

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 NO TRAM TO OHSU, INC., LARRY J. BECK,  
5 BARBARA HUTCHINSON and  
6 SEAN BRENNAN,  
7 *Petitioners,*

8  
9 and

10  
11 CORBETT-TERWILLIGER LAIR HILL  
12 NEIGHBORHOOD ASSOCIATION,  
13 *Intervenor-Petitioner,*

14  
15 vs.

16  
17 CITY OF PORTLAND,  
18 *Respondent,*

19  
20 and

21  
22 OREGON HEALTH & SCIENCE UNIVERSITY,  
23 *Intervenor-Respondent.*

24  
25 LUBA No. 2002-099

26  
27 FINAL OPINION  
28 AND ORDER

29  
30 Appeal from City of Portland.

31  
32 William C. Cox and Gary P. Shephard, Portland, filed the petition for review and  
33 Gary P. Shepard argued on behalf of petitioners.

34  
35 Daniel Kearns, Portland, represented intervenor-petitioner.

36  
37 Linley Ferris Rees, Portland, Deputy City Attorney, Kathryn S. Beaumont, Senior  
38 Deputy City Attorney, Christen C. White, Portland and Stephen T. Janik, Portland, filed a  
39 joint response brief on behalf of respondent and intervenor-respondent. Linley Ferris Rees,  
40 Kathryn S. Beaumont and Christen C. White argued on behalf of respondent and intervenor-  
41 respondent. With them on the brief was Ball Janik LLP.

42  
43 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
44 participated in the decision.

1  
2  
3  
4

REMANDED

06/10/2003

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**NATURE OF THE DECISION**

Petitioners challenge a city decision that, in pertinent part: (1) adopts the Marquam Hill Plan (2002); (2) adopts the Marquam Hill Design Guidelines; (3) rezones certain property within the Marquam Hill Plan District from residential to central employment or open space; and (4) amends the city zoning code to list suspended cable transportation systems as an example of a “basic utility.”

**FACTS**

The challenged decision is the culmination of a two-year long planning process designed to promote bioscience institutional development at Oregon Health and Science University (OHSU) at its present location on Marquam Hill and at a satellite location in the South Waterfront area of the City of Portland.

Marquam Hill lies to the west of the South Waterfront area, and is approximately 500 feet higher in elevation. Access to OHSU from the South Waterfront is circuitous. In order to retain a close connection between the activities occurring at the two institutional locations, OHSU determined that a commute between those two locations should take no longer than 15-20 minutes. OHSU proposed the concept of a suspended cable transportation system (the tram) to eliminate the inconvenience of an overland commute by vehicle or transit, and to ensure that the commuting time between the two locations would be no longer than 20 minutes.

Petitioners reside between Marquam Hill and the South Waterfront, in an area known as the South Portland Historic District. It covers 49 acres, encompassing 31 city blocks, and includes approximately 200 structures that date from between 1860 and 1926, with most structures dating from between 1880 and 1900. The Historic District is on the National Register of Historic Places. If a tram is built, it is anticipated that the tram cable will be suspended approximately 77 feet above the Historic District over a public right-of-way. It is

1 anticipated that the tram will operate at approximately five-minute intervals for 18 hours a  
2 day.

3 It is also anticipated that the tram will pass over Terwilliger Parkway, a scenic  
4 pedestrian, bicycle and vehicle route that includes vistas listed on the city’s Goal 5 (Natural  
5 Resources, Scenic and Historic Areas, and Open Spaces) inventory. Development within the  
6 parkway is governed by the vision statement, goals and policies contained in the Terwilliger  
7 Parkway Corridor Plan and is subject to the Terwilliger Parkway Design Guidelines adopted  
8 in conjunction with the Terwilliger Parkway Corridor Plan.

### 9 **THE CHALLENGED DECISION**

10 The challenged decision is Ordinance 176742. Among other things, Ordinance  
11 176742 adopts Marquam Hill Plan Volumes 1 and 2. In this opinion, we refer generally to  
12 the multi-volume Marquam Hill Plan as the MHP, but we note here that Volume 1 includes  
13 the main components of the MHP and Volume 2 is the Design Guidelines portion of the  
14 MHP.<sup>1</sup> It is helpful to have a general idea of what the MHP does and does not do before  
15 approaching the parties’ arguments. We therefore list below some of the things the MHP  
16 does and some of the things the MHP does not do. The MHP:

---

<sup>1</sup> The MHP explains the organization of the MHP documents as follows:

“The Marquam Hill Plan is presented in three volumes. Volume 1: City Council Revised Marquam Hill Plan contains the main components of the plan. These include the vision, policies, objectives and action items as well as amendments to the Comprehensive Plan, the Comprehensive Plan Map and Zoning Map, and Title 32 and Title 33 of the Portland City Code. Volume 2: City Council Revised Marquam Hill Design Guidelines contains the design guidelines that will apply in the Marquam Hill Design District. Volume 3: Background Material contains background information about the plan area as well as key reports referenced throughout the planning process. These reports were released over time and are included in the Volume 3 for the reader’s ease of reference. \* \* \*” Record 63 (italics omitted).

As far as we can tell, Ordinance 176742 does not adopt the MHP Background Material (Volume 3). Ordinance 176742 does adopt the MHP (Volume 1), with the exception of the MHP Action Charts, which were adopted by a separate resolution, and the MHP Design Guidelines (Volume 2). Record 64, 353. In this opinion we use the shorthand references Volume 1 for the MHP and Volume 2 for the MHP Design Guidelines.

- 1 • adopts the Marquam Hill Plan, which includes policies that support the  
2 construction of a tram facility linking OHSU with the South  
3 Waterfront;
- 4 • changes zoning designations for 113 acres within the Marquam Hill  
5 Plan District from residential to central employment, and 45 acres  
6 from residential to Open Space (OS);
- 7 • adopts the Marquam Hill Design District where the Marquam Hill  
8 Design Guidelines are applied to support institutional development  
9 within the Marquam Hill setting;
- 10 • provides that the reviews pertaining to tram design and its final  
11 location will be conducted by the city's transportation division;
- 12 • amends the zoning ordinance to include "suspended cable  
13 transportation systems" as a listed example of a "Basic Utility;" and
- 14 • specifies that, within the Marquam Hill Plan District, "suspended  
15 cable transportation systems" are allowed uses on property zoned OS.

