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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF EUGENE, DEAN BISHOP,  
LINDA SWISHER and 1000 FRIENDS  
OF OREGON,  
*Petitioners,*

vs.

CITY OF EUGENE, LANE COUNTY,  
CITY OF SPRINGFIELD  
and LANE COUNTY TRANSIT DISTRICT,  
*Respondents,*

and

OREGON DEPARTMENT  
OF TRANSPORTATION,  
*Intervenor-Respondent.*

LUBA Nos. 2002-105, 2002-112, 2002-113,  
2002-114, 2002-115, and 2002-116

FINAL OPINION  
AND ORDER

Appeal from City of Eugene, Lane County, City of Springfield and Lane County  
Transit District.

Mary Kyle McCurdy, and Michael K. Collmeyer, Portland, filed the petition for  
review and argued on behalf of petitioners.

Emily N. Jerome, Stephen L. Vorhes, Catherine D. Susman, Eugene, Kathryn A.  
Lincoln and Bonnie E. Heitsch, Salem, and Meg E. Kieran, Springfield, filed a joint response  
brief. Emily N. Jerome and Kathryn A. Lincoln argued on behalf of respondents and  
intervenor-respondent. With them on the brief was Harrang Long Gary Rudnick, PC;  
Harold, Leahy and Kieran; Arnold Gallagher Saydack Percell Roberts & Potter, PC, and  
Hardy Meyers, Attorney General.

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

REMANDED 03/24/2003

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

**NATURE OF THE DECISION**

Petitioners appeal six decisions that amend three regional plans and one county plan.<sup>1</sup> The appealed decisions concern the proposed West Eugene Parkway (WEP) and related transportation facilities and planning actions.

**MOTION TO INTERVENE**

The Oregon Department of Transportation (ODOT) moves to intervene on the side of respondent.<sup>2</sup> There is no opposition to the motion, and it is allowed.

**FACTS**

The challenged decisions amend the Eugene-Springfield Metropolitan Area General Plan (Metro Plan), The Eugene-Springfield Metropolitan Area Transportation Plan (TransPlan), the West Eugene Wetlands Plan (WEWP), and the Lane County Rural Comprehensive Plan.<sup>3</sup> The previously approved alignment for the WEP (the Approved Project) and the new alignment that is approved by the challenged decisions (the Modified Project) are shown in Figure 2-2 in the record.<sup>4</sup> Figure 2-2 is reproduced below.

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<sup>1</sup> Two of the challenged decisions are ordinances adopted by the City of Eugene. Two of the challenged decisions are ordinances adopted by Lane County. One of the challenged decisions is an ordinance adopted by the City of Springfield. The sixth decision is a resolution adopted by Lane Transit District.

<sup>2</sup> Because respondents and intervenor-respondent jointly filed a single brief, we refer to them collectively as respondents.

<sup>3</sup> The Metro Plan is a regional comprehensive plan for the metropolitan area that is made up of the City of Eugene, the City of Springfield and the nearby urban portion of Lane County. TransPlan is a refinement or sub-plan of the Metro Plan. TransPlan is a “transportation systems plan” (TSP), as that term is defined in the Department of Land Conservation and Development’s transportation planning rule (TPR). OAR 660-012-0005(32). The WEWP is also a refinement plan of the Metro Plan. The Lane County Rural Comprehensive Plan applies to those rural areas of the county that lie outside the urban growth boundary (UGB). Approximately the westward 1.8 miles of the WEP extend outside the UGB. The Lane County Rural Comprehensive Plan was amended to adopt statewide planning goal exceptions to Goals 3 (Agricultural Lands), 4 (Forest Lands), 11 (Public Facilities and Services) and 14 (Urbanization) for that portion of the WEP.

<sup>4</sup> In this decision we refer to the Approved Project and the Modified Project. In the decision and findings the Approved Project is sometimes referred to as the Approved Design and the Modified Project is frequently referred to as the Modified Design.



\* Unit 1 Part A extends eastward of Seneca Road only for signage, intersection improvements, and one-way couplet.

**Figure 2-2**  
**Project Location Map**  
**WEST EUGENE PARKWAY**  
 West 11th Avenue-Garfield Street  
 Florence-Eugene Highway

**LEGEND:**

- Phase 1 = Unit 1 Part A
- Phase 2 = Unit 2 Part A
- Phase 3 = Unit 2 Part B
- Phase 4 = Unit 1 Part B

1960 Approved Design  
 Modified Project  
 Wetland Mitigation Sites



1           **A.     Approved Project**

2           The WEP is a proposed east-west limited access arterial that has been contemplated  
3 since the early 1950s. As Figure 2-2 shows, the Approved Project corridor would begin at  
4 the western edge of the City of Eugene central business district (Highway 99 and Garfield  
5 Street) and extend westward approximately 5.8 miles to the rural Oak Hills area  
6 approximately 1.8 miles west of the UGB, which in this area runs along Green Hill Road.  
7 Approximately three miles west of its starting point, after crossing Beltline Highway and  
8 North Danebo Avenue, the Approved Project turns northward and then turns back westward  
9 as it approaches the Central Oregon and Pacific Railroad and then proceeds westward on the  
10 south side of the tracks until it merges with West 11<sup>th</sup> Avenue at a point outside the UGB.  
11 The Approved Project continues along West 11<sup>th</sup> Avenue, crosses to the north side of the  
12 railroad tracks and then merges with Highway 126 (Florence-Eugene Highway).

13           The Approved Project was included in the 1986 TransPlan, which all parties agree is  
14 an acknowledged plan.<sup>5</sup> The Approved Project crosses the UGB at Green Hill Road, and the  
15 portion of the Approved Project west of Greenhill Road is therefore located on rural land.  
16 Some of the rural land crossed by the Approved Project is agricultural land subject to  
17 protection under Goal 3. An exception to Goal 3 was adopted in 1986 to allow the Approved  
18 Project to be sited on these rural agricultural lands.<sup>6</sup>

19           **B.     Modified Project**

20           Following the 1986 action to include the WEP Approved Project and related  
21 transportation improvements in TransPlan, there were additional studies of wetlands in the

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<sup>5</sup> We distinguish between different versions of TransPlan in this opinion by date. As noted, the 1986 TransPlan was adopted with the Approved Project. We refer to the version of TransPlan that was amended by the challenged decisions as the 2001 TransPlan. We refer to TransPlan as amended by the challenged decisions as the Amended TransPlan.

<sup>6</sup> No exceptions to Goals 11 or 14 were adopted in 1986.

1 area that led to the adoption of the WEWP in 1992. Funding constraints and environmental  
2 concerns that arose during preparation of the WEWP led to preparation of a Supplemental  
3 Draft Environmental Impact Statement (SDEIS) in 1997, which called for the Modified  
4 Project. Record Oversized Exhibits (OE) 4647. The differences between the WEP corridors  
5 inside the UGB, east of North Danebo Avenue, are comparatively minor and are not at issue  
6 in this appeal.<sup>7</sup> As the Modified Project proceeds northwest from its intersection with North  
7 Danebo Avenue, instead of proceeding west along the south side of the railroad tracks, the  
8 Modified Project crosses the railroad tracks, and then proceeds west along the *north* side of  
9 the railroad tracks, eventually merging with Highway 126 approximately one mile west of  
10 Green Hill Road. Statewide Planning Goal exceptions to Goals 3, 4, 11 and 14 were adopted  
11 for the portion of the Modified Project that extends past Greenhill road on rural lands outside  
12 the UGB.

13 As petitioners explain, in addition to changing the adopted corridor alignment from  
14 the Approved Project to the Modified Project alignment, the decisions also make other  
15 changes to the 2001 TransPlan:

16 “In addition to the alignment change, amendments to TransPlan were  
17 allegedly required to include all of the WEP on the ‘20-Year Financially-  
18 Constrained Project List,’ in order to comply with, at least, federal law. The  
19 2001 TransPlan had included only the first Phase of the WEP on the  
20 Financially Constrained list: Unit 1, Part A.<sup>[8]</sup> Thus, the 2001 TransPlan was  
21 amended by the decisions at issue in this appeal, in an attempt to move the  
22 remaining portions of the WEP from the ‘future’ or ‘unprogrammed’ list to  
23 the ‘financially-constrained’ or ‘programmed’ list. This caused a number of  
24 other TransPlan projects to be moved from the ‘financially-constrained’ list to  
25 the ‘future’ list.” Petition for Review 6 (record citations omitted).

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<sup>7</sup> As discussed later in this opinion, changes in the planned funding for the entire WEP and some WEP related improvements located in the eastern portion of the proposal are challenged by petitioners. However, petitioners’ dispute concerning the corridor realignment appears to be focused on the portion of the WEP west of North Danebo Avenue.

<sup>8</sup> The first phase of the WEP (Unit 1, Part A) runs west from Seneca Road to Beltline Highway. *See* Figure 2-2. We discuss these TransPlan project funding designations later in this opinion.

1 **FIRST ASSIGNMENT OF ERROR**

2 Statewide Planning Goals 11 and 14 generally limit urban public facilities and urban  
3 uses to urban areas, *i.e.*, those lands inside urban growth boundaries. *1000 Friends of*  
4 *Oregon v. LCDC (Curry County)*, 301 Or 447, 477, 724 P2d 268 (1986); *Parmenter v.*  
5 *Wallowa County*, 21 Or LUBA 490 (1991); *Hammack & Associates, Inc. v. Washington*  
6 *County*, 16 Or LUBA 75, 79-82, *aff'd* 89 Or App 40, 747 P2d 373 (1987). Because the  
7 challenged decisions approve a new corridor for the WEP on rural lands, the challenged  
8 decisions approve exceptions to those goals. Because some of the affected rural lands are  
9 also agricultural lands and forest lands, exceptions to Goals 3 and 4 are also approved to  
10 authorize construction of the WEP across those lands.

