

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 NORBERT J. VOLNY, JOAN VOLNY,  
5 NORBERT A. VOLNY and SBV SALES, INC.,  
6 *Petitioners,*  
7

8 and  
9

10 TIMOTHY L. ROBINSON, JILL C. LANG, LYNN M. PICKNEY,  
11 RICHARD C. ROBINSON, JR., HARVEY M. WATT,  
12 MARCIA ROSE, WILLIAM G. ELLIS and BETTY ELLIS,  
13 Co-Trustees of the William and Betty Ellis Revocable Trust  
14 u/t/a dated October 8, 1990, DONALD O. CARLSON,  
15 SHIRLEY J.T. CARLSON, RICHARD L. CARLSON, SCOTT D. CARLSON,  
16 JILL M. CARLSON, RANDIE S. CARLSON, TONI M. CARLSON,  
17 GLADYS STEINLICHT, LEONARD PEVERIERI and KENT COUCH,  
18 *Intervenors-Petitioner,*  
19

20 vs.  
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22 CITY OF BEND,  
23 *Respondent.*  
24

25 LUBA No. 98-210  
26

27 NORBERT J. VOLNY, JOAN VOLNY,  
28 NORBERT A. VOLNY and SBV SALES, INC.,  
29 *Petitioners,*  
30

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40 GLADYS STEINLICHT, LEONARD PEVERIERI and KENT COUCH,  
41 *Intervenors-Petitioner,*  
42

43 vs.  
44

45 DESCHUTES COUNTY,

1 *Respondent.*

2  
3 LUBA No. 98-215

4  
5 FINAL OPINION  
6 AND ORDER  
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8  
9 Appeal from the City of Bend and Deschutes County.

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11 Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of  
12 petitioners. With her on the brief was Johnson and Sherton P.C.

13  
14 Ron L. Marceau, Bend, filed the response brief and argued on behalf of respondent  
15 City of Bend.

16  
17 No appearance by respondent Deschutes County.

18  
19 Robert L. Lovlien, Bend, represented intervenors-respondent.

20  
21 BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member,  
22 participated in the decision.

23  
24 REMANDED

01/14/2000

25  
26 You are entitled to judicial review of this Order. Judicial review is governed by the  
27 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners appeal the city’s and county’s legislative adoption of amendments to the Bend Area General Plan (BAP).

**MOTION TO INTERVENE**

Timothy L. Robinson, Jill C. Lang, Lynn M. Pickney, Richard C. Robinson, Jr., Harvey M. Watt, Marcia Rose, William G. Ellis, Betty Ellis, Donald O. Carlson, Shirley J.T. Carlson, Richard L. Carlson, Scott D. Carlson, Jill M. Carlson, Randie S. Carlson, Toni M. Carlson, Gladys Steinlicht, Leonard Peverieri, and Kent Couch move to intervene on the side of petitioners. There is no opposition to their motions, and they are allowed.

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a reply brief pursuant to OAR 661-010-0039 to respond to five “new matters” raised in the response brief: (1) whether petitioners waived all issues not specifically mentioned in the notice of intent to appeal; (2) whether a letter by the Department of Land Conservation and Development (DLCD) recommending approval of the plan amendments that were adopted in respondents’ decisions precludes petitioners’ challenges to those amendments; (3) whether the challenged plan amendments are subject to review for compliance with statewide planning goals and relevant administrative rules; (4) whether the city council’s decision, in a separate proceeding, to widen 27<sup>th</sup> Street moots certain issues in these appeals; and (5) whether the city’s separate decision to annex certain lands moots certain issues in these appeals.

We agree with petitioners that the first, second, fourth and fifth matters are “new matters” raised in a response brief within the meaning of OAR 661-010-0039.<sup>1</sup> *See D.S.*

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<sup>1</sup>OAR 661-010-0039 provides:

“A reply brief may not be filed unless permission is obtained from the Board. \* \* \* A reply brief shall be confined solely to new matters raised in the respondent's brief. \* \* \*”

1 *Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 527 (1999) (new matters include  
2 arguments that an assignment of error should fail, regardless of its merits, based on facts or  
3 law not implicated by the merits of the assignment). Arguments that an assignment of error  
4 should be denied because the issues raised under that assignment have been waived, or are  
5 precluded, or have been mooted by other decisions, are typically “new matters” that entitle  
6 petitioners to file a reply brief. The third alleged “new matter” is primarily a response to the  
7 merits of several assignments of error: the city disputes petitioners’ premise that the  
8 amendments affecting 27<sup>th</sup> Street are sufficient to trigger review for compliance with the  
9 goals and the administrative rules.

10 The proposed reply brief is allowed, except for the material in section C at Reply  
11 Brief 4-6.

12 **FACTS**

13 Petitioners own property along 27<sup>th</sup> Street, a two-lane road that runs most of the  
14 length of the City of Bend north-south from Butler Market Road to Knott Road. Land on  
15 either side of 27<sup>th</sup> Street is designated and zoned primarily for residential use, with several  
16 small commercial areas.

17 In 1976, the city and county adopted the BAP to govern the areas within the City of  
18 Bend urban growth boundary (UGB) and urban reserve areas outside the UGB. Under the  
19 transportation element of the BAP, city arterials were designated either “principal arterials”  
20 or “urban minor arterials.” The only principal arterials designated in the BAP were Highway  
21 97, Highway 20, and the Bend Parkway. The BAP designated 27<sup>th</sup> Street a minor arterial.  
22 The street standards in effect under the BAP required that minor arterials have a minimum  
23 80-foot right of way and a pavement width of 40-52 feet.

24 In 1994, the city and county began a comprehensive update to the BAP, including the  
25 transportation element. Over several years the Bend Urban Area Planning Commission and  
26 the city and county conducted various public workshops and work sessions to develop draft

1 amendments to the BAP. In May 1998, the process had culminated in the production of a  
2 recommended version of the revised BAP. The city council then conducted work sessions to  
3 review the May 1998 draft, which resulted in various final revisions.