16 The challenged decision does not:

- 17 • amend the boundaries of the Historic District;
- 18 • amend the adopted design guidelines for development within the  
19 Historic District;
- 20 • amend previously acknowledged Goal 5 inventories regarding open  
21 spaces, historic sites and scenic resources; or
- 22 • provide for further public review of the tram concept through a quasi-  
23 judicial land use permitting process.

#### 24 **TENTH ASSIGNMENT OF ERROR**

25 The city's initial evidentiary proceedings on the MHP were heard by different bodies,  
26 the planning commission and the design commission. The planning commission conducted  
27 the initial evidentiary hearing on Volume 1 of the MHP. The design commission conducted  
28 the initial evidentiary hearing on Volume 2 of the MHP. The city sent separate notices of  
29 these proposed amendments to the Department of Land Conservation and Development  
30 (DLCD). *See* Record 8818, 8820 (Volume 1); 5270, 5272 (Volume 2).

1           Petitioners argue that the challenged amendments must be remanded to the city  
2 because the city failed to provide notice of those amendments in accordance with ORS  
3 197.610(1). Before we turn to the particulars of petitioners’ arguments, and respondents’  
4 responses to them, we review the requirements of ORS 197.610(1), and the case law  
5 discussing the legal consequences of failures to comply with those statutory requirements.

6           **A.       ORS 197.610(1) and Case Law Interpreting Its Provisions**

7           ORS 197.610(1) provides, in relevant part:

8           “A proposal to amend a local government acknowledged comprehensive plan  
9 or land use regulation or to adopt a new land use regulation shall be forwarded  
10 to [DLCD] at least 45 days before the first evidentiary hearing on adoption.  
11 The proposal forwarded shall contain the text and any supplemental  
12 information that the local government believes is necessary to inform the  
13 director as to the effect of the proposal. The notice shall include the date set  
14 for the first evidentiary hearing. The director shall notify persons who have  
15 requested notice that the proposal is pending.”

16           In *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495  
17 (1993), the Court of Appeals held that a complete failure to provide the notices required by  
18 ORS 197.610(1) was not correctly characterized as a “procedural error.”<sup>2</sup> A number of our  
19 cases following that decision held, as a result, that *any* deviation from the standards set out at  
20 ORS 197.610(1) required remand of the challenged decision. *Oregon City Leasing, Inc. v.*  
21 *Columbia County*, 26 Or LUBA 203, 208 (1993), *aff’d* 126 Or App 314, 868 P2d 1372, *rev*  
22 *den* 318 Or 661 (1994); *DLCD v. City of St. Helens*, 29 Or LUBA 485, 495, *aff’d* 138 Or  
23 App 222, 907 P2d 259 (1995).

24           In *Stallkamp v. King City*, 43 Or LUBA 333, 351-352 (2002), *aff’d* 186 Or App 742,  
25 \_\_ P3d \_\_ (2003), we reconsidered our conclusion in those cases that *any* error in the notice a  
26 local government provides to DLCD pursuant to ORS 197.610(1) necessarily requires

---

<sup>2</sup> The primary significance of this holding is that a procedural error only provides a basis for reversal or remand if the error prejudices the substantial rights of the petitioner who appeals the decision that is affected by the procedural error to LUBA. A non-procedural or substantive error may provide a basis for reversal or remand even if the error did not prejudice the substantial rights of the petitioner appearing before LUBA.

1 remand. We refined that holding recently in *OCAPA v. City of Mosier*, \_\_\_ Or LUBA \_\_\_,  
2 (LUBA No. 2002-166, May 1, 2003), saying

3 “We adhere to our holding in *Stallkamp*, that ‘not every deviation from the  
4 requirements of ORS 197.610(1) or its implementing rule is a ‘substantive’  
5 error that must result in remand.’ However, we now attempt to clarify what  
6 kind or degree of deviation from the requirements of ORS 197.610 warrants  
7 remand, regardless of whether the petitioners before LUBA have  
8 demonstrated that the deviation prejudiced *their* substantial rights.

9 “The Court of Appeals concern in *Oregon City Leasing, Inc.* was with a  
10 potential failure of the larger statutory scheme at ORS 197.610 to 197.625,  
11 which is intended to expand notice and participatory options for DLCDC and a  
12 broader audience that may not receive local notice and instead rely on notice  
13 from DLCDC of proposed post-acknowledgment plan and land use regulation  
14 amendments. The ORS 197.610(1) requirement for secondary notice by  
15 DLCDC and the broader participation that such secondary notice may stimulate  
16 in any given post-acknowledgment proceeding is to ensure that proposed post-  
17 acknowledgment amendment proposals receive appropriate scrutiny to ensure  
18 that the acknowledged comprehensive plan and land use regulations are not  
19 amended in ways that violate the statewide planning goals. The legislature  
20 apparently made this broader notice and potential for participation by DLCDC  
21 and others the *quid pro quo* for ORS 197.625. ORS 197.625 deems post-  
22 acknowledgment amendments to be consistent with the statewide planning  
23 goals as a matter of law, if the amendment is not appealed or is affirmed on  
24 appeal. Viewed in that context, possible prejudice to DLCDC and to the persons  
25 who are entitled to notice from DLCDC under ORS 197.610(1), who may not  
26 be parties in an appeal to LUBA, is also relevant in determining whether a  
27 city’s errors in its ORS 197.610(1) notice to DLCDC warrant remand. In our  
28 view, whether such errors warrant remand depends upon whether the errors  
29 are of the kind or degree that calls into question whether the ORS 197.610 to  
30 197.625 process nevertheless performed its function. If so, whether the  
31 particular petitioners before LUBA can demonstrate prejudice to their  
32 substantial rights is not dispositive.”

33 “In this case, petitioner is located in Salem and asserts that it relies on notices  
34 from DLCDC to make local appearances on behalf of its members. No doubt  
35 there are other organizations that similarly rely on notice of proposed post-  
36 acknowledgment amendments from DLCDC. We simply cannot be sure that  
37 petitioner and other potential petitioners who received erroneous notice of the  
38 date of the local hearing have not been prejudiced by the city’s erroneous  
39 notice of the date of the initial hearing. \* \* \* In short, we cannot be sure that  
40 the city’s error in specifying that the initial evidentiary hearing would be held  
41 on November 7, 2002 [when the initial evidentiary hearing was actually held  
42 on November 6, 2002] was a harmless error that did not result in a failure of  
43 the statutory scheme set out at ORS 197.610 to 197.625. Accordingly, remand

1 is required so that the city may correct the error in its notice to DLCD under  
2 ORS 197.610(1).” Slip op 17-19.