11 ORS 197.732(1)(c) and Goal 2, Part II impose four identically worded criteria for  
12 approving a “reasons” exception to one or more statewide planning goals.<sup>9</sup> The TPR  
13 identifies transportation facilities that may be located on rural lands *without* adopting an  
14 exception to “Goals 3, 4, 11, and 14.” OAR 660-012-0065. As noted earlier, the challenged  
15 decision adopts statewide planning goal exceptions and does not rely on

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<sup>9</sup> The statute and rule authorize three kinds of exceptions: (1) exceptions for physically developed lands; (2) exceptions for lands that are irrevocably committed to uses that are not allowed by applicable goals; and (3) exceptions where there are reasons that justify not applying the state policy that is reflected in applicable goals. The four criteria for the third category of exception (referred to as a reasons exception) are set out in Goal 2, Part II(c) as follows:

- “(1) Reasons justify why the state policy embodied in the applicable goals should not apply;
- “(2) Areas which do not require a new exception cannot reasonably accommodate the use;
- “(3) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
- “(4) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.”

1 OAR 660-012-0065.<sup>10</sup> OAR 660-012-0070 sets out particular requirements for exceptions to  
2 authorize transportation improvements on rural lands and elaborates on the requirements of  
3 each of the four criteria in Goal 2, Part II(c).<sup>11</sup>

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<sup>10</sup> We note that it appears that if the WEP were in fact already built along the Approved Project alignment, the Modified Project could have been approved without an exception to Goals 3, 4, 11, and 14 under OAR 660-012-0065(3)(c), which authorizes “[r]ealignment of roads” without an exception to those goals. As defined by OAR 660-012-0065(2)(f), “[r]ealignment” means rebuilding an existing roadway on a new alignment where the new centerline shifts outside the existing right of way \* \* \*.”

<sup>11</sup> OAR 660-012-0070 provides:

- “(1) Transportation facilities and improvements which do not meet the requirements of OAR 660-012-0065 require an exception to be sited on rural lands.
- “(2) Where an exception to Goals 3, 4, 11, or 14 is required, the exception shall be taken pursuant to ORS 197.732(1)(c), Goal 2, OAR Chapter 660, Division 4 and this division.
- “(3) An exception adopted as part of a TSP or refinement plan shall, at a minimum, decide need, mode, function and general location for the proposed facility or improvement:
  - “(a) The general location shall be specified as a corridor within which the proposed facility or improvement is to be located, including the outer limits of the proposed location. Specific sites or areas within the corridor may be excluded from the exception to avoid or lessen likely adverse impacts;
  - “(b) The size, design and capacity of the proposed facility or improvement shall be described generally, but in sufficient detail to allow a general understanding of the likely impacts of the proposed facility or improvement. Measures limiting the size, design or capacity may be specified in the description of the proposed use in order to simplify the analysis of the effects of the proposed use;
  - “(c) The adopted exception shall include a process and standards to guide selection of the precise design and location within the corridor and consistent with the general description of the proposed facility or improvement. For example, where a general location or corridor crosses a river, the exception would specify that a bridge crossing would be built but would defer to project development decisions about precise location and design of the bridge within the selected corridor subject to requirements to minimize impacts on riparian vegetation, habitat values, etc.;
  - “(d) Land use regulations implementing the exception may include standards for specific mitigation measures to offset unavoidable environmental, economic, social or energy impacts of the proposed facility or improvement or to assure compatibility with adjacent uses.

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- “(4) To address Goal 2, Part II(c)(1) the exception shall demonstrate that there is a transportation need identified consistent with the requirements of OAR 660-012-0030 which cannot reasonably be accommodated through one or a combination of the following measures not requiring an exception:
- “(a) Alternative modes of transportation;
  - “(b) Traffic management measures; and
  - “(c) Improvements to existing transportation facilities.
- “(5) To address Goal 2, Part II(c)(2), the exception shall demonstrate that non-exception locations cannot reasonably accommodate the proposed transportation improvement or facility.
- “(6) To determine the reasonableness of alternatives to an exception under sections (4) and (5) of this rule, cost, operational feasibility, economic dislocation and other relevant factors shall be addressed. The thresholds chosen to judge whether an alternative method or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception.
- “(7) To address Goal 2, Part II(c)(3), the exception shall:
- “(a) Compare the economic, social, environmental and energy consequences of the proposed location and other alternative locations requiring exceptions;
  - “(b) Determine whether the net adverse impacts associated with the proposed exception site are significantly more adverse than the net impacts from other locations which would also require an exception. A proposed exception location would fail to meet this requirement only if the affected local government concludes that the impacts associated with it are significantly more adverse than the other identified exception sites;
  - “(c) The evaluation of the consequences of general locations or corridors need not be site-specific, but may be generalized consistent with the requirements of section (3) of this rule.
- “(8) To address Goal 2, Part II(c)(4), the exception shall:
- “(a) Describe the adverse effects that the proposed transportation improvement is likely to have on the surrounding rural lands and land uses, including increased traffic and pressure for nonfarm or highway oriented development on areas made more accessible by the transportation improvement;
  - “(b) Adopt as part of the exception, facility design and land use measures which minimize accessibility of rural lands from the proposed transportation facility or improvement and support continued rural use of surrounding lands.”

1 Under their first assignment of error, petitioners assert seven subassignments of error  
2 in support of their argument that the exceptions that the challenged decisions adopt are  
3 inadequate. We address each of those subassignments of error separately below.

4 Before turning to those subassignments of error we first note and briefly discuss two  
5 problems that have complicated our review of the parties' arguments. First, as petitioners  
6 note, the challenged decision incorporates findings in other documents that address different  
7 but overlapping legal requirements. Different persons prepared those documents at different  
8 times, and they are not always consistent in their discussion of the proposal and the  
9 applicable criteria. This makes it more difficult to accurately determine *how* the decision  
10 makers believe the relevant criteria apply, particularly the exception criteria, and *why* the  
11 decision makers believe those criteria are satisfied.

12 Relatedly, the parties characterize the challenged decisions differently. In a number  
13 of places the findings emphasize that the 5.8-mile Approved Project alignment (with end  
14 points at Highway 126 on the west and 5<sup>th</sup> and 6<sup>th</sup> Avenues on the east) is already part of  
15 TransPlan. Exceptions to Goals 11 and 14 for the Approved Project were not adopted in  
16 1986. However, under the current understanding of those goals, exceptions to Goals 11 and  
17 14 are required for the rural portion of the WEP. Nevertheless, there is no dispute that the  
18 2001 TransPlan is an acknowledged plan and therefore is deemed to comply with statewide  
19 planning goals. *Byrd v. Stringer*, 295 Or 311, 316-17, 666 P2d 1332 (1983). With relatively  
20 minor, immaterial exceptions, the endpoints and length of the WEP are not changed by the  
21 disputed decision. Respondents take the position that the Modified Project simply shifts part  
22 of the already approved corridor away from the Approved Project corridor on the south side  
23 of the railroad tracks to a new corridor on the north side of the railroad tracks between Terry  
24 Street and the point where the WEP merges with Highway 126. We understand respondents  
25 to contend that it is this realignment of the already approved WEP that must be justified

1 under the statewide planning goals and other relevant approval criteria, not the WEP as a  
2 whole.

3 Conceptually we generally agree with respondents' view of the Approved Project  
4 corridor and the Modified Project corridor. However, as our discussion that follows shows,  
5 it is not always easy to square that view of the disputed amendments with the standards and  
6 criteria of the TPR, because those standards and criteria, for the most part, seem to be written  
7 with entirely new transportation facilities in mind. Nevertheless we generally agree with  
8 respondents that the rules do not require that a decision to modify a highway corridor, which  
9 has already been approved and included in a plan that is acknowledged to comply with the  
10 statewide planning goals, must completely rejustify that already approved highway corridor.  
11 At least where other aspects of the challenged decision are not at issue, only the modification  
12 or amendment of the WEP corridor must be justified, and the WEP itself need not be  
13 rejustified.

14 With the above noted, we turn to petitioners' subassignments of error.

15 **A. Subassignment of Error 1(a) - Need and Function of the WEP**

16 OAR 660-012-0070(3) requires that "[a]n exception adopted as part of a TSP \* \* \*  
17 shall, at a minimum, decide need, mode, function and general location for the proposed  
18 facility or improvement." Petitioners contend that the primary need for the WEP is to  
19 remove regional traffic from West 11<sup>th</sup> Avenue and other nearby streets so that those existing  
20 transportation facilities may more efficiently carry local traffic. Currently, vehicles that seek  
21 to travel from the west side of the City of Eugene to Interstate-5 and points beyond use West  
22 11<sup>th</sup> Avenue and cause severe traffic congestion on that avenue and nearby streets. However,  
23 petitioners contend that the record shows that although the WEP will certainly carry *some*  
24 regional traffic, a *majority* of the trips that are expected on the WEP will have local  
25 destinations. Moreover, petitioners contend that if the WEP is built, it will cause many  
26 intersections in the area to operate at unsatisfactory levels of service.

1 Respondents identify a number of purposes that the WEP was approved in 1986 to  
2 serve and contend that the WEP will continue to serve those purposes with the adopted  
3 changes. More to the point, as respondents correctly note, the “proposed facility or  
4 improvement” for which the challenged decisions must justify an exception is the shift of the  
5 WEP alignment from the south side of the railroad tracks to the north side of the railroad  
6 tracks. According to respondents, the need for that change is to avoid destroying the high  
7 quality wetlands and sensitive habitat south of the railroad.<sup>12</sup> Petitioners do not dispute that  
8 need under this subassignment of error.