4 The final version of the transportation element in the revised BAP adopted a new  
5 road classification scheme, which distinguishes among “expressways” (the Bend Parkway),  
6 “principal arterials” (Highways 20 and 97), “major arterials,” “minor arterials,” “arterial-  
7 frontage roads,” “major collectors” and so on. Under the revised transportation element, 27<sup>th</sup>  
8 Street north of Reed Market Road is designated a major arterial. Major arterials are required  
9 to have a minimum 100-foot right of way and may have up to five vehicle lanes. The revised  
10 BAP also included revisions to the housing and economic elements. On November 18, 1998,  
11 the city council adopted the revised BAP and associated maps. The county board of  
12 commissioners followed suit on November 25, 1998.

13 This appeal followed.

#### 14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners argue that respondents erred in adopting comprehensive amendments to  
16 the transportation element of the revised BAP without complying with relevant requirements  
17 of the Transportation Planning Rule (TPR) at OAR chapter, 660, division 12.

18 Petitioners explain that OAR 660-012-0055(2) requires that respondents adopt a  
19 Transportation System Plan (TSP) for the Bend Urban Area by May 8, 1997. However, that  
20 deadline came and went and, by the date of the decisions challenged in this case, neither  
21 respondent had adopted a TSP. Petitioners argue that, under these circumstances, the city  
22 and county cannot adopt a comprehensive rewrite of the transportation element without  
23 complying with the rule’s requirements for adoption of a TSP. Petitioners note that the  
24 revised transportation element addresses many of the same topics as a TSP but does not

1 satisfy the requirements for a TSP, as set out at OAR 660-012-0020(2).<sup>2</sup> Petitioners cite to  
2 *Dept. of Transportation v. Douglas County*, 157 Or App 18, 967 P2d 901 (1998), for the

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<sup>2</sup>OAR 660-012-0020(2) provides in relevant part that a TSP shall include the following elements:

- “(a) A determination of transportation needs as provided in OAR 660-012-0030;
- “(b) A road plan for a system of arterials and collectors and standards for the layout of local streets and other important non-collector street connections. \* \* \* The standards for the layout of local streets shall address:
  - “(A) Extensions of existing streets;
  - “(B) Connections to existing or planned streets, including arterials and collectors; and
  - “(C) Connections to neighborhood destinations.
- “(c) A public transportation plan which:
  - “(A) Describes public transportation services for the transportation disadvantaged and identifies service inadequacies;
  - “(B) Describes intercity bus and passenger rail service and identifies the location of terminals;
  - “(C) For areas within an urban growth boundary which have public transit service, identifies existing and planned transit trunk routes, exclusive transit ways, terminals and major transfer stations, major transit stops, and park-and-ride stations. \* \* \*
  - “(D) For areas within an urban area containing a population greater than 25,000 persons, not currently served by transit, evaluates the feasibility of developing a public transit system at buildout. Where a transit system is determined to be feasible, the plan shall meet the requirements of paragraph (2)(c)(C) of this rule.
- “(d) A bicycle and pedestrian plan for a network of bicycle and pedestrian routes throughout the planning area. \* \* \*;
- “(e) An air, rail, water and pipeline transportation plan \* \* \* ;
- “(f) For areas within an urban area containing a population greater than 25,000 persons a plan for transportation system management and demand management;
- “(g) A parking plan in MPO areas as provided in OAR 660-012-0045(5)(c);
- “(h) Policies and land use regulations for implementing the TSP as provided in OAR 660-0120-045;

1 proposition that, having amended the BAP transportation element, respondents must ensure  
2 that the element satisfies all applicable TPR requirements, including OAR 660-012-0020(2).

3 The city responds that the BAP transportation element is not a TSP and is not  
4 intended to be. The city notes that it is currently in a separate process of preparing a TSP,  
5 and that DLCD has approved deferring completion of the TSP until the city undergoes  
6 periodic review.<sup>3</sup> The city argues that petitioners have not identified anything in the TPR  
7 that prohibits respondents from amending the existing BAP transportation element until a  
8 TSP is adopted, or that requires such amendments to include the required elements of a TSP.  
9 We agree. The only TPR requirements petitioners cite describe the necessary elements of a  
10 TSP and describe the measures necessary to implement a TSP, but the cited requirements do  
11 not prohibit local governments from amending portions of the comprehensive plans affecting  
12 transportation until a TSP is adopted, or require that such amendments include a TSP. We  
13 disagree with petitioners that the amended transportation element must satisfy the  
14 requirements for a TSP, where the element does not constitute and is not intended to be a  
15 TSP.

16 *Dept. of Transportation v. Douglas County* is not to the contrary. In that case, the  
17 county adopted a comprehensive update to its existing TSP in order to bring it into  
18 compliance with applicable TPR requirements. However, there, the petitioners alleged that  
19 the county failed to update portions of its existing TSP to conform to certain TPR

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“(i) For areas within an urban growth boundary containing a population greater than 2500 persons, a transportation financing program as provided in OAR 660-012-0040.”

<sup>3</sup>The city points to a letter from DLCD to the city, which states:

“In our review of the draft update to the comprehensive plan we and your staff have identified several of the issues that should be deferred until periodic review. These issues include implementation of Statewide Planning Goal 5 resource protection requirements, *completion and implementation of the transportation system plan*, review of industrial land needs, and review/modification of implementing ordinances to insure compliance with the Bend Comprehensive Plan and applicable state law.” Supp Record 75 (emphasis added).

1 requirements. The TPR at OAR 660-012-0055(4)(a) mandated compliance with those  
2 requirements by April 12, 1996, more than a year before the county adopted its decision.  
3 The Court of Appeals concluded that, under those circumstances, the county's failure to  
4 amend portions of its existing TSP to conform to those requirements could constitute  
5 reversible error. 157 Or App at 25. The court's conclusion rested on (1) the mandate of the  
6 rule; (2) the requirement at ORS 197.646(1) that local governments amend their plans and  
7 regulations to implement rules and other state provisions when those provisions become  
8 applicable; and (3) the fact that the county's decision was intended to achieve comprehensive  
9 compliance with the TPR.<sup>4</sup> *Id.* at 23-24.