3 *OCAPA v. City of Mosier* stands for the proposition that if LUBA cannot conclude  
4 that (1) petitioner; or (2) any other persons who may be relying on DLCD’s notice to  
5 participate in a post-acknowledgment plan amendment were not prejudiced by a notice error  
6 under ORS 197.610(1), the decision must be remanded so that the notice required by ORS  
7 197.610(1) is provided.

8 **B. Notice of Initial Planning Commission Hearing**

9 Planning staff mailed its first notice of the proposed Volume I amendments to DLCD  
10 pursuant to ORS 197.610(1) on February 15, 2002.<sup>3</sup> The city sent a revised notice to DLCD  
11 on March 7, 2002.<sup>4</sup> Record 8818. The planning commission held its first evidentiary hearing  
12 on the proposed Volume 1 on April 2, 2002. Record 2096. It continued the hearing to April

---

<sup>3</sup> The notice of the planning commission hearing for Volume 1 was provided to DLCD on a DLCD form. It states, in relevant part:

“Date of First Evidentiary Hearing: April 2, 2002 Date of Final Hearing: June 16, 2002  
(tent.)

“Date this proposal was sent or mailed: Feb 15, 2002

“Has this proposal previously been submitted to DLCD? Yes:      No: X

“\* \* \* \* \*

“Briefly Summarize the proposal. Do not use technical terms. Do not write ‘See Attached.’

“**The Marquam Hill Plan:** (1) creates new [policies] to be adopted as part of Portland’s Comprehensive Plan; (2) amends Zoning and Comprehensive Plan Maps to implement policies and goals developed for [the] Marquam Hill Plan area; and (3) creates new land use regulations for institutional land uses to be adopted as part of Portland’s Zoning Code. **Note:** *Amendments are not prepared, but drafts will be forwarded to DLCD regularly once they are available. Newsletter is attached to provide additional project background information.*” Record 8820 (emphasis added).

<sup>4</sup> We cannot confirm what text was actually sent to DLCD because the record does not include a copy of all of the documents that were included in the March 7, 2002 notice. However, respondents allege, and petitioners do not dispute, that the March 7, 2002 notice included the proposed text of Volume 1, and maps depicting the area to be rezoned.

1 9, 2002, and held the record open for additional written evidence until April 22, 2002. The  
2 planning commission adopted its recommendations regarding Volume 1 on May 14, 2002.

3 Petitioners allege that the city's notice to DLCD is inadequate because that initial  
4 notice was received by DLCD less than 45 days prior to the initial evidentiary hearing.<sup>5</sup>  
5 Respondent and intervenor-respondent (respondents) concede that the notice to DLCD of the  
6 initial planning commission hearing that was mailed on February 15, 2002 was probably  
7 received by DLCD less than 45 days before the initial evidentiary hearing on April 2, 2002,  
8 but they argue that the difference between the 45-day notice required by ORS 197.610(1) and  
9 OAR 660-018-0020(1) and the 41 to 43-day notice actually provided by the February 15,  
10 2002 notice is not a material deficiency that requires remand.

11 We do not agree with respondents that adequate notice of the proposed amendments  
12 was provided to DLCD by virtue of the February 15, 2002 notice. OAR 660-018-0020(1)  
13 requires that three copies of the "text" of the proposed amendment be provided to DLCD at  
14 least 45 days prior to the initial evidentiary hearing. OAR 660-018-0020(2) defines "text" to  
15 mean the "specific language being proposed," and that "text" does not mean a "general

---

<sup>5</sup> OAR 660-018-0020 implements ORS 197.610(1) and provides, in relevant part:

"(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be submitted to the Director at least 45 days before the first evidentiary hearing on adoption. The proposal submitted \* \* \* shall contain three copies of the text and any supplemental information the local government believes is necessary to inform the Director as to the effect of the proposal. The submittal shall indicate the date of the final hearing on adoption. In the case of a map change, the proposal must include a map showing the area to be changed as well as the existing and proposed designations. Wherever possible, this map should be on 8-1/2 by 11-inch paper \* \* \*. The Commission urges the local government to submit information that explains the relationship of the proposal to the acknowledged plan and the goals, where applicable.

"(2) For purposes of this rule, 'text' means the specific language being proposed as an addition to or deletion from the acknowledged plan or land use regulations. For purposes of this rule, 'text' does not mean a general description of the proposal or its purpose. In the case of map changes 'text' does not mean a legal description, tax account number, address or other similar general description."

OAR 660-018-0010(7) defines "submitted" as having been "received by [DLCD] at its Salem, Oregon office."

1 description of the proposal or its purpose.” The February 15, 2002 notice expressly did not  
2 provide the “text” of the amendments; the March 7, 2002 notice did. Therefore, the relevant  
3 question is whether the *March 7, 2002* notice was sufficient to perform the functions  
4 required by ORS 197.610(1), even though it was mailed to DLCD only 26 days before the  
5 planning commission’s initial evidentiary hearing on Volume 1.

6 We conclude that the March 7, 2002 notice was sufficient to apprise those parties  
7 who may have relied on notice from DLCD, and would not otherwise receive notice from the  
8 city, of the nature and scope of the matters under review by the planning commission. The  
9 notice sets out when the initial evidentiary hearing would be held and the date the notice was  
10 mailed, explains that notice of the proposed action that was previously sent on February 15,  
11 2002, briefly describes the amendments, and includes copies of the proposed Volume 1 text  
12 and maps. The city’s failure to provide the full 45-day notice does not provide a basis for  
13 reversal or remand. *See Donnell v. Union County*, 40 Or LUBA 455, 459-460 n 2 (2001)  
14 (questioning whether notice provided 19 days before evidentiary hearing necessarily required  
15 remand).

16 **B. Notice of Initial Design Commission Hearing**

17 Planning staff mailed its first notice of Volume 2 to DLCD pursuant to ORS  
18 197.610(1) on April 8, 2002.<sup>6</sup> The city sent a revised notice to DLCD on April 22, 2002.