9 Petitioners’ arguments under this subassignment of error are directed at the WEP as a  
10 transportation facility, rather than the changes to that already-approved facility that are  
11 approved in the challenged decisions. For that reason, subassignment of error 1(a) is denied.

12 **B. Subassignment of Error 1(b) - Reliance on the 1986 Exceptions to Goals 3**  
13 **and 4**

14 The 1986 exceptions authorize the rural segment of the Approved Project corridor to  
15 cross lands that would otherwise be subject to protection under Goals 3 and 4.<sup>13</sup> Depending  
16 on the ultimate alignment that is selected within that corridor, 2.5 to 4.5 acres of agricultural  
17 land would be required. Petitioners first question whether the 1986 exception, which refers  
18 to “Street and Highway Project No. 107” applies to the same corridor that is occupied by the

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<sup>12</sup> Respondents point to the following findings:

“The identified transportation need is for the [WEP] project rather than the Modified Project alignment. The need for the Modified Project alignment is environmental, to reduce significant adverse impacts to high value wetlands and to threatened and endangered plant and animal species from those that would occur through construction of the Approved [Project]. \* \* \* Record 855 (underscoring in original).

<sup>13</sup> There is some confusion about whether that corridor included any forest land subject to Goal 4. The 1986 exception purported to include an exception to Goal 4. The 1986 exception also included an exception to Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces).

1 Approved Project.<sup>14</sup> Even if they are the same, petitioners argue that respondents erred by  
2 relying on the 1986 Goal 3 exception for 2.5 to 4.5 acres that lie *south* of the railroad to  
3 justify a Goal 3, 4, 11 and 14 exceptions for approximately 27 acres of agricultural land that  
4 lies *north* of the railroad.<sup>15</sup>

5 We readily agree with petitioners that the reasons that were used to justify the 1986  
6 exception for 2.5 to 4.5 acres of agricultural and forest land south of the railroad tracks *might*  
7 *not* be adequate to justify a new exception for 27 acres of agricultural and forest land north of  
8 the railroad tracks. For example, the reasons that might justify using a small number of acres  
9 of poor agricultural land for an urban freeway in one location might not justify using a larger  
10 number of acres of high value farm land for that purpose in another location, particularly if  
11 that high value farm land is occupied by important commercial farms that would be divided  
12 and severely impacted by the transportation facility.

13 However, we do not agree with petitioners' apparent position under these  
14 subassignments of error that respondents' references to and apparent reliance on that earlier  
15 exception as one of their reasons for approving the exception that is at issue in this appeal is  
16 legal error. The reasons that were relied on to approve the 1986 exception for fewer acres of

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<sup>14</sup> Respondents contend that Project 107 and the Approved Project corridor are the same. We find it unnecessary to resolve this question.

<sup>15</sup> Petitioners also argue that it is unclear how many acres of agricultural land are included in the exceptions that are challenged in this appeal. The decisions say "approximately 27 acres of resource lands [will be] taken to accommodate the Modified Project[.]" Record 868. Exhibit B to the decisions includes a map on which the Modified Project corridor is drawn. Record 812. On the page that follows that map is a list of "[A]ffected Tax Lots." Record 813. According to petitioners, the total acreage in the listed tax lots is over 232 acres. However, a note at the bottom of Record 813 states that "[g]enerally, only a portion of [a] tax lot is [a]ffected." From all of this we understand that the Modified Project corridor occupies part of the 232 acres that make up the tax lots listed on page 813 of the record and that approximately 27 of those acres will ultimately be occupied by the highway alignment within that corridor.

The table that appears at Record 924-925, which apparently lists the same tax lots that appear at Record 813 along with other close-by properties that may be affected by the WEP, adds to the confusion about how many acres are affected. However, those tax lots, which include over 734 acres, apparently include not only the affected tax lots that will be at least partially included in the Modified Project corridor, but also nearby tax lots that will not be occupied by the Modified Project but may nevertheless be impacted.

1 agricultural land south of the railroad tracks, alone or in conjunction with other reasons,  
2 might not justify an exception for different resource lands north of the railroad tracks. But  
3 that requires that we consider those reasons and whatever other reasons respondents relied on  
4 in the challenged decision to determine whether they are adequate to justify the challenged  
5 exception. Respondents' reference to and reliance on that 1986 exception is not legal error in  
6 and of itself.

7 Subassignment of error 1(b) is denied.

8 **C. Subassignment of Error 1(c) - Lack of Precision in Identifying the Rural**  
9 **Lands Included in the Modified Project**

10 OAR 660-012-0070(3)(a) requires:

11 "The general location shall be specified as a corridor within which the  
12 proposed facility or improvement is to be located, including the outer limits of  
13 the proposed location. \* \* \*" See n 11.

14 Petitioners contend that respondents inadequately identify the location of the Modified  
15 Project corridor. Petitioners argue that the decisions suggest that the corridor may be as  
16 small as 27 acres or as large as 734 acres.

17 We believe it is reasonably clear that the rural portion of the corridor will occupy  
18 approximately 27 acres of agricultural or forest land. See n 15. Respondents point to the  
19 description of the right of way in the decisions.<sup>16</sup> Respondents also note that the location of  
20 the corridor is displayed on figure 1, which appears at Record 899. Although respondents do  
21 not cite it, we note that the Modified Project corridor is also shown on the map that appears  
22 at Record 812. Although some of the maps depicting the Modified Project are conceptual,  
23 when the maps, figures and description noted above are viewed together, we agree with

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<sup>16</sup> The findings include the following description of the Modified Project:

"\* \* \* The Modified Project would have four 12-foot wide travel lanes with 8-foot wide shoulders on the outside of the lanes. A center median would vary in width from 12 to 14 feet. See Road way Profiles at Figure 2-3 of the SDEIS." Record 854.

1 respondents that they are not so imprecise as to constitute a violation of  
2 OAR 660-012-0070(3)(a).

3 Subassignment of error 1(c) is denied.

4 **D. Subassignment of Error 1(d) - Description of Rural Lands Surrounding**  
5 **the Modified Project, Evaluation of Adverse Impacts on those Lands and**  
6 **Development of Mitigation Measures**

7 Petitioners' arguments under this subassignment of error do not clearly coincide with  
8 the assignment of error itself. The exact wording of the assignment of error is as follows:

9 "The decisions fail to adequately describe the lands outside the UGB  
10 surrounding the Modified Project, and therefore fail to evaluate its adverse  
11 impacts and analyze adequate mitigation measures." Petition for Review 15.

12 Subassignment of Error 1(d) appears to be directed at the alleged inadequate description of  
13 the lands *surrounding* the Modified Project and a resulting failure to consider and mitigate  
14 impacts of the proposal on surrounding farms. Petitioners cite and quote the Goal 2, Part  
15 II(c)(4) requirement that the proposed WEP be shown to be "compatible with other adjacent  
16 uses or \* \* \* be so rendered through measures designed to reduce adverse impacts." *See* n 9.

17 However, most of the argument in support of that subassignment of error seems to be  
18 focused on what petitioners argue are inadequate characterizations in the decision of the  
19 agricultural lands that are to be included in the Modified Project rather than the lands  
20 surrounding the Modified Project.<sup>17</sup> Any inadequacies in respondents' description of the  
21 farm land that will actually be *included* in the Modified Project corridor would seem to be  
22 relevant to the Goal 2, Part II(c)(1) requirement that "[r]easons justify why the state policy  
23 embodied in the applicable goals should not apply" to the land for which the exception is  
24 approved, but largely irrelevant to the requirement set forth in Goal 2, Part II(c)(4) that

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<sup>17</sup> Petitioners particularly take the findings to task for referring to some affected farms as "hobby farms" and to some farm lands as "vacant." Petitioners also criticize the findings for noting that some of the agricultural lands that will be included in the Modified Project are presently designated in the WEWP for wetland protection or wetland restoration and presumably would not be used for agricultural purposes in any event.

1 impacts on adjacent uses be reduced to a compatible level. Nevertheless, this subassignment  
2 of error does include a challenge to the adequacy and accuracy of the description in the  
3 findings of the agricultural lands that surround the Modified Project alignment. The  
4 subassignment of error also includes a contention that respondents therefore inadequately  
5 addressed the Goal 2, Part II(c)(4) requirement that the Modified Project be compatible with  
6 adjacent uses or be rendered compatible “through measures designed to reduce adverse  
7 impacts.”

8 The closest respondents come to responding to this subassignment of error is an  
9 argument that “[p]etitioners dwell improperly on details concerning the productive status of  
10 adjacent agricultural land.” Respondents’ Brief 16. The rest of respondents’ response to this  
11 subassignment of error contends that alternative alignments to the Approved Project, and the  
12 economic, social, environmental and energy (ESEE) consequences of those alternatives were  
13 adequately considered. Those arguments are not responsive to the subassignment of error.

14 Although we might be able to locate an adequate response to this subassignment of  
15 error from the many pages of findings, we decline to do so without assistance from  
16 respondents. On remand respondents must provide an adequate explanation for why the  
17 Modified Project will be compatible with adjacent agricultural uses or what “measures  
18 designed to reduce adverse impacts” will render it compatible with those adjacent uses. We  
19 agree with petitioners that an adequate description of the nature of those agricultural uses  
20 followed by a discussion of how they might be impacted by construction of the Modified  
21 Project would seem to be a logical way to proceed in providing that explanation.

22 Subassignment of error 1(d) is sustained.

23 **E. Subassignment of Error 1(e) - Accessibility of Rural Lands as a Result of**  
24 **the Modified Project**

25 OAR 660-012-0070(8) requires that respondents describe the adverse effects of the  
26 increased accessibility to rural lands that an urban transportation facility may provide,  
27 including “traffic and pressure for nonfarm or highway oriented development.” See n 11.