10 In our view, neither OAR 660-012-0055(2) nor ORS 197.646(1) is independently  
11 determinative of whether, in the context of a particular land use decision, a local government  
12 is required to adopt a TSP. If such were the case, once the deadline for adoption of a TSP  
13 has passed, any amendment to a local government's land use legislation could be challenged  
14 successfully for failure to adopt a TSP, no matter how limited that amendment or how  
15 tangential the decision is to transportation issues. What is determinative, in our view, is  
16 whether the local government's decision is intended to or has the effect of implementing  
17 OAR 660-012-0055(2). In that circumstance, the local government must ensure that its  
18 decision fully implements the requirements applicable to adoption of a TSP.

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<sup>4</sup>ORS 197.646 provides in relevant part:

“(1) A local government shall amend the comprehensive plan and land use regulations to implement new or amended statewide planning goals, Land Conservation and Development Commission administrative rules and land use statutes when such goals, rules or statutes become applicable to the jurisdiction. \* \* \*

“\* \* \* \* \*

“(3) When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. The failure to adopt comprehensive plan and land use regulation amendments required by subsection (1) of this section may be the basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335.”



1 In the present case, it is undisputed that the transportation element does not constitute  
2 and is not intended to be a TSP. The revised transportation element states that it “provides  
3 the policy framework for planning transportation systems of the community while the TSP is  
4 a separate document that further defines transportation strategies, standards and technical  
5 details necessary to guide the implementation of the plan.” Record 142. Under the BAP, the  
6 revised transportation element is a separate, hierarchically-superior document that serves a  
7 different purpose than the TSP. The BAP contemplates that the TSP will guide the  
8 implementation of the policies articulated in the transportation element. In this circumstance,  
9 it is clear that amendment of the transportation element was not intended to and did not have  
10 the effect of adopting a TSP.

11 Consequently, we agree with the city that respondents’ failure to adopt a TSP as  
12 required by OAR 660-012-0055(2) does not preclude them from amending the transportation  
13 element of the BAP, or require that respondents adopt a TSP as part of these decisions.

14 Petitioners make an additional argument under this assignment of error: that the city’s  
15 land use regulations are not adequate to implement the adopted transportation policies, as  
16 required by Statewide Planning Goal 2.<sup>5</sup> Petitioners explain that the amended transportation  
17 element includes a new street functional classification system, but that respondents did not  
18 amend the preexisting standards for implementing the street classification system.  
19 Petitioners note that the existing street improvement standards for minor arterials provide a  
20 minimum pavement width of 40 to 52 feet, while under the amended street classification  
21 system, streets designated major arterials in the revised BAP may have as many as five  
22 vehicle lanes. Record 176, 2547. Petitioners submit that it is impossible to have more than

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<sup>5</sup>Goal 2 provides in relevant part that:

“[Land use comprehensive] plans shall be the basis for specific implementation measures.  
These measures shall be consistent with and adequate to carry out the plans. \* \* \*”

1 three lanes within a pavement width of 40 to 52 feet,<sup>6</sup> and argue therefore that the city’s  
2 existing street improvement standards are inconsistent with the revised transportation  
3 element.

4 The city responds that the street improvement standards at Record 2547 are *minimum*  
5 standards, and do not impose a maximum pavement width. Consequently, the city argues,  
6 the existing street improvement standards are not inconsistent with the street classification  
7 system in the revised transportation element. We agree. Record 2547 is a table that sets  
8 forth “Minimum Street Right of Way and Basic Improvement Standards” for various street  
9 classifications. Nothing in the table indicates that the pavement width standards set forth  
10 therein are maximum standards. Petitioners have not established that the city’s land use  
11 regulations are inadequate to implement the amended transportation element, or any other  
12 basis under this assignment of error to reverse or remand the challenged decision.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 Petitioners argue that the designation of 27<sup>th</sup> Street as a major arterial is inconsistent  
16 with OAR 660-012-0060, Statewide Planning Goals 9 (Economic Development) and 10  
17 (Housing), and pre-existing provisions of the BAP.

18 **A. OAR 660-012-0060**

19 Petitioners argue that designation of 27<sup>th</sup> Street from a minor to a major arterial  
20 “significantly affects” that transportation facility within the meaning of OAR 660-012-0060,  
21 and thus requires respondents to ensure that the major arterial classification is consistent with  
22 allowed and planned land uses along 27<sup>th</sup> Street.<sup>7</sup> OAR 660-012-0060(2)(a) defines when a

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<sup>6</sup>Petitioners do not explain the basis for their understanding that no more than three lanes can be provided within a pavement width of 40 to 52 feet. As discussed below, the city does not dispute petitioners’ understanding, but argues that the minor arterial pavement width standards are minimum, not maximum standards.

<sup>7</sup>OAR 660-012-0060(1) provides:

1 plan amendment “significantly affects” a transportation facility to include changes to the  
2 functional classification of the facility.<sup>8</sup>

3 As discussed above, petitioners contend that the designation of 27<sup>th</sup> Street as a major  
4 arterial will allow up to five vehicle lanes. Combined with similar designations to streets that  
5 connect 27<sup>th</sup> Street to Highways 20 and 97, petitioners argue that the challenged amendments  
6 effect changes that will allow increased levels of traffic and restricted access on 27<sup>th</sup> Street  
7 that will be inconsistent with existing and planned residential and commercial land uses  
8 along that street. Petitioners argue that “[i]n order to adopt the proposed functional

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“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
- “(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.”

<sup>8</sup>OAR 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 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 classification changes, the decision must *assure* that Major Arterial classification is  
2 consistent with the uses already allowed along this corridor and the uses planned for the  
3 future.” Petition for Review 15 (emphasis in original). Petitioners cite to concerns expressed  
4 by opponents below that “the proposed redesignations would create a *de facto* eastside by-  
5 pass, have adverse impacts on the accessibility of existing homes and businesses, damage  
6 connectivity between and within existing neighborhoods and create unsafe conditions for  
7 pedestrians who use or cross 27<sup>th</sup> Street[.]” *Id.* at 14-15. Petitioners argue that nothing in the  
8 decision or the record demonstrates compliance with OAR 660-012-0060.