---

<sup>6</sup> The notice of the initial design commission hearing for the draft Volume 2 states, in relevant part:

“Date of First Evidentiary Hearing: 4/18/02 Date of Final Hearing: \_\_\_\_\_

“Date this proposal was sent or mailed: 4/8/02

“Has this proposal previously been submitted to DLCD? Yes:    No:   x  

“\* \* \* \* \*

“Briefly Summarize the proposal. Do not use technical terms. Do not write ‘See Attached.’

“**Marquam Hill Design District & Design Guidelines:** A new design district, the Marquam Hill Design District, and design guidelines are proposed to address unique aesthetic and

1 Record 5270.<sup>7</sup> Contrary to the representation in the April 8, 2002 and April 26, 2002 notices  
2 to DLCD, the design commission did not hold its first evidentiary hearing on April 18, 2002.  
3 The design commission’s initial hearing on Volume 2 was held on May 16, 2002, a date that  
4 is not mentioned in either the April 8, 2002 or the April 26, 2002 notice. Record 2098. It held  
5 work sessions on May 23, 2002 and June 6, 2002. The design commission’s recommended  
6 design guidelines were forwarded to the city council on June 7, 2002.

7 Petitioners argue that the city’s first notice regarding Volume 2 does not comply with  
8 ORS 197.610(1) because not only was that first notice mailed to DLCD only 10 days prior to  
9 the April 18, 2002 meeting, the first notice that provided *a copy of the proposed text* was not  
10 sent until eight days *after* the initial evidentiary hearing on those amendments was supposed  
11 to be held.

12 Respondents argue that the city was only required to provide one notice of the April  
13 2, 2002 initial evidentiary hearing held by the planning commission. Respondents contend  
14 that the design commission’s consideration of the draft Volume 2 could not occur until the  
15 planning commission adopted its recommendation to approve a design district for Marquam  
16 Hill on May 14, 2002.<sup>8</sup> Therefore, respondents argue, the requirements of ORS 197.610(1)

---

design issues associated with institutional development on Marquam Hill. This new district and guidelines will address visual impacts to Terwilliger Parkway, the skyline of Marquam Hill, and adjacent neighborhoods and open space areas. They will also address the creation of a campus environment that contains high quality formal outdoor areas and a well-organized pedestrian friendly circulation system. **Note:** The guidelines are still being drafted so only our memo to the Design Commission is available at this time. However, we will forward to DLCD updated drafts of the design guidelines as they become available.” Record 5272.

<sup>7</sup> The April 26, 2002 notice of proposed amendment states that the first evidentiary hearing on Volume 2 was held on April 18, 2002, and that the draft would be “presented to the Portland Design Commission for their review and consideration on May 23, 2002.” Record 5270.

<sup>8</sup> Respondents concede that the copy of the notice found at Record 5270 states that the initial design commission hearing was to be held on April 18, 2002. Respondents explain that on April 18, 2002, planning staff briefed the design commission on the status of the proposed draft guidelines, but that there was no public hearing and no testimony or other evidence with respect to those amendments was received by the design commission at that time. Respondents argue that that planner’s statements constituted mere “clerical errors” because the initial evidentiary proceeding was in fact the planning commission’s April 2, 2002 hearing. Respondents’ Brief 42 n 11.

1 were met by the city's February 15, 2002 notice regarding the planning commission's April  
2 2, 2002 hearing, because the initial evidentiary proceeding before the city was held on April  
3 2, 2002. Because the design commission's review was dependent on the planning  
4 commission's decision and occurred after the planning commission adopted its  
5 recommendation, respondents argue that the city's endeavor to be overly cautious and  
6 provide notice to DLCD of both hearings does not constitute error.

7         Neither the February 15, 2002 notice nor the March 7, 2002 notice of the planning  
8 commission's initial evidentiary hearing were sufficient to provide the notice that is required  
9 by ORS 197.610(1) for Volume 2. While Volume 2 was ultimately adopted by the city  
10 council as a volume of the larger MHP, the two volumes are separate planning documents.  
11 The text of Volume 2 was not attached to either the February 15, 2002 notice or the March 7,  
12 2002 notice of the planning commission's initial evidentiary hearing on April 2, 2002, and  
13 the planning commission did not consider Volume 2 at that evidentiary hearing. It was the  
14 design commission that conducted the initial evidentiary hearing on Volume 2 and  
15 recommended to the city council that it be adopted. Therefore, notice of the design  
16 commission's initial May 16, 2002 hearing was required by ORS 197.610(1).

17         We also disagree with respondents that the initial April 8, 2002 notice provided to  
18 DLCD of the initial evidentiary proceeding before the design commission was effective. Like  
19 the February 15, 2002 notice of the April 2, 2002 planning commission hearing, the April 8,  
20 2002 notice failed to include a copy of the proposed text. The first notice that provided the  
21 actual text of Volume 2 was mailed to DLCD on April 26, 2002. *That* notice states that the  
22 initial evidentiary hearing had already been held on April 18, 2002. We have no idea what  
23 DLCD did with the April 26, 2002 notice. If DLCD forwarded that notice to persons who  
24 had requested such notice, a person receiving notice of hearing of the proposed Volume 2  
25 pursuant to ORS 197.610(1) would have no idea whether comments on the proposal would  
26 be considered after April 18, 2002. To the extent a party would be interested in providing

1 evidence, the notice states that the design commission would be considering the amendments  
2 at their “May 23, 2002 meeting.” *See* n 7. It does not provide notice of the initial evidentiary  
3 hearing on May 16, 2002 at all. These errors are of a kind and degree that we cannot say that  
4 persons relying on DLCD’s notice were not prejudiced.

5 Because the city’s notice of initial hearing of Volume 2 was inadequate, we must  
6 remand the challenged decision so that the city can provide the notice that ORS 197.610(1)  
7 requires.<sup>9</sup>

8 The tenth assignment of error is sustained, in part. Although our disposition of the  
9 tenth assignment of error requires that we remand the city’s decision, we nevertheless  
10 address petitioners’ remaining assignments of error, because those assignments of error are  
11 not implicated by the city’s inadequate notice regarding Volume 2. ORS 197.835(11)(a).