1 The rule also requires that respondents adopt “measures which minimize [such]  
2 accessibility[.]” Petitioners argue the findings supporting the decision do not adequately  
3 address these requirements of OAR 660-012-0070(8).

4 To the extent this subassignment of error includes an argument that the rural lands  
5 adjacent to the Modified Project will be adversely affected by increased accessibility in ways  
6 that they would not have been affected by the Approved Project, and that respondents erred  
7 by failing to address that impact, we agree with petitioners for the reasons explained in our  
8 disposition of subassignment of error 1(d). However, for the most part this subassignment of  
9 error and the bulk of the argument in support of the subassignment of error is directed at  
10 increased accessibility that will result from the WEP rather than the change to the WEP that  
11 the Modified Project represents. Respondents argue that “[t]he Modified Project will not  
12 cause any more pressure for development than the Approved [Project] would have.”  
13 Respondents’ Brief 19. Since the end point and beginning point of the WEP Approved  
14 Project and the Modified Project are nearly identical, and the facility itself is not materially  
15 different, respondents appear to be correct on this point.

16 We agree with respondents that petitioners’ arguments under this subassignment of  
17 error are essentially a collateral challenge to the WEP, which is already approved and  
18 included in TransPlan. Such a challenge is not cognizable in this appeal of the Modified  
19 Project. The Modified Project does not authorize a 5.8-mile expressway from the  
20 intersection of the WEP with Highway 126 on the west to Garfield Street on the east. The  
21 expressway has already been approved and any concerns that it may provide an unwanted  
22 stimulus for development of rural lands by providing better access to and through the cities  
23 of Eugene and Springfield either were considered when the WEP was approved in 1986 or  
24 should have been considered at that time. Approval of the modification of the WEP that the  
25 Modified Project represents does not require that respondents consider accessibility impacts  
26 that the unamended WEP will have on affected rural lands.

1 To the extent the subassignment of error challenges respondents' failure to address  
2 accessibility impacts from the Modified Project that are indistinguishable from accessibility  
3 impacts that would result from the Approved Project, subassignment of error 1(e) is denied.  
4 Subassignment of error 1(e) is sustained to the limited extent that it assigns error to  
5 respondents' failure to consider and address accessibility impacts that can be attributed to the  
6 change in the Approved Project that the challenged decisions make by approving the  
7 Modified Project corridor.

8 **F. Subassignment of Error 1(f) - Adequacy of the Goal 11 and Goal 14**  
9 **Exceptions**

10 Petitioners argue that respondents improperly rely on the 1986 statewide planning  
11 goal exception for the WEP to support the challenged decisions. As we have already noted,  
12 the 1986 exception for the WEP did not include exceptions to Goals 11 and 14. Petitioners  
13 acknowledge that the challenged decisions adopt exceptions to Goals 11 and 14, but they  
14 dispute the adequacy of those exceptions.

15 Respondents cite discussion in the findings regarding factors that may operate to limit  
16 the urbanizing effect of the WEP on the rural area surrounding the western part of the WEP  
17 where it crosses the UGB and travels west to where it merges with Highway 126.<sup>18</sup>  
18 Respondents also argue that "[t]he Modified Project will create no more pressure for urban  
19 uses than the Approved [Project] would have." Respondents' Brief 22.

20 As we have already explained in our discussion of subassignment of error 1(e), the  
21 endpoints of the WEP are not materially affected by the challenged decisions. Petitioners do  
22 not argue that the Modified Project has urbanizing or public facility impacts that are different

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<sup>18</sup> The findings at 2760-2761 acknowledge the role that the WEP, together with other factors, may play in making these rural areas and the nearby city of Veneta more attractive for development. However the findings note that the rural portion of WEP is a limited access freeway and that the only rural access to the WEP will be at its juncture with Highway 126 and at the intersection with Green Hill Road where the WEP crosses the UGB. WEP intersections at Highway 126 and Green Hill Road are already approved under the Approved Project. The findings also note that a number of the adjoining rural properties are government owned and apparently are not likely to be developed.

1 from or go beyond the urbanizing and public facility impacts of the Approved Project. Given  
2 that access to the rural portion of the WEP at Highway 126 and Green Hill road is essentially  
3 the same under either alternative, it is difficult to see how the Modified Project could have  
4 different impacts.

5 Subassignment of error 1(f) is denied.

6 **G. Subassignment of Error 1(g) - Alternative Modes of Transportation,**  
7 **Traffic Management Measures, and Improvements to Existing**  
8 **Transportation Facilities**

9 As previously noted, Goal 2, Part II(c)(1) requires that statewide planning goal  
10 exceptions to allow the Modified Project must establish that “[r]easons justify why the state  
11 policy embodied in the applicable goals should not apply.” See n 9. The TPR includes more  
12 specific guidance on how respondents must address Goal 2, Part II(c)(1) when approving  
13 transportation improvements on rural land. OAR 660-012-0070(4). See n 11. OAR 660-  
14 012-0070(4) requires that respondents show that there is a transportation need that cannot  
15 reasonably be met by: (1) alternative modes of transportation; (2) traffic management  
16 measures; or (3) improving existing transportation facilities. The rule dictates that these  
17 three alternatives be considered alone and in combination. Petitioners contend that  
18 respondents inadequately address the requirements of OAR 660-012-0070(4).

19 Respondents argue:

20 “\* \* \* Once again, Petitioners fail to acknowledge that the amendment is  
21 merely the relocation of a portion of a transportation corridor that has already  
22 been analyzed. It would be impossible to substitute other modes of  
23 transportation or TDM measures for that one section of the Parkway. The  
24 Modified Project is crucial to complete the entire Parkway, from inside the  
25 city limits of Eugene to the junction with Highway 126 to the west.”  
26 Respondents’ Brief 23.

27 Although we tend to agree with respondent, the position they take here appears to be  
28 inconsistent with the position they take under the fourth assignment of error below where  
29 petitioners challenge the adequacy of respondents’ decision regarding the very similar  
30 Oregon Highway Plan requirements to (1) take steps to protect the existing highway system,

1 (2) improve existing transportation facilities and (3) add capacity to existing transportation  
2 facilities before constructing new transportation facilities. We conclude under the fourth  
3 assignment of error that respondents' findings are adequate to address these Oregon Highway  
4 Plan requirements. Those findings are also adequate to address the requirements of OAR  
5 660-012-0070(4).

6 Subassignment of error 1(g) is denied.

7 The first assignment of error is sustained, in part, for the reasons explained in our  
8 discussion of subassignments of error 1(d) and 1(e). Otherwise, the first assignment of error  
9 is denied.

## 10 **SECOND ASSIGNMENT OF ERROR**

11 Transportation system plans must evaluate transportation system alternatives under  
12 OAR 660-012-0035. OAR 660-012-0040 requires that TSPs include a transportation  
13 financing program. Under this assignment of error, petitioners argue that respondents  
14 inadequately address several subsections of these rules. We consider each subassignment of  
15 error separately below.

### 16 **A. Subassignment of Error 2(a) - OAR 660-012-0035(1)**

17 OAR 660-012-0035(1) provides:

18 “The TSP shall be based upon evaluation of potential impacts of system  
19 alternatives that can reasonably be expected to meet the identified  
20 transportation needs in a safe manner and at a reasonable cost with available  
21 technology. The following shall be evaluated as components of system  
22 alternatives:

23 “(a) Improvements to existing facilities or services;

24 “(b) New facilities and services, including different modes or combinations  
25 of modes that could reasonably meet identified transportation needs;

26 “(c) Transportation system management measures;

27 “(d) Demand management measures; and

1           “(e) A no-build system alternative required by the National Environmental  
2           Policy Act of 1969 or other laws.”

3           Petitioners essentially rely on their argument under subassignment of error 1(g) to  
4           support this subassignment of error. For the same reasons explained in our discussion of that  
5           subassignment of error and the fourth assignment of error below, we reject this  
6           subassignment of error.

7           Subassignment of error 2(a) is denied.

8           **B. Subassignment of Error 2(b) - OAR 660-012-0035(3)(a) and**  
9           **660-012-0040(5)**

10           As noted earlier in this opinion, Goals 11 and 14 generally require that urban public  
11           facilities and urban development be located inside UGBs. OAR 660-012-0035(3)(a) and  
12           660-012-0040(5) appear to have been adopted to reinforce that state policy.<sup>19</sup> Petitioners  
13           argue:

14           “As described in detail in [subassignment of error 1(e)], the decisions  
15           acknowledge that the WEP, an urban facility, will induce and accelerate  
16           growth in Veneta and the rural areas around the WEP, and there are no facility  
17           designs or land use measures adopted that are claimed to minimize this. The  
18           burden is on the local governments to show that the WEP ‘shall support urban  
19           and rural development by providing types and levels of transportation  
20           facilities and services appropriate to serve the land uses identified in the  
21           acknowledged comprehensive plan.’ OAR 660-012-0035(3)[.] However, the  
22           local governments have not addressed this section of the TPR, nor have they  
23           analyzed the amount or rate of growth that will be induced and its impact on  
24           traffic on the WEP. Therefore, this burden has not been met.” Petition for  
25           Review 28.

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<sup>19</sup> OAR 660-012-0035(3)(a) provides:

“The transportation system shall support urban and rural development by providing types and levels of transportation facilities and services appropriate to serve the land uses identified in the acknowledged comprehensive plan[.]”

OAR 660-012-0040(5) provides:

“The transportation financing program shall provide for phasing of major improvements to encourage infill and redevelopment of urban lands prior to facilities and improvements which would cause premature development of urbanizable lands or conversion of rural lands to urban uses.”