9           We understand the city to respond that the challenged decisions do not “change the  
10 functional classification” of 27<sup>th</sup> Street within the meaning of OAR 660-012-0060(2)(a),  
11 because only the labels and not the substance of those classifications changed. According to  
12 the city, 27<sup>th</sup> Street retains the same place in the hierarchy of street classifications under the  
13 amended transportation element as it did under the previous version. The city explains that  
14 the pre-amendment transportation element contained three arterial classifications: “principal  
15 arterials,” “arterials,” and “urban minor arterials.” Principal arterials consisted of Highways  
16 20 and 97 and the Bend Expressway. All other arterials were classified as minor arterials;  
17 the category of “arterials” as distinct from “urban minor arterials” was empty. Under the  
18 amended transportation element, the city argues, a new category of “expressway” was  
19 created to encompass the Bend Expressway, and some minor arterials were distributed to the  
20 newly labeled “major arterial” category, which corresponded to the previous “arterial”  
21 classification. However, the city contends, no substantive change occurred with respect to  
22 27<sup>th</sup> Street, because under either version of the transportation element 27<sup>th</sup> Street was  
23 classified in the third hierarchical category.

24           We disagree with the city that the challenged decisions did not “change the functional  
25 classification” of 27<sup>th</sup> Street within the meaning of OAR 660-010-0060(2)(a). As the city  
26 concedes, only parts of 27<sup>th</sup> Street were reclassified as major arterial; the remainder

1 continues to be classified as minor arterial. Clearly, the classification of 27<sup>th</sup> Street under the  
2 amended transportation element was not simply a matter of relabeling categories. That 27<sup>th</sup>  
3 Street remains third in the hierarchy is not dispositive, given that the amendments created a  
4 new first level category. We conclude that one effect of the challenged decision was to  
5 change the functional classification of parts of 27<sup>th</sup> Street. It follows that respondents were  
6 required to demonstrate that the amendments satisfy the requirements of the rule. The  
7 remaining question is what those requirements are.

8 As petitioners note, a plan amendment “significantly affects” a transportation facility,  
9 and therefore triggers the requirements of OAR 660-012-0060, when it “[c]hanges the  
10 functional classification of an existing or planned transportation facility.” If a plan  
11 amendment “significantly affects” a transportation facility, the local government must assure  
12 that “allowed land uses are consistent with the identified function, capacity, and performance  
13 standards” of a facility by one of four enumerated methods. OAR 660-012-0060(1).  
14 Broadly speaking, the four identified methods achieve consistency between allowed land  
15 uses and transportation facilities, either by limiting allowed land uses or designations in ways  
16 that reduce impacts on transportation facilities (OAR 660-012-0060(1)(a) and (c)), or by  
17 amending the TSP to upgrade the transportation facility in a manner that allows it to handle  
18 the increased demands on that facility (OAR 660-012-0060(1)(b) and (d)).

19 We understand petitioners to argue that respondents cannot change the functional  
20 classification of 27<sup>th</sup> Street to a more intensive classification, unless they assure that the  
21 increased traffic allowed by that change does not adversely impact existing and planned land  
22 uses along 27<sup>th</sup> Street. The difficulty with petitioners’ argument is that OAR 660-012-  
23 0060(1) does *not* require that transportation facilities not have adverse impacts on allowed  
24 land uses; rather, the rule requires that allowed land uses be consistent with the functional  
25 classification, etc., of the transportation facility. The local government must assure  
26 consistency between the allowed land uses and the transportation facility by adopting one of

1 the four enumerated options at OAR 660-012-0060(1)(a) to (d). However, none of those  
2 options address the circumstances presented here: a plan amendment that intensifies the  
3 functional classification of a facility in a manner that is, according to petitioners, inconsistent  
4 with adjacent low-intensity land uses, such as the residential and small commercial uses  
5 currently existing and planned along 27<sup>th</sup> Street. Instead, each of the four options is designed  
6 to protect the *transportation facility* from traffic impacts inconsistent with its identified  
7 function, capacity, etc. The focus of OAR 660-012-0060 is not on protecting land uses from  
8 the adverse impacts of transportation facilities.

9           Consequently, we disagree with petitioners to the extent they contend that compliance  
10 with OAR 660-012-0060 requires a demonstration that the new functional classification and  
11 any concomitant increases in traffic and access restriction do not have adverse impacts on  
12 adjacent land uses. Nonetheless, respondents must assure that allowed land uses are  
13 consistent with the identified function, capacity and performance standards of the  
14 transportation facility. The challenged decisions contain no findings directed at OAR 660-  
15 012-0060, and the city does not identify any evidence in the record that demonstrates  
16 compliance with the rule. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or  
17 LUBA 560, 564 (1994) (a local government may demonstrate that a legislative decision is  
18 supported by an adequate factual base and complies with applicable standards by either  
19 adopting findings demonstrating compliance or by providing in its brief argument and  
20 citation to facts in the record demonstrating that the decision complies with applicable  
21 standards).

22           This subassignment of error is sustained, in part.

23           **B.       Goals 9 and 10**

24           Statewide Planning Goals 9 and 10 require, respectively, that the city and county  
25 provide an adequate supply of sites for industrial and commercial uses, and an adequate

1 amount of available buildable land for needed residential use.<sup>9</sup> Petitioners argue that the  
2 change in functional classification of 27<sup>th</sup> Street and concomitant improvements to 27<sup>th</sup> Street  
3 will result in additional right of way acquisition and access limitations that will make it more  
4 difficult to develop lands adjoining 27<sup>th</sup> Street than would otherwise be the case. Petitioners  
5 argue that compliance with Goals 9 and 10 under these circumstances requires a  
6 demonstration that the restrictions resulting from improving 27<sup>th</sup> Street to major arterial  
7 standards will not impact the supply of buildable land or commercial sites.