12 **EIGHTH ASSIGNMENT OF ERROR**

13 **A. Consistency with Purpose of the OS zone**

14 Petitioners argue that the challenged amendments are inconsistent with PCC  
15 33.835.040, which requires that amendments to the zoning code be “consistent with the  
16 intent or purpose statement for the base zone \* \* \*.” The MHP provides that “suspended  
17 cable transportation systems” are an allowed use in the OS zone in the Marquam Hill Plan  
18 District. According to petitioners, allowing a suspended cable transportation system such as a  
19 tram as an allowed use in the OS zone is inconsistent with PCC 33.100.010, because it is  
20 primarily a transportation system for OHSU rather than a pedestrian connection for users of  
21 the OS-designated areas, as the code contemplates.<sup>10</sup>

---

<sup>9</sup> It is obviously not possible to now give 45 days notice before the first evidentiary hearing on May 16, 2002. However, it is possible to hold another evidentiary hearing and provide another notice of hearing to DLCD 45 days before that hearing is held.

<sup>10</sup> PCC 33.100.010, the OS Zone “Purpose” statement, provides:

1 Respondents emphasize that PCC 33.835.040 requires only that the city conclude that  
2 the proposed amendments are “consistent” with the purpose of the zone, not that the  
3 amendments further one or more of the specific purposes of the zone. Respondents point to  
4 evidence showing that a tram system will protect open space generally by being located  
5 above treed areas, rather than passing through them. Respondents also point to evidence that  
6 a tram would protect fragile and sensitive environmental areas by providing an opportunity  
7 to view those areas without traveling through them. In addition, respondents identify findings  
8 where the city concludes that the tram system will provide linkages between the trails at the  
9 top of the Marquam Hill and the recreational amenities along the Willamette River, such as  
10 the 40-Mile Loop Trail, and the waterfront Greenway Trail as supportive of the purpose of  
11 the OS zone. Finally, respondents contend that the city found that a tram system would not  
12 impede development of trail systems within the open space area below. From the evidence  
13 and findings, respondents contend that it is entirely reasonable for the city to conclude that  
14 the amendments to allow a tram as a permitted use in the Marquam Hill Plan District OS  
15 zone is consistent with the purpose of the OS zone.

16 Petitioners’ argument expresses a basic disagreement with the city’s conclusion that  
17 the proposed tram is consistent with the purpose of the OS zone. We agree with the

---

“The [OS] zone is intended to preserve and enhance public and private open, natural, and improved park and recreational areas identified in the Comprehensive Plan. The areas serve many functions including:

- “• Providing opportunities for outdoor recreation;
- “• Providing contrasts to the built environment;
- “• Preserving scenic qualities;
- “• Protecting sensitive or fragile environmental areas;
- “• Preserving the capacity and water quality of the stormwater drainage system; and
- “• Providing pedestrian and bicycle transportation connections.”

1 respondents that based on the evidence, the city could find that a tram system is consistent  
2 with the OS zone, because it protects sensitive and fragile areas from encroachment while  
3 providing opportunities to view natural areas and because it provides new linkages to  
4 existing trail systems.

5 **B. Appropriateness of Including Suspended Cable Transportation Systems**  
6 **as a “Basic Utility”**

7 PCC 33.920.030(A) sets out the considerations that planning staff uses to determine  
8 the most appropriate use category for different types of uses. The use categories include non-  
9 exclusive sets of examples of uses that are included in each use category. For example, the  
10 examples listed under “Basic Utilities” include “mass transit stops or turn arounds,” “light  
11 rail stations” and “transit centers.” PCC 33.920.400(C). The city’s decision amends the PCC  
12 33.920.400(C) to include “suspended cable transportation systems” to the list of examples of  
13 “Basic Utilities.”

14 In a June 23, 2002 memorandum from the Director of the Office of Planning and  
15 Development Review (Director), the Director summarized the city’s method for determining  
16 the most appropriate general use category for particular uses:

17 “[PCC Chapter 33.920] classifies land uses and activities into 30 general use  
18 categories based on common functional, product or physical characteristics of  
19 the uses within the individual use categories. These use categories are  
20 intended to provide a systematic basis for the assignment of present and future  
21 uses to zones. Depending on the use category, a use is allowed, allowed with  
22 limitations, allowed as a conditional use, or prohibited in a particular zone.”  
23 Record 1126.

24 “Generally, OPDR finds that similar to the characteristics that describe a  
25 Basic Utility use, the described [suspended cable transportation system] is  
26 infrastructure that provides transportation service to the area in which it is  
27 located. While Chapter 33.920 includes use categories for regional  
28 transportation services, only the Basic Utility category identifies  
29 transportation services that provide local service. The [suspended cable  
30 transportation system], as described, is limited to providing local service.”  
31 Record 1127.

1 “Testimony presented at the Planning Commission hearing included  
2 statements that the Basic Utility category is intended to be limited to  
3 underground utilities, such as sewer and water lines, or gas lines, which need  
4 to be located in the area where the service is being provided. OPDR agrees  
5 that this type of infrastructure is included in the Basic Utility use category, but  
6 this category also includes other infrastructure services that need to be located  
7 in the area where the service is provided. This conclusion is supported by the  
8 cited examples in the Basic Utility use category, such as mass transit stops  
9 and turn-arounds, light rail stations, transit centers, and fire and police  
10 stations. (Note that while the term ‘infrastructure’ is not defined in Title 33,  
11 the term is defined in Webster’s Dictionary as[:] ‘The basic facilities,  
12 equipment, and installations needed for the functioning of a system.’ Based on  
13 this definition, a [suspended cable transportation system] qualifies as  
14 ‘infrastructure,’ which must be located in the area where the service is  
15 provided.)

16 “In 2000, OPDR was presented with a similar situation of identifying in which  
17 category a local transportation infrastructure service was located. This service,  
18 the Central City Streetcar line, was proposed to pass through an [OS] zone in  
19 the South Park Blocks. Because the proposed streetcar line was viewed as  
20 *infrastructure* that provided service to the *local* area in which it was located, it  
21 too was classified as a Basic Utility, and reviewed as a Conditional Use in the  
22 OS zone.” Record 1128 (italics in original).

23 “In consideration of the use categories contained in Chapter 33.920 of the  
24 Zoning Code, and the testimony submitted to the Planning Commission,  
25 OPDR considers the described [suspended cable transportation system] to be a  
26 Basic Utility use. This conclusion is consistent with determinations that  
27 OPDR and the Hearings Officer have previously made on other transportation  
28 facilities providing local service. \* \* \*” Record 1129.