1           Once again, petitioners’ arguments are directed at the WEP as a whole rather than the  
2 amendments to that already-approved facility that is adopted by the challenged decision. We  
3 do not understand petitioners to allege that the Modified Project allows urban development  
4 or urban facilities that are materially different from those that are already approved through  
5 the Approved Project. Rather, petitioners’ concerns are directed at the potential urbanizing  
6 effect of the WEP itself. Even if the WEP was approved and included in TransPlan, the  
7 Metro Plan and the Lane County Rural Comprehensive Plan without Goal 11 and Goal 14  
8 exceptions and without adequate consideration of the potential for the WEP to urbanize  
9 nearby rural areas, that does not alter the fact that the WEP was approved in 1986 and is now  
10 included in those acknowledged plans. Respondents were not required in the appealed  
11 decisions to address that question in approving the Modified Project.

12           Subassignment of error 2(b) is denied.

13           **C.       Subassignment of Error 2(c) - OAR 660-012-0035(3)(e) and (5)**

14           OAR 660-012-0035(3)(e) provides:

15           “The transportation system shall avoid principal reliance on any one mode of  
16 transportation and shall reduce principal reliance on the automobile. In MPO  
17 areas this shall be accomplished by selecting transportation alternatives which  
18 meet the requirements in [OAR 660-012-0035(4)].”

19           OAR 660-012-0035(4) requires that TSPs for “MPO areas of less than 1 million population,”  
20 such as the Eugene/Springfield MPO, be designed to reduce vehicle miles traveled per capita  
21 (VMT) by 5% within 20 years of the adoption of the TSP, with a further reduction in VMT  
22 of 5% within 30 years. However, OAR 660-012-0035(5) authorizes the Land Conservation  
23 and Development Commission (LCDC) to establish alternatives to the OAR 660-012-  
24 0035(4) standards and LCDC has done so for Eugene/Springfield. Those alternative  
25 performance measures (APMs) and the adopted Year 2015 targets for the measures appear at  
26 Record 3012 and are reproduced in relevant part below:

1

LCDC Approved Alternative Performance Measures	2015 Target
1. Percent Non-Auto Trips	17 % Walk = 10 % Bike = 4% Bus = 3%
2. Percent Transit Mode Share on Congested Corridors	10.0%
3. Priority Bikeway Miles	74 Miles
4. Acres Zoned Nodal Development	2,000 Acres Zoned for Nodal Development
5. Percent of Dwelling Units Built in Nodes	23.3% of New Dwelling Units
6. Percent of New Total Employment in Nodes	45%
7. Internal VMT	3,224,037
8. VMT/Capita	10.9

2 The LCDC order that approves the above APMs includes four “recommendations to provide  
3 guidance to Eugene-Springfield Metropolitan area local governments as they prepare and  
4 implement \* \* \* TransPlan[.]” Record 3082 (underscoring in original deleted).

5 “1. LCOG [Lane Council of Governments] should amend TransPlan to  
6 include a schedule for implementation of the nodal development  
7 strategy. \* \* \*

8 “2. Eugene and Springfield need to specify specific areas for nodal  
9 development within one year. \* \* \*

10 “3. Eugene and Springfield need to adopt Metro Plan designations and  
11 zoning amendments for the specified nodes within two years after  
12 TransPlan adoption. \* \* \*

13 “4. Eugene, Springfield and Lane County need to review plan  
14 amendments and zone changes *outside* nodes to assure that they are  
15 consistent with the nodal strategy. \* \* \*” Record 3082-3083  
16 (emphasis in original; underscoring in original deleted).

17 Petitioners argue that because the challenged decisions amend TransPlan, respondents  
18 are obligated to demonstrate that the amended TransPlan remains consistent with the APMs  
19 and the underlying requirement of OAR 660-012-0035(3)(e) that principal reliance on any  
20 one mode of transportation be avoided and that principle reliance on the automobile be  
21 reduced. As we explain more fully later in this opinion, the challenged decisions adopt

1 changes in the funding status of a number of proposed transportation facilities. The  
2 challenged decisions address these changes and the effect they have on TransPlan’s ability to  
3 meet the above-noted APMs as well as other performance measures that are included in  
4 TransPlan. We understand petitioners to argue the challenged decisions do not adequately  
5 address the impact of the challenged decisions on TransPlan’s compliance with the APMs  
6 and the requirements of ORS 660-012-0065(3)(e) that they were imposed to implement. We  
7 set out below and discuss each of petitioners’ specific arguments before considering whether  
8 those arguments, viewed as a whole, demonstrate error in respondents’ decisions.

9 **1. Bike Trips as a Share of all Trips**

10 Petitioners argue that if bike trips are expressed as a percentage of all trips, that  
11 percentage under the amended TransPlan represents a 1.1% decrease from 2015 trends, as  
12 shown on the table at 782-783. Petitioners misread the table at Record 782-783. The  
13 TransPlan APM target percentage of bike trips for 2015 is 4%. Bike trips represented 3.68%  
14 of all trips in 1995.<sup>20</sup> If 1995 trends were allowed to continue without taking steps to change  
15 them, that percentage would have dropped in 2015 to 3.32%. Under both the 2001 TransPlan  
16 and the Amended TransPlan, the 1995 percentage will drop, but will only drop to 3.64%.  
17 The challenged amendments have no effect on this APM. The expected percentage was  
18 3.64% before the challenged amendments and that expectation is not affected by the  
19 challenged amendments.

20 **2. Increase in Drive Alone Trips**

21 In 1995 drive alone trips represented 43.52% of all trips. Under 2001 TransPlan  
22 those drive alone trips were expected to drop to 39.48% of all trips. With the disputed  
23 amendments, there will still be a reduction in the percentage of drive alone trips, but the  
24 percentage is expected to drop slightly less, to 39.57%.

---

<sup>20</sup> 2001 TransPlan provides 1995 trend figures for each performance measure. Record 2993.

1                                   **3.        Decrease in Walking Trips**

2                    In 1995, walking trips accounted for 8.93% of all trips. Without taking steps to alter  
3 1995 trends, walking trips were expected to decline to 7.92% of all trips in 2015. Under  
4 2001 TransPlan, walking trips were expected to increase to 9.63% (a 7.8% increase over the  
5 1995 percentage). Under the amended TransPlan the percentage of walking trips will  
6 increase to 9.52% (a 6.6% increase over 1995). While the increase under the amended  
7 TransPlan is not as large as under 2001 TransPlan, it still represents an increase in walking  
8 trips.

9                                   **4.        Ratio of Bikeway Miles to Arterial and Collector Miles**

10                   The “ratio” of bikeway miles to miles of arterial and collector roads is apparently  
11 expressed as a percentage. In 1995 the percentage was 44%. Under 2001 TransPlan that  
12 percentage was expected to increase to 82%. Under the amended TransPlan the percentage  
13 increases to 81%.

14                                   **5.        Internal VMT**

15                   Internal VMT in 1995 totaled 2,305,779 or 10.99 VMT/capita. If 1995 trends were  
16 allowed to continue, the 2015 VMT total was expected to increase to 3,508,913 or 11.83  
17 VMT/capita. Under 2001 TransPlan, VMT was expected to increase to 3,224,037 or 10.87  
18 VMT/capita. Under the amended TransPlan, VMT is expected to increase to 3,232,977 or  
19 10.9 VMT/capita.

20                                   **6.        Average Fuel Efficiency**

21                   In 1995, the average fuel efficiency was 19.7 VMT/Gal. If 1995 trends had been  
22 allowed to continue, the 2015 average fuel efficiency was expected to drop to 19.1 VMT/Gal.  
23 Under 2001 TransPlan, average fuel efficiency was expected to drop 18.9 VMT/Gal. Under  
24 the amended TransPlan, average fuel efficiency is expected to drop to 19.2 VMT/Gal.

1                   **7. Conclusion**

2           With the exception of items 1 (Bike Trips as a Share of all Trips) and 5 (Internal  
3 VMT), the six specific arguments that petitioners advance concern performance measures  
4 other than the LCDC-approved APMs. In the case of bike trips (item 1) there is no change in  
5 the improvement in LCDC-approved APM that was expected under the December 2001  
6 TransPlan. For drive alone trips (item 2), walking trips (item 3) and ratio of bikeway miles  
7 to arterial and collector road miles (item 4) the challenged amendments slightly reduce the  
8 improvement in those factors that was expected under the December 2001 TransPlan.  
9 However, despite the reduction, the improvements in these areas that are not subject to  
10 LCDC-approved APMs presumably will further the general OAR 660-012-0035(3)(e)  
11 objective of reducing reliance on the automobile as a mode of transportation.

12           Finally, with respect to item 5 above, the challenged decisions take the position that  
13 the only LCDC-approved APM that is affected by the challenged decisions is “Priority  
14 Bikeway Miles,” APM 3 in the table above.<sup>21</sup> However, that does not appear to be correct.  
15 The challenged decisions appear to result in an expectation that Internal VMT (APM 7) will  
16 increase from 3,224,037 miles to 3,232,977 miles. However, that increase apparently is so  
17 small that it remains consistent with the APM 2015 target for VMT/Per Capita, which is  
18 10.9.<sup>22</sup> Respondents took the position that the comparatively much larger 1.8% increase in  
19 Priority Bikeway Miles (74 miles to 75.3 miles) did not require an amendment of APM 3.<sup>23</sup>  
20 We assume that respondents would take the position that a very small increase in Internal

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<sup>21</sup> The APM numbers (1-8) that we have assigned in the table in the text are our own numbers. The table in TransPlan at Record 3012, which we used to list these alternative performance measures, does not assign numbers. Different identification numbers have been assigned in to these alternative performance measures in TransPlan.

<sup>22</sup> Compare Record 782 with Record 3012.