8 The city responds, first, that the aspects of the amendments affecting 27<sup>th</sup> Street are  
9 not reviewable for compliance with the statewide planning goals, because those amendments  
10 are essentially consistent with the previously acknowledged BAP. The city cites *Byrd v.*  
11 *Stringer*, 295 Or 311, 666 P2d 1332 (1983) and *1000 Friends of Oregon v. Jackson County*,  
12 79 Or App 93, 718 P2d 753 (1986) for the proposition that review by LUBA for goal  
13 compliance is precluded when amendments to an acknowledged plan are consistent with that  
14 plan. However, neither case supports that proposition. *Byrd* does not involve a plan  
15 amendment, and merely articulates the established principle that land use decisions that are  
16 adopted pursuant to acknowledged comprehensive plans and land use regulations are not  
17 subject to goal compliance review. ORS 197.835(8). *1000 Friends of Oregon v. Jackson*  
18 *County* reiterates the equally accepted principle that amendments to acknowledged plans *are*  
19 subject to goal compliance review. *1000 Friends of Oregon v. Jackson County*, 79 Or App at  
20 99. That a challenged plan amendment is consistent with other provisions of an

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<sup>9</sup>Goal 9 requires in relevant part that local governments “[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies[.]”

Goal 10 is “[t]o provide for the housing needs of citizens of the state.” Goal 10 further requires that

“Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.”

1 acknowledged plan may have some bearing on goal compliance review, but it does not  
2 obviate that review. *Id.* at 98.

3 The city responds next that a letter from DLCD recommending approval of the  
4 challenged amendments is conclusive evidence that those amendments comply with  
5 applicable statewide planning goals. The city argues that DLCD is charged with ensuring  
6 that local governments' comprehensive plans and land use regulations are consistent with the  
7 goals, and that DLCD would not have expressed its approval unless it felt that the  
8 amendments complied with the goals. Petitioners reply, and we agree, that the DLCD letter  
9 has no legally cognizable bearing on petitioners' goal compliance challenges.

10 Finally, the city argues that the gravamen of petitioners' challenge is not to the  
11 amended transportation element itself, but rather to the city's separate decision on November  
12 5, 1997, to widen and improve 27<sup>th</sup> Street. The city contends that its November 5, 1997  
13 decision is authorized by and consistent with the old transportation element to widen and  
14 improve 27<sup>th</sup> Street.<sup>10</sup> According to the city, the challenged amendments affect 27<sup>th</sup> Street in  
15 only two ways: relabeling its classification under the functional classification system, and  
16 requiring that the city undertake Transportation Demand Management (TDM) and  
17 Transportation System Management (TSM) analyses before widening the facility. The city  
18 argues that nothing in the challenged decisions authorizes improvements to 27<sup>th</sup> Street. The  
19 decision to widen and improve 27<sup>th</sup> Street, the city contends, was made in the separate  
20 November 5, 1997 decision, more than a year before the city adopted the challenged  
21 amendments. Accordingly, the city submits that petitioners' goal compliance challenge to  
22 the amended transportation element is misdirected, in that those amendments do not  
23 authorize or cause the consequences that petitioners argue will violate Goals 9 and 10.

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<sup>10</sup>The city's November 5, 1997 decision is the subject of a separate appeal, LUBA No. 99-077.



1           Petitioners' argument under this assignment of error is premised on the fact that the  
2 amended transportation element reclassifies relevant portions of 27<sup>th</sup> Street as a major  
3 arterial, and establishes the minimum right of way for major arterials as 100 feet. Under the  
4 previous minor arterial classification, 27<sup>th</sup> Street, as well as all other arterials in the city other  
5 than principal arterials, were subject to a minimum right of way of 80 feet. Petitioners argue  
6 that, because the major arterial classification *requires* a more extensive right of way  
7 acquisition than the minor arterial classification and subjects 27<sup>th</sup> Street to access limitations  
8 that might restrict development, the amended transportation element potentially affects the  
9 amount of buildable land and commercial sites available and thus implicates Goals 9 and 10,  
10 regardless of when or whether the city has actually authorized widening 27<sup>th</sup> Street.

11           The city's response to this particular argument, we understand, is that widening 27<sup>th</sup>  
12 Street in a manner that would require a 100-foot right of way was permissible under the old  
13 standards governing 27<sup>th</sup> Street. That is, the city argues that under the old transportation  
14 element it could have authorized widening 27<sup>th</sup> Street in a manner that requires a right of way  
15 in excess of 80 feet, and in fact did so on November 5, 1997. Be that as it may, we agree  
16 with petitioners that the challenged amendments *require* a right of way on 27<sup>th</sup> Street, and on  
17 the 27<sup>th</sup> Street and Empire Avenue Extensions, that is greater than the minimum right of way  
18 that was required under the old transportation element. Thus, the increase in the minimum  
19 right of way could reduce the amount of buildable land and commercial sites in a manner that  
20 implicates Goals 9 and 10. Petitioners also argue that the challenged decisions result in  
21 access limitations that did not previously exist. The city does not identify any findings or  
22 evidence in the record demonstrating that the supply of buildable land and commercial sites  
23 remains consistent with the requirements of Goals 9 and 10, notwithstanding any reduction in  
24 that supply attributable to the challenged amendments, or responding to petitioners'  
25 arguments concerning access limitations. *See Opus Development Corp. v. City of Eugene,*

1 141 Or App 249, 918 P2d 116 (1996) (affirming LUBA’s decision that the city’s plan  
2 amendment reducing the inventory of industrial and commercial lands violated Goal 9).

3 This subassignment of error is sustained.

4 **C. BAP Policies**

5 Petitioners argue that changing the functional classification for 27<sup>th</sup> Street and streets  
6 potentially linking 27<sup>th</sup> Street to Highways 20 and 97, together with repeal of Transportation  
7 Circulation Policy 32 requiring that 27<sup>th</sup> Street not become part of an eastside bypass system,  
8 is inconsistent with several other goals and policies in both the old and revised BAP. Under  
9 Statewide Planning Goal 2, petitioners argue, the city is obligated to assure that its amended  
10 plan is not in conflict with unamended portions of its acknowledged comprehensive plan and  
11 land use regulations.

