later submitted showing the thoroughfare located
19 entirely within the PUD. Oversize Exhibit F. Further, intervenor argues, the city addressed
20 ODOT’s concern by imposing a condition that the thoroughfare “shall not cross outside the
21 urban growth boundary unless the applicant obtains [an] appropriate exception, or

²⁰CDO 12.372(3) provides:

“The proposed street plan affords the most economic, safe, efficient and least environmentally damaging circulation of traffic possible under existing circumstances.”

²¹ODOT raises a similar issue under the fifth subassignment to the third assignment of error and under the third subassignment to the fourth assignment of error. Our discussion of the fifth assignment of error resolves all three sets of arguments.

1 establishe[s] that the access road is otherwise allowable under state law.” Amended Record
2 19. We agree with intervenor that ODOT has not established that the city’s findings under
3 CDO 12.372(3) lack evidentiary support.

4 The fifth assignment of error is denied.

5 **SIXTH ASSIGNMENT OF ERROR**

6 ODOT argues that the city violated Statewide Planning Goal 2 (Land Use Planning)
7 by failing to coordinate properly with affected governmental units, specifically ODOT.
8 Intervenor responds that ODOT waived this issue by failing to raise it below, that Goal 2 is
9 not applicable to the decision, and that even if Goal 2 does apply the city adequately
10 coordinated with ODOT.

11 We need not address intervenor’s first two responses because we agree that the city
12 conducted the requisite coordination pursuant to Goal 2. Goal 2 requires that comprehensive
13 plans and related implementation measures be coordinated with affected units of
14 government. The Goal 2 coordination requirement is met where:

15 “1. The makers of the plan engaged in an exchange of information
16 between the planning jurisdiction and affected governmental units, or
17 at least invited such an exchange.

18 “2. The jurisdiction used the information to balance the needs of all
19 governmental units as well as the needs of citizens in the plan
20 formulation or revision.” *Rajneesh v. Wasco County*, 13 Or LUBA
21 202, 210 (1985).

22 The city invited comments from ODOT and Klamath County. Amended Record 114-
23 15, 174. City officials also met with ODOT on several occasions. Amended Record 120.
24 ODOT itself states that it participated in the process for over a year. Amended Record 113.
25 Finally, the city incorporated the information and addressed the concerns raised by ODOT in
26 granting final approval, even though they did not make every change suggested by ODOT.
27 The Goal 2 coordination obligation does not mean that local governments must accede to
28 every request made by a state agency. *Turner Community Association v. Marion County*, 37

1 Or LUBA 324, 352 (1999). The city's actions satisfy the coordination requirement under
2 Goal 2.

3 The sixth assignment of error is denied.

4 The city's decision is remanded.