<sup>23</sup> The challenged decision takes the position that although the amendments increase the miles of priority bikeway miles from 74 miles to 75.3 miles “[t]he LCDC-approved 2015 target and interim benchmarks will remain as approved \* \* \*.” Record 989.

1 VMT (in this case less than .3%) neither violates the APM 7 nor requires that APM 7 be  
2 amended. Given the very small increase, and the fact that the increase is consistent with the  
3 related VMT/Capita APM 8 2015 target without any change, we do not believe this is  
4 reversible error.

5 Subassignment of error 2(c) is denied.

6 **D. Subassignment of Error 2(d) - OAR 660-012-0035(5)(c)**

7 OAR 660-012-0055(1)(a) provides as follows:

8 “If by May 8, 2000, a Metropolitan Planning Organization (MPO) has not  
9 adopted a regional transportation system plan that meets the VMT reduction  
10 standard in 0035(4) and the metropolitan area *does not have an approved*  
11 *alternative standard established pursuant to 0035(5)*, then the cities and  
12 counties within the metropolitan area shall prepare and adopt an integrated  
13 land use and transportation plan as outlined in 0035(5)(c)(A)–(E). Such a plan  
14 shall be prepared in coordination with the MPO and shall be adopted within  
15 three years[.]” (Emphasis added.)

16 OAR 660-012-0035(5)(c) sets out detailed requirements for “an integrated land use and  
17 transportation plan,” and requires that it include the specific elements described at  
18 subsections (A) through (E) of the rule.<sup>24</sup>

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<sup>24</sup> OAR 660-012-0035(5)(c) provides:

“If a plan using an alternative standard, approved pursuant to this rule, is expected to result in an increase in VMT per capita, then the cities and counties in the metropolitan area shall prepare and adopt an integrated land use and transportation plan including the elements listed in (A)–(E) below. Such a plan shall be prepared in coordination with the MPO and shall be adopted within three years of the approval of the alternative standard:

“(A) Changes to land use plan designations, densities, and design standards listed in 0035(2)(a)–(d);

“(B) A transportation demand management plan that includes significant new transportation demand management measures;

“(C) A public transit plan that includes a significant expansion in transit service;

“(D) Policies to review and manage major roadway improvements to ensure that their effects are consistent with achieving the adopted strategy for reduced reliance on the automobile, including policies that provide for the following:

1 We have some question whether OAR 660-012-0055(1)(a) and 660-012-0035(5)(c)  
2 require adoption of the plan described in OAR 660-012-0035(5)(c), since respondents  
3 apparently have an approved alternative VMT reduction standard. However, respondents  
4 apparently read the first of LCDC’s four recommendations set out earlier in this decision to  
5 require it. TransPlan includes the following statement:

6 “Much of [the requirements of OAR 660-012-0035(5)(c)](B), (C) and (D) are  
7 addressed by components of TransPlan. Other elements either are or will be  
8 addressed in subsequent implementation of the nodal development strategy.”  
9 Record 2970.

10 Petitioners argue:

11 “Thus, TransPlan states that the policies called for in [OAR 660-012-  
12 0035(5)(c)(D)] are already in place. If so, these policies should have been  
13 applied to the WEP, which is a ‘major roadway expansion,’ and there should  
14 be findings that these policies were applied and that measures to limit possible  
15 unintended effects have been or will be taken. However, this requirement of  
16 the TPR is not addressed at all in the findings. Therefore, the decisions do not  
17 comply with OAR 660-012-0035(5) and –0055 and should be reversed or  
18 remanded.” Petition for Review 33.

19 Respondents do not respond to this subassignment of error in their brief. At oral  
20 argument intervenor-respondent presented a number of possible responses. OAR 661-010-  
21 0040(1) provides in part that LUBA “shall not consider issues raised for the first time at oral  
22 argument.” We have cited that rule many times in refusing to consider arguments that are  
23 advanced by petitioners for the first time at oral argument. *1000 Friends of Oregon v. Metro*,

- 
- “(i) An assessment of whether improvements would result in development or travel that is inconsistent with what is expected in the plan;
  - “(ii) Consideration of alternative measures to meet transportation needs;
  - “(iii) Adoption of measures to limit possible unintended effects on travel and land use patterns including access management, limitations on subsequent plan amendments, phasing of improvements, etc.

“\* \* \* \* \*

“(E) Plan and ordinance provisions that meet all other applicable requirements of this division.”

1 38 Or LUBA 565, 613 (2000), *aff'd in part and rev'd and remanded in part on other grounds*  
2 174 Or App 406, 26 P3d 151 (2001); *Friends of Yamhill County v. Yamhill County*, 38 Or  
3 LUBA 62, 73 (2000); *Ward v. City of Lake Oswego*, 21 Or LUBA 470, 482 (1991). We  
4 similarly believe that OAR 661-010-0040(1) bars respondents from failing to respond to an  
5 assignment of error in their brief and then attempting to present a response (and thereby  
6 placing that assignment of error at issue) for the first time at oral argument. *See Multi-Light*  
7 *Sign Co. v. City of Portland*, 39 Or LUBA 605, 608 n 5 (2001) (LUBA will not consider a  
8 city argument that petitioner's procedural assignment of error should be denied based on  
9 petitioner's failure to object to the procedural error before the city, where the city's argument  
10 is not included in its brief and is raised for the first time at oral argument).

11 Without a response from respondents, our job in reviewing this subassignment of  
12 error is complicated. Developing an argument for respondents is not appropriate. Our  
13 inquiry is essentially limited to determining whether the assignment of error is lacking in  
14 merit on its face or whether the arguments that petitioners advance in support of the  
15 subassignment of error demonstrate that it is without merit. Petitioners' approach in this  
16 subassignment of error is to fault respondents for not addressing unnamed TransPlan policies  
17 that petitioners contend must nevertheless exist because there is language in the plan that  
18 suggests they do exist. That approach is somewhat unconventional. Nevertheless, without  
19 some assistance from respondents, we cannot say this subassignment of error is lacking in  
20 merit.

21 Subassignment of error 2(d) is sustained.

22 The second assignment of error is sustained in part, for the reasons just explained  
23 under subassignment of error 2(d). Otherwise the second assignment of error is denied.

### 24 **THIRD ASSIGNMENT OF ERROR**

25 Chapter 3 of TransPlan concerns "Plan Implementation." In the words of TransPlan:

1 “Capital Investment Actions [are] transportation system improvement (TSI)  
2 projects for motor vehicles, transit, bicycles, pedestrians, goods movement,  
3 and other modes that require significant capital investment.” Record 2893.

4 TransPlan includes the following explanation of its capital investment action project lists:

5 **“Overview of Capital Investment Action Project Lists**

6 “\* \* \* \* \*

7 **“Project Implementation Phases**

8 “The Roadway and Bicycle project lists are subdivided into Financially  
9 Constrained and Future implementation phases. The Financially Constrained  
10 project lists include **Programmed** and **Unprogrammed** projects.

11 “● **Programmed** (0-5 years) projects have been identified in a local  
12 agency’s CIP, the regional TIP, or the STIP. These projects have  
13 funding sources identified that will enable them to proceed to project  
14 construction.

15 “● **Unprogrammed** (6-20 years) projects may not have specific funding  
16 sources identified, but are expected to be funded with reasonable  
17 assumptions about expected revenues.

18 “Future (beyond 20 years) projects are not planned for construction during the  
19 20-year planning period. These projects are not part of the financially  
20 constrained plan; however, these projects could be implemented earlier if  
21 additional funding is identified.

22 “As described in the Capital Investment Action Implementation Process \* \* \*,  
23 in all cases inclusion of a project in a particular phase does not represent a  
24 commitment to complete the project during that phase. It is expected that  
25 some projects may be accelerated and others postponed due to changing  
26 conditions, funding availability, public input, or more detailed study  
27 performed during programming and budgeting processes.” Record 2898 (bold  
28 type in original).

29 Record 906 is a table that displays the level of service (LOS) consequences of not  
30 building the WEP, building the WEP Approved Project and building the WEP Modified  
31 Project. We note the relevant LOS consequences of each of those courses of action before  
32 turning to petitioners’ arguments under the third assignment of error.

1           **A.     No Build**

2           If neither the Approved Project nor the Modified Project is constructed, and no  
3 additional corrective measures are taken, six intersections with West 11<sup>th</sup> from Seneca on the  
4 east to West Hill on the west would fail by the year 2015 and operate at the unacceptable  
5 level of service (LOS) F.<sup>25</sup> Record 906.

6           **B.     WEP Approved Project**

7           Under 2001 TransPlan, Unit 1 Part A of the WEP Approved Project is included as a  
8 “Programmed,” “Financially Constrained” project. *See* Figure 2-2. Unit 2, Parts A and B  
9 and Unit 1, Part B of the WEP Approved Project are *not* included as “Programmed” or  
10 “Unprogrammed,” “Financially Constrained” projects.<sup>26</sup> The 2001 TransPlan also lists a  
11 major improvement to Beltline Highway between River Road and Delta Highway (referred  
12 to hereafter as the Beltline-River/Delta project) as an “Unprogrammed,” “Financially  
13 Constrained” project.<sup>27</sup>

14           The WEP Approved Project improves the performance of all of the six intersections  
15 mentioned under our discussion of the No Build course of action. Four of those intersections  
16 would, however, still operate at an unacceptable LOS, while two of these six intersections  
17 would operate at an acceptable LOS. The WEP Approved Project creates seven new  
18 intersections. Four of those new intersections are projected to operate at an unacceptable  
19 LOS F. The remaining three new intersections would operate at an acceptable LOS of D or  
20 better. To summarize, under the WEP Approved Project, eight area intersections would  
21 operate at an unacceptable LOS and five area intersections would operate at an acceptable  
22 LOS by 2015.