29 Petitioners contend that the decision to include trams within the category of “Basic  
30 Utility” is error. According to petitioners, the tram system is more like the uses described in  
31 the “Aviation and Surface Passenger Terminals” use category, because it includes an entire  
32 transportation system. PCC 33.920.510. In the alternative, petitioners argue that the tram,  
33 because it supports OHSU’s institutional uses, is more appropriately classified as an  
34 accessory to those institutional uses in the “Medical Centers” category. PCC 33.920.450.  
35 Petitioners argue that most of the other uses included in the “Basic Utility” category, such as  
36 mass transit stops, light-rail stations and park-and-ride facilities, support the larger  
37 transportation system; they are not entire stand-alone systems like the tram.

1 Respondents point to findings in the city’s decision that adopt by reference the  
2 reasoning set out in the June 23, 2002 memorandum supporting the inclusion of tram  
3 systems. Respondents argue that the city’s choice to include systems such as a tram in the  
4 Basic Utility category is adequately explained in that memorandum and is consistent with  
5 prior determinations that concluded the Central City Streetcar system is a “basic utility.”  
6 Respondents further argue that the city’s determination that suspended cable transportation  
7 systems are most appropriately placed in the “Basic Utility” use category is subject to  
8 deference under ORS 197.829(1).<sup>11</sup>

9 We agree. The June 23, 2002 memorandum explains why the city considers the other  
10 two use categories that petitioners point to, “Aviation and Surface Passenger Terminals” and  
11 accessory uses to the “Medical Centers” category are not as appropriate as the “Basic  
12 Utility” category. It explains that unlike the “Basic Utility” category, which is oriented  
13 toward providing local service to adjacent and nearby properties, “Aviation and Surface  
14 Passenger Terminal” uses are oriented toward serving a regional population. With respect to  
15 the argument that the tram is best classified as an accessory to uses included in the “Medical  
16 Centers” category, the memorandum explains that it is not the relationship between the  
17 suspended cable transportation system and the medical facilities located on Marquam Hill

---

<sup>11</sup> ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 that is most important to determining the proper use classification, but whether a suspended  
2 cable transportation system can exist independently of the main uses included in that  
3 category. Record 1128-1129. Petitioners have not challenged those findings, nor have they  
4 provided a cogent argument why categorizing suspended cable transportation systems as a  
5 “Basic Utility” is inconsistent with the “Basic Utilities” classification.

6 **C. Appropriateness of Allowing “Basic Utilities” as Permitted Rather Than**  
7 **Conditional Uses in the Marquam Hill Plan District OS Zone**

8 “Basic Utilities” are conditional uses in the OS zone. However, the challenged  
9 amendments allow suspended cable transportation systems to be sited in the Marquam Hill  
10 Plan District OS zone as a permitted use rather than a conditional use. According to  
11 petitioners, the decision to permit the tram as a permitted use allows the city and OHSU to  
12 construct a major transportation system through park and open space areas, without  
13 providing any transportation connection to the recreational uses of those areas. Petitioners  
14 argue that allowing a tram to be sited without imposing conditional use review is inconsistent  
15 with the purpose of providing “bicycle and transportation connections” within the OS zone  
16 itself.

17 The city’s decision explains:

18 “[PCC 33.555.140] makes suspended cable transportation systems an allowed  
19 use within the [OS] zoned portions of the Marquam Hill Plan District.  
20 Although categorized in the Basic Utilities Use Category, which are  
21 conditional uses in the OS zone, suspended cable transportation systems are  
22 not subject to a conditional use review as the types of impacts associated with  
23 most basic utilities are not presented by the suspended cable transportation  
24 systems. However, because impacts associated with noise, vibration, and glare  
25 are possible, suspended cable transportation systems will be subject to the  
26 criteria of Chapter 33.262, Off-Site Impacts.” Record 200.

27 Those findings adequately explain why the city believes that the impacts that are  
28 likely to be caused by a suspended cable transportation system are not substantial enough to  
29 warrant conditional use review. Again, petitioners have not demonstrated that the city’s  
30 decision to allow those systems outright is inconsistent with the express language of the

1 comprehensive plan, the purpose of the plan, or the underlying policies that provide the basis  
2 for the plan. ORS 197.829(1).

3 The eighth assignment of error is denied.

4 **FIRST ASSIGNMENT OF ERROR**

5 **A. Regulation of Development Within Historic Districts**

6 Statewide Planning Goal 5 provides, in relevant part that “[l]ocal governments shall  
7 adopt programs that will \*\*\* conserve \* \* \* historic \* \* \* resources for future  
8 generations.”<sup>12</sup> Goal 5 also “encourages” local governments to maintain current historic  
9 resources inventories. Further, the goal requires that local governments follow the  
10 “procedures, standards and definitions” set out in LCDC administrative rules to “determine  
11 significant sites for inventoried resources and develop programs to achieve the goal.”

12 OAR chapter 660, division 23 provides the applicable administrative rules for  
13 addressing Goal 5 resources. OAR 660-023-0200 provides the regulatory structure for  
14 addressing historic resources. OAR 660-023-0200(8) requires that local governments

15 “protect all historic resources of statewide significance through local historic  
16 protection regulations, regardless of whether these resources are ‘designated’  
17 in the local plan.”<sup>13</sup>

18 “‘Historic resources of statewide significance’ include

19 “\* \* \* districts listed in the National Register of Historic Places, and within  
20 approved national register historic districts pursuant to the National Historic  
21 Preservation Act of 1966 (PL 89-665; 16 U.S.C. 470).” OAR 660-023-  
22 0200(1)(d).

23 The South Portland Historic District (Historic District) was placed on the National  
24 Register of Historic Resources in 1998. In conjunction with that designation, the city

---

<sup>12</sup> “Conserve” is defined in the goals as “[t]o manage in a manner [that] avoids wasteful or destructive uses and provides for future availability.” Oregon’s Statewide Planning Goals Definitions 2.

<sup>13</sup> “Protect” as that term is used in OAR chapter 660, division 200 means “to require local government review of applications for demolition, removal, or major exterior alteration of a[n] historic resource.” OAR 660-023-0200(1)(e).