12 Petitioners argue, first, that improving 27<sup>th</sup> Street to a five-lane arterial and limiting  
13 access is not compatible with existing and future residential development along that street,  
14 contrary to Residential Compatibility Policies 1 and 4, which provide:

15 “1. Future development and local development standards shall recognize  
16 and respect the character of existing areas.

17 “\* \* \* \* \*

18 “4. Private and public nonresidential uses are necessary and should be  
19 permitted within residential areas for the convenience and safety of the  
20 people. Such facilities shall be compatible with surrounding  
21 developments, and their appearance should enhance the area.” Record  
22 118.

23 Similarly, petitioners also argue that designating 27<sup>th</sup> Street and proposed extensions  
24 as major arterials will eventually result in additional right of way acquisition and limited  
25 access that will adversely affect community livability and business viability along 27<sup>th</sup> Street,  
26 and will encourage drivers to treat the street as a *de facto* eastside bypass. Petitioners  
27 contend that such changes are inconsistent with the following BAP Transportation Goals,  
28 that:

1 “Encourage the development of land use patterns that provide efficient,  
2 compact use of land, and facilitate a reduced number and lengths of trips.

3 “\* \* \* \* \*

4 “Implement transportation improvements to foster economic development and  
5 business vitality.

6 “\* \* \* \* \*

7 “Design and locate transportation facilities to be sensitive to protecting the  
8 livability of the community.” Record 137.

9 As petitioners argue in the third assignment of error, the challenged amendments do  
10 not themselves authorize widening 27<sup>th</sup> Street to five lanes, or authorize any other  
11 acquisitions or improvements. As relevant here, the amendments merely reclassify parts of  
12 27<sup>th</sup> Street and require TDM/TSM analysis before improving or widening the street.  
13 Nonetheless, even if the amendments do not authorize the widening of 27<sup>th</sup> Street, we cannot  
14 say that they do not implicate Residential Compatibility Policies 1 or 4, or the Transportation  
15 Goals. The city does not respond to this subassignment of error, or point to findings or  
16 evidence demonstrating either that the amendments do not implicate the cited policies and  
17 goals, or that those amendments are consistent with the policies and goals.

18 This 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, petitioners assert their belief that nothing in the  
22 challenged amendments approves the widening of 27<sup>th</sup> Street beyond three lanes. However,  
23 in case the county contends otherwise, petitioners take the precaution of arguing that such an  
24 approval violates the applicable standards in effect under both versions of the BAP.

1 The city agrees with petitioners that the challenged decisions do not approve the  
2 widening of 27<sup>th</sup> Street.<sup>11</sup> Given the parties' agreement on this point, there is no reason to  
3 discuss this assignment of error further.

4 The third assignment of error is denied.

#### 5 **FOURTH ASSIGNMENT OF ERROR**

6 As part of the challenged decisions, the city and county adopted a new forecast of  
7 housing needs in the Bend Urban Area. However, petitioners argue that respondents failed to  
8 ensure that needed manufactured housing parks (MHPs) and multiple-family housing units  
9 will be subject only to clear and objective approval standards and conditions, as required by  
10 ORS 197.307(6).

11 ORS 197.307(6) requires that “[a]ny approval standards, special conditions and the  
12 procedures for approval adopted by a local government shall be clear and objective and shall  
13 not have the effect, either in themselves or cumulatively, of discouraging needed housing  
14 through unreasonable cost or delay.” Petitioners explain that the site plan approval process  
15 set out in Bend Code (BC) 10-10.23 applies to all uses in all zones, except for a single-family  
16 unit on one lot. Therefore, petitioners note, site plan approval is required for all MHPs and  
17 all multiple-family dwelling units.

18 In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 157-58  
19 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999), LUBA explained that ORS 197.307(6)  
20 prohibits comprehensive plan amendments that subject needed housing to standards,  
21 conditions or procedures that involve “subjective, value-laden analyses” that are designed to  
22 balance or mitigate impacts of the development on the property being developed or adjoining  
23 properties or the community. In the present case, petitioners contend that the site plan  
24 criteria at BC 10-10.23(8) include criteria that are not “clear and objective” within the

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<sup>11</sup>In the city's view, the decision to widen 27<sup>th</sup> Street occurred on November 5, 1997, as part of a separate decision. The parties may disagree on that point, but that issue is not presented in this appeal.

1 meaning of ORS 197.307(6), because they require impermissibly subjective judgments that  
2 are value-laden or designed to balance impacts.<sup>12</sup> Consequently, petitioners argue, the  
3 decisions must be remanded to require respondents to demonstrate that needed housing can  
4 be provided on land consistent with the requirements of ORS 197.307(6).

5 Petitioners do not contend that the challenged decisions amend the city’s site review  
6 standards, or any standards *at all* affecting housing or needed housing. If we understand  
7 petitioners correctly, they contend that in updating the housing needs forecast in the BAP,  
8 respondents were *also* required to conform all existing standards in the city’s land use  
9 regulations to the requirements of ORS 197.307(6). However, petitioners do not explain the  
10 source of respondents’ obligation to do so as part of these challenged decisions. Petitioners  
11 may be correct that the city’s site plan review criteria contain standards that, if applied to  
12 approve or deny needed housing in a quasi-judicial proceeding, would violate  
13 ORS 197.307(6). However, petitioners have not established the existence of any requirement  
14 that the city conform its existing code standards to ORS 197.307(6) in the course of  
15 amending the BAP.

16 The fourth assignment of error is denied.

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<sup>12</sup>Petitioners cite to the following provisions of BC 10-10.23(8):

“(a) Safety and Privacy. Residential site plans shall be designed to provide a safe living environment, while offering appropriate opportunities for privacy and transitions from public to private spaces.