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<sup>25</sup> LOS D is the adopted minimum acceptable LOS in the area outside central Eugene. Record 2859.

<sup>26</sup> It is not clear to us how those parts of the WEP are classified in the 2001 TransPlan.

<sup>27</sup> The Beltline-River/Delta project is located north of the area shown on Figure 2-2.

1           **C.     WEP Modified Project**

2           Under the amended TransPlan, the WEP Modified Project Unit 2, Parts A and B and  
3 Unit 1, Part B are added as “Unprogrammed,” “Financially Constrained” projects. However,  
4 the Beltline-River/Delta project is removed from the “Unprogrammed,” “Financially  
5 Constrained” project list and added to the “Future” project list.

6           The WEP Modified Project improves the performance of the six intersections  
7 mentioned under the No Build course of action and the seven new WEP intersections. Under  
8 the WEP Modified Project all thirteen existing and new intersections would operate at an  
9 acceptable LOS D or better.<sup>28</sup> However, Beltline-River/Delta would operate at an  
10 unacceptable LOS F by 2015. While the project improvement that will be needed to allow  
11 that roadway to operate at an acceptable LOS remain listed in TransPlan, it is now listed as a  
12 “Future” rather than an “Unprogrammed,” “Financially Constrained” project.

13           **D.     Discussion**

14           Petitioners argue that Beltline-River/Delta will operate at an unacceptable LOS by the  
15 year 2015.<sup>29</sup> Because the challenged decisions move the improvement project that will be  
16 needed to allow Beltline-River/Delta to operate at an acceptable LOS to the “Future”  
17 category, petitioners argue the challenged TransPlan amendments “significantly affect” a  
18 transportation facility, within the meaning of OAR 660-012-0060(2).<sup>30</sup>

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<sup>28</sup> Part of the parties’ disagreement under this assignment of error can be attributed to the different data that they cite in support of their arguments. Petitioners rely on information in the SDEIS that suggests that five of the 13 intersections would operate at unacceptable levels of service under WEP Modified Project. Respondents contend that the table that appears at Record 906 is based on updated information. Petitioners do not establish that it was error for respondents to rely on the table at Record 906.

<sup>29</sup> Petitioners also contend that a section of Beltline north of West 11<sup>th</sup> Avenue will also operate at an unacceptable level of service by the year 2015. However, as respondents point out, that portion of Beltline apparently will operate at acceptable LOS D. Respondents’ Brief 33 n 21.

<sup>30</sup> OAR 660-012-0060(2) provides:

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

1 Respondents' findings take an approach that could only be asserted with a straight  
2 face in the context of a TPR challenge. Respondents' findings take the position that the same  
3 act that petitioners rely on to argue that the challenged decision "significantly affects a  
4 transportation facility" (moving the Beltline-River/Delta project from "Financially  
5 Constrained," "Unprogrammed" project list to "Future" project list) constitutes an  
6 appropriate remedial action under OAR 660-012-0060(1) to address an action that  
7 significantly affects a transportation facility.<sup>31</sup>

8 Our cases involving OAR 660-012-0060(1) and (2) have typically concerned  
9 amendments to comprehensive plans or land use regulations to allow development that will

- 
- “(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.”

<sup>31</sup> OAR 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
- “(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.

1 generate additional traffic. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384  
2 (2001); *ODOT v. City of Klamath Falls*, 39 Or LUBA 641 (2001); *DLCD v. City of*  
3 *Warrenton*, 37 Or LUBA 933 (2000). The relevant question in such cases is whether the  
4 existing and planned for transportation facilities will be able to accommodate that traffic  
5 without resulting in traffic congestion that leads to unacceptable levels of service.  
6 Articulating how OAR 660-012-0060(1) and (2) might apply to decisions such as the ones at  
7 issue in this appeal (which amend a TSP) presents obvious and not so obvious difficulties.  
8 For example, two of the remedial measures identified in OAR 660-012-0060(1) provide for  
9 amending the TSP. Those provisions suggest that while amending a TSP may be an  
10 appropriate *response* under OAR 660-012-0060(1) to a plan amendment that affects a  
11 transportation facility that is identified in the TSP, amendments to the TSP itself are not  
12 necessarily amendments that significantly affect transportation facilities.

13         Rather than attempting an extended discussion of the ambiguous wording and  
14 structure of OAR 660-012-0060(1) and (2), we simply question whether the reference to  
15 “[a]mendments to functional plans, acknowledged comprehensive plans and land use  
16 regulations” in OAR 660-012-0060(1) was intended to include TSP amendments such as the  
17 ones at issue in this appeal. Even if it was, we agree with the first of respondents’ arguments  
18 in their brief under this assignment of error that the challenged amendments do not  
19 significantly affect a transportation facility, and for that reason no remedial action is required  
20 under OAR 660-012-0060(1). We conclude that a TransPlan amendment that *improves* the  
21 performance of 13 intersections over the performance that is expected under the unamended  
22 plan does not “significantly affect[] a transportation facility,” within the meaning of OAR  
23 660-012-0060(2). The facts that (1) a section of roadway identified in the plan will operate  
24 at an unacceptable level of service by the year 2015 and (2) an improvement project that will  
25 correct that result is retained in TransPlan but placed in a less certain funding category does  
26 not affect our conclusion.

1 The third assignment of error is denied.

2 **FOURTH ASSIGNMENT OF ERROR**

3 The Oregon Transportation Plan is the State of Oregon’s TSP. OAR 660-012-  
4 0015(1). The Oregon Highway Plan (OHP) is a transportation facility plan and part of the  
5 Oregon Transportation Plan. All parties agree that TransPlan, a regional TSP, must be  
6 consistent with the OHP. The OHP includes a Major Improvements Policy action item that  
7 establishes a priority system. That priority system is set out below:

8 “Use the following priorities for developing corridor plans, transportation  
9 system plans, the Statewide Transportation Improvement Program, and  
10 project plans to respond to highway needs. Implement higher priority  
11 measures first unless a lower priority measure is clearly more cost-effective or  
12 unless it clearly better supports safety, growth management, or other livability  
13 and economic viability considerations. *Plans must document the findings*  
14 *which support using lower priority measures before higher priority measures.*

15 **“1. Protect the existing system.** The highest priority is to preserve the  
16 functionality of the existing highway system by means such as access  
17 management, local comprehensive plans, transportation demand  
18 management, improved traffic operations, and alternative modes of  
19 transportation.

20 **“2. Improve efficiency and capacity of existing highway facilities.** The  
21 second priority is to make minor improvements to existing highway  
22 facilities such as widening highway shoulders or adding auxiliary  
23 lanes, providing better access for alternative modes (e.g., bike lanes,  
24 sidewalks, bus shelters), extending or connecting local streets, and  
25 making other off-system improvements.

26 **“3. Add capacity to the existing system.** The third priority is to make  
27 major roadway improvements to existing highway facilities such as  
28 adding general purpose lanes and making alignment corrections to  
29 accommodate legal size vehicles.

30 **“4. Add new facilities to the system.** The lowest priority is to add new  
31 transportation facilities such as a new highway or bypass.” OHP 82-  
32 83 (emphasis added; bold type in original).<sup>32</sup>

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<sup>32</sup> Petitioners also cite Metro Transportation Plan Policy F-38 which provides “[t]he City of Eugene will maintain transportation performance and improve safety by improving system efficiency and management before adding capacity to the transportation system under Eugene’s jurisdiction.” Petitioners contend Policy F-

1 As petitioners correctly note, respondents’ findings do not explicitly address the  
2 above Major Improvements Policy priorities as such. Petitioners contend that the record  
3 does not establish that priorities one through three were adequately considered before  
4 jumping to the fourth priority to add the WEP to the “Financially Constrained” project list  
5 and move five other “higher” priority projects to the “Future” project list.<sup>33</sup> Petitioners  
6 contend that when the December 2001 TransPlan was developed, those five projects were  
7 rated as higher priorities and that the challenged amendments to allow the WEP to be funded  
8 and built ahead of these facilities is inconsistent with the OHP Major Improvements Policy  
9 priorities.

10 Petitioners go on to argue that the record does not show that respondents have  
11 adequately considered and adopted land use and transportation management measures  
12 (priority 1), minor improvements to existing facilities (priority 2) or major improvements to  
13 existing facilities (priority 3). To the extent priority 1 through 3 measures were examined,  
14 petitioners contend they were examined in isolation and rejected without sufficient  
15 justification.

16 Respondents rely on findings that were adopted to address the similar requirements of  
17 OAR 660-012-0070(4), *see* n 11, as well as other findings that they identify and discuss in  
18 their brief. We discuss those findings below.

19 With regard to first priority measures, respondents identify findings that discuss  
20 efforts that have been and will be made to encourage other modes of transportation. Record  
21 862-863, 893. Transportation Management and Transportation Demand Measures, and the  
22 potential efficiencies these measures may have for the transportation system are also

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38 is similar to the four step OHP priority system. Because petitioners do not allege that Policy F-38 is any different from the OHP priority system and do not develop an independent argument concerning Policy F-38 we do not consider that policy further.

<sup>33</sup> Those five projects include the Beltline-River/Delta project noted in our discussion of the third assignment of error.

1 discussed at some length in the findings. Record 863-864, 891-893. The findings conclude  
2 that although these measures would improve the efficiency of the transportation system, they  
3 do not satisfy the identified transportation need for improved east-west travel in the project  
4 area and would not eliminate the need for the WEP. Record 863, 893.