1 imposed a Historic Resource Protection Overlay for the Historic District that requires local  
2 government review of applications for demolition, removal or major exterior alterations of  
3 structures located within the district. *See* Portland City Code (PCC) Chapter 33.445 (Historic  
4 Resource Protection Overlay Zone) and 33.846.060 (setting out historic design review  
5 guidelines). PCC 33.846.060 requires design review for new construction or alteration of  
6 structures within the district when the proposed construction or alteration exceeds certain  
7 thresholds.<sup>14</sup>

8 The city found that, because the challenged decision does not (1) amend the  
9 boundaries of the Historic District, or (2) amend the processes the city adopted to address  
10 development within the Historic District, the challenged decision does not implicate Goal  
11 5.<sup>15</sup>

## 12 **B. Compliance with Goal 5**

13 According to petitioners, compliance with Goal 5 is implicated because the  
14 challenged decision includes amendments to the city’s comprehensive plan and  
15 implementing regulations. *See* ORS 197.175(2)(a) (“each city \* \* \* in this state shall \* \* \*

---

<sup>14</sup> *See, e.g.*, PCC 33.846.060(B)(4)(a) (Type III review for new construction exceeding \$200,000 in 1990 dollars); 33.846.060(B)(4)(e) (Type I review in certain zones for exterior signs less than 150 square feet or exterior alterations not exceeding 500 square feet).

<sup>15</sup> The city’s findings state, in relevant part:

“In 1995[,] the Oregon Legislature amended the manner in which historic resources are reviewed and protected under Goal 5 by (1) introducing owner consent provisions, and (2) making historic resource protection programs voluntary under Goal 5, except for properties on the National Register of Historic Places. The South Portland Historic District was created in 1997 and contains the only historic resources potentially affected by the [MHP]. Because this district was created two years after the Legislature’s amendments to Goal 5, an [economic, social, environment and energy (ESEE)] analysis was not required to create this district and the resources were not protected through a Goal 5 process. However, it should be noted that protections for historic resources are incorporated into the *Zoning Code*. Specifically, Chapters 33.445, Historic Resource Protection Overlay, and 33.846, Historic Reviews, contain regulations and design review procedure to address impacts to historic resources and apply in the South Portland Historic District. The provisions of the [MHP] do not affect the application of these regulations in the South Portland Historic District and the Council finds that the protection afforded these historic resources is unchanged by adoption of the [MHP].” Record 23-24 (italics in original).

1 amend comprehensive plans in compliance with [the] goals”). Petitioners argue that it is not  
2 enough for the city to establish that the challenged decision complies with OAR chapter 660,  
3 division 23, because Goal 5 requires that the city “conserve” historic resources irrespective  
4 of the implementing administrative rules. Petitioners argue that the city failed to establish  
5 that the proposed amendments that promote the development of the tram comply with Goal 5  
6 because, as a result of the policy recommendations adopted in the challenged decision, the  
7 integrity of the district as a whole will be irrevocably compromised by the introduction of “a  
8 futuristic, highly imposing form of transportation” over the center of the Historic District.  
9 Petition for Review 7.

10 Respondents argue that the applicability of Goal 5 to post-acknowledgement plan  
11 amendments is governed by OAR 660-023-0250. According to respondents, OAR 660-023-  
12 0250(3) requires that local governments apply Goal 5 to a post-acknowledgement plan  
13 amendment only when that decision:

14 “(a) \* \* \* [C]reates or amends a resource list or a portion of an  
15 acknowledged plan or land use regulation adopted in order to protect a  
16 significant Goal 5 resource or to address specific requirements of Goal  
17 5;

18 “(b) \* \* \* [A]llows new uses that could be conflicting uses with a particular  
19 significant Goal 5 resource site on an acknowledged resource list; or

20 “(c) \* \* \* [A]mends an acknowledged UGB and factual information is  
21 submitted demonstrating that a resource site, or the impact areas of  
22 such a site, is included in the amended UGB area.”

23 Respondents argue that OAR 660-023-0250(3)(c), above, clearly does not apply to  
24 the challenged decision. Respondents also argue that OAR 660-023-0250(3)(a) does not  
25 apply, because the challenged decision does not amend the city land use regulations that  
26 were adopted to protect historic resources located within the Historic District. Finally,  
27 respondents contend that OAR 660-023-0250(3)(b) does not apply, because the decision does  
28 not allow new uses that “could be conflicting uses with a particular significant Goal 5  
29 resource site on an acknowledged resource list.” Respondents argue that “suspended cable

1 transportation systems” such as a tram have already been categorized by planning staff as a  
2 “Basic Utility,” and thus are already allowed.

3 We disagree with petitioners that Goal 5 imposes decisional criteria that are  
4 independent of the criteria set out in OAR 660, division 23. As we quoted earlier, the Goal 5  
5 rule specifies that Goal 5 applies only in the circumstances set out in OAR 660-023-0250(3).

6 With respect to whether the challenged decision amends an acknowledged inventory  
7 or regulations that implement a program to protect the historic district under Goal 5, we  
8 agree with respondents that the challenged decision does not amend either the boundaries of  
9 the district, or the protections afforded the district under the city code. Therefore, the city  
10 was not obliged by OAR 660-023-0250(3)(a) to address Goal 5.

11 Although it is a much closer question, we also disagree with petitioners that the  
12 challenged decision allows a “new use” as that term is used in OAR 660-023-0250(3)(b). As  
13 we explain in our discussion under the eighth assignment of error, above, prior to the  
14 challenged decision, the city interpreted its code provisions regarding use categories to  
15 include suspended cable transportation systems as a basic utility. Thus, even without the  
16 clarification included in the challenged decision, suspended cable transportation systems  
17 would be within the category of uses allowed, albeit conditionally, in the Open Space zone.  
18 And, to the extent the challenged decision would permit approval of a tram as an allowed use  
19 in the Marquam Hill Plan District rather than a conditional use, a change in the level of  
20 review of a particular use does not mean that the use is a “new use” that must be considered  
21 as a potentially conflicting use subject to review to ensure that the existing program to  
22 protect Goal 5 resources remain effective.<sup>16</sup> Suspended cable transportation systems are not a  
23 “new use” within the meaning of OAR 660-023-0250(3)(b) and, accordingly, the city was

---

<sup>16</sup> We do not mean to say that a local government may amend its ordinance to allow a use without review, if the conditional use review was imposed as part of a Goal 5 program to protect a resource. In that circumstance, a post-acknowledgement plan amendment to eliminate conditional use review would be subject to review pursuant to OAR 660-023-0250(3)(a).

1 correct in its conclusion that the challenged decision does not implicate Goal 5. The first  
2 assignment of error is denied.