“\* \* \* \* \*

“(e) Buffering and Screening. Area, structures, and facilities for \* \* \* loading and parking, and similar accessory areas and structures shall be designed, located, buffered, or screened to minimize adverse impacts on the site and neighboring properties.

“(f) Utilities. All utility installations above ground, if such are allowed, shall be located so as to minimize adverse impacts on the site and neighboring properties.

“(g) Public Facilities. The proposed use shall not be an undue burden on public facilities, such as the street, sewer or water systems.”

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the challenged decisions fail to designate sufficient land to meet  
3 the identified need for commercial and industrial land during the relevant planning period,  
4 and thus fail to comply with Statewide Planning Goal 9 (Economic Development)<sup>13</sup> and  
5 OAR 660-009-0025.<sup>14</sup>

6 Petitioners explain that the revised BAP projects the need for commercial and  
7 industrial land in the Bend Urban Area over the current planning period, to the year 2020.  
8 This analysis concludes that there will be a shortfall within the UGB of approximately 124  
9 commercial acres and 235 industrial acres over that period. However, petitioners point out,  
10 the revised BAP takes no action to remedy that shortfall, but simply adopts a policy to  
11 resume study of industrial and commercial land needs in the following year. Because the  
12 revised BAP fails to designate enough land within the UGB to meet the identified need for  
13 commercial and industrial land, petitioners argue, it fails to comply with Goal 9 and  
14 OAR 660-009-0025(2).

15 Petitioners acknowledge that a multi-step process for compliance with Goal 9 might  
16 be permissible as part of periodic review. *Hummel v. LCDC*, 152 Or App 404, 410, 954 P2d  
17 824, *rev den* 327 Or 317 (1998) (periodic review is designed to be sequential and  
18 interactive). However, petitioners argue that post-acknowledgment plan amendments such as

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<sup>13</sup>See n 9.

<sup>14</sup>OAR 660-009-0025 provides in relevant part:

- “(1) \* \* \* The plan shall identify the approximate number and acreage of sites needed to accommodate industrial and commercial uses to implement plan policies. The need for sites should be specified in several broad ‘site categories’, (e.g., light industrial, heavy industrial, commercial office, commercial retail, highway commercial, etc.) combining compatible uses with similar site requirements. \* \* \*
- “(2) \* \* \* Plans shall designate land suitable to meet the site needs identified in section (1) of this rule. The total acreage of land designated in each site category shall at least equal the projected land needs for each category during the 20-year planning period. \* \* \*”

1 those embodied in the decisions challenged here must meet all applicable requirements at the  
2 time they are adopted. *Hummel*, 152 Or App at 411; *see also Dept. of Transportation v.*  
3 *Douglas County*, 157 Or App at 23-24 (having amended portions of the county transportation  
4 system plan to conform to the Transportation Planning Rule, the county cannot retain  
5 existing unamended legislation that is inconsistent with other applicable requirements in the  
6 rule).

7 The city does not respond directly to this assignment of error, other than to argue that  
8 the arguments presented are beyond LUBA’s scope of review. The city argues that the  
9 notices of intent to appeal filed by petitioners limit the scope of the appeals to those portions  
10 of the challenged decisions that relate to 27<sup>th</sup> Street. The first sentence of each notice of  
11 intent to appeal announces that petitioners intend to appeal respondent’s decision adopting  
12 the revised BAP. In addition, the second sentence of each notice states that:

13 “In particular, petitioners appeal all portions of the [revised BAP] and maps  
14 relating to 27<sup>th</sup> Street including but not limited to its redesignation from a  
15 minor arterial to a major arterial.” Notice of Intent to Appeal (LUBA No. 98-  
16 210, 98-215) 1.

17 The city cites no authority for the proposition that petitioners can challenge only  
18 those aspects of the decisions that are specifically mentioned in the notices of intent to  
19 appeal, and we are aware of none. Even if such authority existed, the first sentence of each  
20 notice announces petitioners’ intent to appeal the decisions, without restriction. The above-  
21 quoted language merely describes petitioners’ particular interest, but in no way suggests an  
22 intent to forego challenges to other aspects of the decisions.

23 On the merits, we disagree with petitioners that the city and county were required to  
24 comply with OAR 660-009-0025(2) in the context of these decisions. OAR 660-009-0010(2)  
25 describes when and how the Goal 9 rule, including OAR 660-009-0025(2), applies to local  
26 governments:

27 “Comprehensive plans and land use regulations shall be reviewed and  
28 amended as necessary to comply with this rule at the time of each periodic

1 review of the plan \* \* \*. Jurisdictions which have received a periodic review  
2 notice from the Department (pursuant to OAR 660-019-0050) prior to the  
3 effective date of this rule shall comply with this rule at their next periodic  
4 review unless otherwise directed by the Commission during their first periodic  
5 review.”

6 Thus, unlike the rule at issue in *Dept. of Transportation v. Douglas County*, the Goal  
7 9 rule does not require that local governments review and amend their comprehensive plans  
8 to comply with the rule outside of the context of periodic review. Instead, the Goal 9 rule  
9 requires review and amendment to conform to the rule within the context of periodic review,  
10 and thus the requirements of OAR 660-009-0025(1) and (2) need not be complied with  
11 outside that context.<sup>15</sup>

12 Petitioners may be arguing that, having elected to voluntarily achieve compliance  
13 with the Goal 9 rule outside of periodic review by adopting an updated needs analysis  
14 pursuant to OAR 660-009-0025(1), the city and county are required to complete the process  
15 and designate lands to meet those needs over the 20-year planning period under OAR 660-  
16 009-0025(2). However, it is not clear that the update to the BAP needs analysis was intended  
17 to comply with the Goal 9 rule or OAR 660-009-0025(1). The updated figures in the BAP  
18 merely total the number of acres of industrial and commercial lands existing within the UGB  
19 in 1997, and compare that with the number of acres needed by 2020. The revised BAP  
20 figures do not conform to the needs analysis required by OAR 660-009-0025(1), which  
21 requires that the local government identify the need for sites in various “site categories” such  
22 as “light industrial, heavy industrial, commercial office, commercial retail, highway  
23 commercial etc.” The revised BAP contains no identification of “site categories” other than  
24 the broad categories of “industrial” and “commercial” lands. Without identification of  
25 specific site categories under OAR 660-009-0025(1), the city and county cannot comply with

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<sup>15</sup>We do not mean to suggest that either Goal 9 or the Goal 9 rule is inapplicable to post-acknowledgment plan amendments. See *Opus Development Corp.*, 151 Or App 249. However, the Goal 9 rule specifically limits to periodic review the affirmative obligation to review and amend the local government’s comprehensive plan to comply with the rule.