5 With regard to second and third priority measures, respondents identify findings that  
6 discuss a variety of improvements to existing facilities that have either been built or  
7 considered. The findings conclude that these improvements are inadequate to satisfy the  
8 regional east-west travel need that the WEP is intended to meet. Those findings include the  
9 following:

10 “Over the past 30 years West 11<sup>th</sup> Avenue has been continually improved and  
11 upgraded. Most recent projects (in the 1990s) include additions of a center  
12 lane and sidewalks in the section from Seneca Road to Garfield Street;  
13 installation of traffic signals at cross streets in the section between Bailey Hill  
14 Road and Garfield Street; road widening (from two to five lanes) and  
15 sidewalks in the section between Beltline Highway and Danebo  
16 Avenue/Willow Creek Road; and road widening (from two to four lanes) plus  
17 center median/turn pockets, bike lanes, sidewalks and a traffic signal (at Terry  
18 Street) in the segment from Danebo Avenue to Terry Street.” Record 857 n  
19 42.

20 “Beginning in the 1960s, the City of Eugene \* \* \* completed several  
21 successive improvements along West 11<sup>th</sup> [Avenue] to improve operating  
22 conditions (such as safety and capacity) and to bring it up to urban level of  
23 service for a major city arterial. In 1993, construction was completed,  
24 widening the section between Garfield Street and Tyinn Street by 8 feet to  
25 accommodate a turn lane and pedestrian access, thus improving signalization  
26 timing, and incorporating access consolidation. These modifications involved  
27 substantial right-of-way acquisition. Although studied, widening the road to  
28 three lanes (each direction) was found to be infeasible because of the amount  
29 of unacceptable right-of-way acquisition.

30 “Additional roadway safety and capacity improvements are planned in the  
31 near future between Danebo Avenue and Green Hill Road. These past and  
32 future improvements have been incorporated into the traffic modeling for the  
33 project that show[s] a need for the WEP.

34 “As the primary link between Highway 126 to the west and the I-5/I-105  
35 corridor to the east and also a principal street serving local travel, West 11<sup>th</sup>

1 Avenue from the Oak Hill area to Garfield Street includes numerous features  
2 that impede efficient expressway travel[.]”<sup>34</sup> Record 907-908.

3 Other existing east-west facilities were also examined to determine whether they could be  
4 improved to provide an alternative to the WEP. Record 865-866, 2732-2736; Record OE  
5 4647 at 2-17 to 2-21.

6 The picture that emerges from the findings cited by respondents is that for several  
7 decades respondents have attempted to resolve the conflict between (1) local traffic on West  
8 11<sup>th</sup> Avenue and nearby roads and (2) east-west regional traffic on those same roadways by  
9 making a series of precisely the kind of transportation demand and management measures  
10 and minor and major improvements to existing facilities that priorities one, two and three call  
11 for. The challenged findings adequately explain that West 11<sup>th</sup> Avenue is failing to  
12 adequately serve local traffic and regional through traffic and will fail more severely if  
13 efforts to address the problem are limited to priority one through three measures.

14 The fourth assignment of error is denied.

15 **FIFTH, SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

16 The fifth, sixth and seventh assignments of error concern two areas. One is a  
17 Significant Vegetation and Wildlife Area, which is a designated Goal 5 (Natural Resources,  
18 Scenic and Historic Areas and Open Spaces) resource site on the Metro Plan. Petition for  
19 Review Appendix B. The second area is a wetland area, part of which was designated  
20 “Restore” and part of which was designated “Protect” in the WEWP. We understand  
21 petitioners to take the position that these areas are the same or that they overlap.

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<sup>34</sup> The findings go on to provide a long list of severe obstacles to making West 11<sup>th</sup> Avenue perform satisfactorily as a major east-west arterial. Those obstacles include numerous existing businesses with direct access, traffic signals and at-grade intersections. The findings question whether there are feasible technical solutions to some of these problem areas and point out that even if technical solutions are possible, many businesses would be impacted or dislocated. The findings conclude that further improvement of West 11<sup>th</sup> Avenue as an alternative to the WEP is not a reasonable alternative.

1           Petitioners allege under these assignments of error that the City of Eugene and Lane  
2 County erroneously changed the designation of these “Protect” and “Restore” wetlands at the  
3 western end of the WEP to Planned Transportation Corridor without demonstrating that the  
4 changed designations comply with Goal 5. Although it is not entirely clear, we understand  
5 petitioners to argue that the area now designated Planned Transportation Corridor crosses (1)  
6 protected Goal 5 significant wetland sites *and* (2) protected Goal 5 significant vegetation and  
7 wildlife areas. We understand petitioners to argue the city and county failed to adopted an  
8 adequate justification for the redesignation of these Goal 5 protected sites.<sup>35</sup>

9           In a number of important respects the parties seem to agree. In particular, all parties  
10 agree that amendments to the WEWP must be consistent with the Metro Plan. The parties  
11 also agree that the WEWP is a “wetland conservation plan” subject to the standards  
12 governing development, amendment, review and approval for such plans set out at OAR  
13 196.678 to 196.684. As far as we can tell, the parties also agree that the status of the WEWP  
14 as a “wetland conservation plan” is only potentially significant with regard to wetlands  
15 resources. We understand respondents to argue that the status of the WEWP as a Division of  
16 State Lands approved “wetland conservation plan” means that the challenged decision to  
17 redesignate the “Protect” and “Restore” wetlands to “Planned Transportation Corridor”  
18 complies with any Goal 5 required protection of those wetlands as a matter of law by virtue

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<sup>35</sup> As relevant, OAR 660-023-0250(3) provides:

Local governments are not required to apply Goal 5 in consideration of a PAPA [post acknowledgment plan amendment] unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

- “(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
- “(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]”

1 of ORS 196.684(8).<sup>36</sup> However, respondents do not contend that the status of the WEWP as  
2 a “wetland conservation plan” would obviate the requirement under Goal 5 to consider  
3 impacts that a WEWP amendment might have on Goal 5 resources *other than wetlands*.<sup>37</sup>

4 With regard to the impact of the challenged decisions on the “Protect” and “Restore”  
5 wetlands, we need not decide whether we agree with respondents that under ORS 196.684(8)  
6 the status of the WEWP as a “wetland conservation plan” resolves these assignments of error  
7 in their favor.<sup>38</sup> With regard to the wetlands, the challenged decisions include findings that  
8 address the ESEE consequences of changing the wetland designation and provide  
9 respondents’ rationale for doing so. Record 842-847. Petitioners make no attempt to  
10 challenge the adequacy of those findings to justify the reduced protection that the affected  
11 wetlands will receive under the challenged decision. For that reason, we reject petitioner’s  
12 arguments under this assignment of error that are based on Goal 5 protection of the wetland  
13 resources.

14 With regard to petitioners’ argument that the WEWP amendment also affects lands  
15 that are also subject to protection under Goal 5 because the Metro Plan designates some part  
16 of the affected area as Significant Vegetation and Wildlife Area, we are presented with what  
17 is essentially a factual dispute. We understand respondents to argue that the challenged

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<sup>36</sup> ORS 196.684(8) provides:

“Wetland conservation plans approved by the Director of the Division of State Lands pursuant to ORS 196.668 to 196.692 shall be deemed to comply with the requirements of any statewide planning goals relating to wetlands, other than estuarine wetlands, for those areas, uses and activities which are regulated by the plan.”

<sup>37</sup> Respondents argue “the local jurisdictions did not rely upon [ORS 196.684(8)] to show Goal 5 compliance with respect to non-wetland Goal 5 resources.” Respondents’ Brief 54.

<sup>38</sup> We understand respondents to make two arguments in this regard. First, they argue that ORS 196.684(8) itself has this effect. In view of the undisputed fact that the Division of State Lands has not yet approved the disputed WEWP amendments, that would seem to be a tenuous argument. Respondents’ second argument is that the WEWP includes criteria that govern wetland classification decisions such as the disputed decisions. Because those criteria are acknowledged to comply with Goal 5 with regard to wetlands, respondents reason that decisions that apply those criteria necessarily comply with Goal 5.

1 decision does not consider whether the WEWP amendment affects a Significant Vegetation  
2 and Wildlife Area that is designated in the Metro Plan, because that area lies *outside* the  
3 boundaries of the WEWP and is not affected by the challenged decision. In support of that  
4 argument, respondents attach maps to their brief. The maps from the WEWP and the Metro  
5 Plan are not sufficiently precise in the relevant delineations to confirm respondents’  
6 argument. Another map, entitled Figure D 3, Metro Plan Update, Natural Assets and  
7 Constraints Working Papers, Significant Vegetation & Wildlife Areas, appears to confirm  
8 respondents’ position. However, petitioners object that respondents have not demonstrated  
9 that the map is a county “enactment” that is subject to official notice by LUBA.<sup>39</sup> *Pearl*  
10 *District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436, 439-440 (2001). Because  
11 respondents do not provide a basis for us to take official notice of that map, we do not do so.  
12 We also note that the map that appears at Record 899 does not seem to be consistent with  
13 that map, leaving the correct resolution of this factual dispute somewhat uncertain in any  
14 event.

15 Because we cannot confirm from the record that the Significant Vegetation and  
16 Wildlife Area that petitioners identify on the Metro Plan is not affected by the WEWP  
17 amendment, a remand is required. On remand, respondents may take appropriate action to  
18 confirm that the designated Significant Vegetation and Wildlife Area designated on the  
19 Metro Plan is unaffected by the WEWP amendments. If that is not the case, and the disputed  
20 WEWP amendments affect the Significant Vegetation and Wildlife Area, respondents must  
21 demonstrate that such action is consistent with Goal 5.

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<sup>39</sup> OEC 202(7), codified at ORS 40.090(7), defines law that is subject to judicial notice to include:

“An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

- 1           The fifth, sixth and seventh assignments of error are sustained in part and denied in
- 2 part.
- 3           The challenged decisions are remanded.