1 OAR 660-009-0025(2) by designating specific lands to meet the identified needs, all of  
2 which suggests that the city and county did not intend to assume the responsibility of  
3 complying with the Goal 9 rule outside of periodic review.

4 Finally, to the extent petitioners argue that Goal 9 itself requires that the city and  
5 county designate enough industrial and commercial lands to meet the identified shortfall over  
6 the 20-year planning period, Goal 9 merely requires that local governments provide for “an  
7 adequate supply of sites” for industrial and commercial uses, without imposing, as the Goal 9  
8 rule does, any requirement that the supply of sites be adequate over a particular planning  
9 horizon. Petitioners do not argue that the shortfall of industrial and commercial sites over the  
10 20-year planning horizon described in the revised BAP indicates that the supply of such sites  
11 is *currently* inadequate.<sup>16</sup> We conclude that petitioners have not established that the city and  
12 county erred in failing to designate additional industrial and commercial lands.

13 The fifth assignment of error is denied.

#### 14 **SIXTH ASSIGNMENT OF ERROR**

15 Petitioners argue that the revised BAP fails to include provisions governing UGB  
16 amendments to implement the requirements of Statewide Planning Goal 14 (Urbanization)  
17 and ORS 197.298, and provisions implementing the requirements of Goal 14 for converting  
18 urbanizable land to urban uses.

##### 19 **A. ORS 197.298**

20 Petitioners explain that ORS 197.298, enacted in 1995, establishes a particular  
21 priority system for including land within a UGB.<sup>17</sup> Petitioners argue that, pursuant to

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<sup>16</sup>We sustained, above, a subassignment of error arguing that the revised BAP had the potential effect of reducing the supply of residential and commercial land in a manner that requires a demonstration that the city’s inventory of buildable lands and commercial sites continues to comply with Goals 9 and 10. However, the issue in this assignment of error is different: whether Goal 9 and the Goal 9 rule require that the city and county designate additional industrial and commercial lands to address predicted *future* deficiencies.

<sup>17</sup>ORS 197.298(1) requires that land may not be included within a UGB except pursuant to four priorities. The first priority is for land designated as urban reserves. The second is for land acknowledged as an exception

1 ORS 197.646(1), respondents are required to amend the BAP to implement ORS 197.298.<sup>18</sup>  
2 However, petitioners note, the revised BAP contains no provisions that implement the  
3 priority scheme at ORS 197.298.

4 It is not clear that ORS 197.646(1) requires “implementation” in the manner  
5 petitioners contend, by amending the BAP to reflect the priority scheme set forth in  
6 ORS 197.298. ORS 197.298 does not expressly impose a planning obligation on local  
7 governments; instead it simply states criteria that local governments must apply when  
8 amending UGBs. The criteria at ORS 197.298 are self-executing, regardless of whether a  
9 local government amends its code to reflect those criteria. Nor is it clear that  
10 ORS 197.646(1) applies to such self-executing legislation, as opposed to legislation that  
11 imposes a planning obligation. However, even if ORS 197.646(1) does require respondents  
12 to amend the BAP and land use regulations to implement ORS 197.298, petitioners do not  
13 explain why ORS 197.646(1) compels respondents to do so in *these* challenged decisions.  
14 ORS 197.646(3) provides that “[t]he failure to adopt comprehensive plan and land use  
15 regulation amendments” required by ORS 197.646(1) “may be the basis for initiation of  
16 enforcement action pursuant to ORS 197.319 to 197.335.” Nothing in ORS 197.646 suggests  
17 that a local government’s failure to implement new statutes or rules as required by  
18 ORS 197.646(1) can be enforced by means of an appeal to LUBA. Instead, ORS 197.646(3)  
19 provides the remedy for a local government’s inaction: the new statute or rule becomes  
20 directly applicable to the local government’s land use decision, and subjects the local  
21 government to the enforcement process at ORS 197.319 to 197.335.

22 This subassignment of error is denied.

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area or nonresource land, or non-high-value resource land completely surrounded by exception areas. The third priority is for marginal lands defined under ORS 197.247 (1991 Edition). The fourth priority is for resource land. ORS 197.298(3) sets out various exceptions to these priorities.

<sup>18</sup>See n 4 for the relevant text of ORS 197.646.

1           **B.     Goal 14**

2           Petitioners also argue that the revised BAP deletes various Urbanization Policies that  
3 implemented the Goal 14 requirements for converting urbanizable land to urban uses,  
4 without replacing those policies. Record 2836-37. Petitioners contend that, absent those  
5 policies, the revised BAP contains no provisions whatsoever regulating the conversion of  
6 urbanizable land within the UGB to urban uses, as required by Goal 14.

7           The city does not respond to petitioners' Goal 14 arguments, or identify any findings  
8 or evidence in the record demonstrating that the revised BAP continues to comply with Goal  
9 14 after the deletion of specific provisions implementing that goal. Because Goal 14 will not  
10 apply to any decisions pursuant to the revised BAP, once it is acknowledged as complying  
11 with the statewide planning goals, we agree with petitioners that the city and county are  
12 required to demonstrate in this review proceeding that the revised BAP continues to comply  
13 with Goal 14. Respondents have made no attempt to do so.

14           This subassignment of error is sustained.

15           The sixth assignment of error is sustained, in part.

16           The challenged decisions are remanded.