3 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

4 In the second assignment of error, petitioners argue that the challenged decision fails  
5 to address Portland Comprehensive Plan (PCP) Policy 3.4, which requires respondent to  
6 “[p]reserve and retain historic structures and areas throughout the city.” In the third  
7 assignment of error, petitioners contend that the challenged decision does not comply with  
8 PCP Policy 12.3, which states:

9 “Enhance the City’s identity through the protection of Portland’s significant  
10 historic resources. Preserve and reuse historic artifacts as part of Portland’s  
11 fabric. Encourage development to sensitively incorporate preservation of  
12 historic structures and artifacts.”

13 According to petitioners, the Marquam Hill Plan will not “preserve,” “protect” or  
14 “retain” an historic resource—the Historic District—nor will it enhance the identity of the  
15 city through protection of historic resources.<sup>17</sup> Petitioners argue that the challenged decision  
16 “promotes uses that will harm and forever change the character of the historic area” by  
17 endorsing the concept of a tram from Marquam Hill to the South Waterfront that will travel  
18 over the center of the Historic District. Petition for Review 16.

19 Respondents answer that because the challenged decision is a legislative decision, it  
20 is not essential for the city to adopt findings that specifically address PCP Policy 3.4. Rather,  
21 respondents argue, they need only cite evidence in the record and provide arguments in their  
22 brief that explain why the challenged decision complies with relevant legal standards.  
23 *Redland/Viola/Fischer’s Mill CPO v. Clackamas County*, 27 Or LUBA 560, 564 (1994).  
24 Nevertheless, respondents rely on findings the city adopted to address PCP Policy 12.3 and  
25 argue that because PCP Policy 12.3 is broader than PCP Policy 3.4, the findings that address

---

<sup>17</sup> PCC 33.910.030, Definitions, does not contain any definitions of those terms. PCC 33.910.010 provides that, where PCC 33.910.030 does not list a particular term that “[w]ords used in the zoning code have their normal dictionary meaning \* \* \*.”

1 Policy 12.3 are adequate to demonstrate compliance with them both.<sup>18</sup> *Residents of*  
2 *Rosemont v. Metro*, 38 Or LUBA 199, 205 (2000), *aff'd in part, rev'd in part on other*  
3 *grounds* 173 Or App 321, 21 P3d 1108 (2001).

4 Findings that address one criterion may, in some cases, may be adequate to address  
5 other criteria. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51, 58 (1991).  
6 PCP Policy 3.4 is part of the PCP's "Neighborhood" element. That element is concerned  
7 with promoting and preserving neighborhood identity and vitality. PCP Policy 12.3 is a  
8 component of the PCP's "Urban Design" element, which is concerned with encouraging  
9 thoughtful and innovative design that will project Portland's unique urban image. The two  
10 policies apparently address different aspects of historic preservation. PCP Policy 3.4 is  
11 concerned with retaining the character of a neighborhood by preserving and retaining historic  
12 structures. PCP Policy 12.3 encourages the use historic artifacts and historic motifs, where  
13 appropriate, to create a "dynamic urban character." Urban Design Goal 12.

14 Fairly read, the findings conclude that the historic district designation and the historic  
15 review overlay provide an adequate level of protection to the historic district and, because  
16 the amendments do not change that level of protection, the amendments are consistent with  
17 PCP Policies 3.4 and 12.3. Petitioners' disagreement with that conclusion does not  
18 demonstrate that the city's findings are inadequate.

19 The second and third assignments of error are denied.

---

<sup>18</sup> The findings respondents refer to state:

**"Policy 12.3, Historic Preservation**, calls for the enhancement of the City's identity through the protection of Portland's significant historic resources and the preservation and reuse of historic artifacts. It also encourages development to sensitively incorporate preservation of historic structures and artifacts. The amendments continue the City's support of this policy as they do not propose to weaken or modify existing City regulations, Chapter 33.445, Historic Resource Protection Overlay, and Chapter 33.846, Historic Reviews, of the Portland Zoning Code, which implement this policy. The City's regulations have been accepted by LCDC as providing an adequate level of protection for identified resources and are not [being] changed through the [MHP]. The findings [addressing] State Goal 5 also address this policy." Record 51 (bold in original). *See* n 15 (setting out the relevant portions of the Goal 5 findings).

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the city’s decision does not comply with OAR chapter 660,  
3 division 12, the Transportation Planning Rule (TPR). According to petitioners, the preferred  
4 location for the tram cable is over the SW Gibbs Street right-of-way, a local service street  
5 that provides access to approximately 12 residences.<sup>19</sup> Petitioners argue that the estimated  
6 number of persons using the tram—between 1085 and 1540 passengers per day in 2007 and  
7 between 3815 and 5510 passengers per day by 2030—will turn SW Gibbs Street into a minor  
8 city transit street, in violation of OAR 660-012-0060.<sup>20</sup>

---

<sup>19</sup> Petitioners also contend that even if the SW Gibbs Street right-of-way is not the chosen final location for the tramway, all of the other east/west streets within the Historic District that the tram will pass over are also local service streets.

<sup>20</sup> OAR 660-012-0060 provides, in relevant part:

“(1) 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; [or]

“(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes[.]”

“\* \* \* \* \*

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

“(a) Changes the functional classification of an existing or planned transportation facility;

“\* \* \* \* \* [or];

1           In response, respondents contend that petitioners are both factually and legally  
2 wrong. According to respondents, the TPR is addressed in the decision, and the city found  
3 that the amendments did not significantly affect any transportation facilities within the  
4 Marquam Hill Plan District, because the amendments to the comprehensive plan do not  
5 change the functional classification of any streets within that plan area, nor do they allow  
6 types of land uses that will result in levels of traffic that are inconsistent with the existing  
7 street classifications.

8           Respondents also argue that to the extent the tram may permit an additional  
9 transportation option from the Marquam Hill Plan District to the South Waterfront, the  
10 standard is not the number of persons that will be transported during any given time period.  
11 Rather, respondents contend that the standards are based on the number of vehicles that will  
12 use the transportation facilities. Respondents contend that a tram will not use the land-based  
13 transportation facilities, and to the extent that traffic on the right-of-way where the tram may  
14 be located will be affected by the tram use, the number of tram cars on the right-of-way do  
15 not exceed applicable level of service standards.

16           Respondents also argue that OAR 660-012-0060(2)(c) is concerned with amendments  
17 that will result in land uses that are inconsistent with transportation systems, not at  
18 transportation systems that are alleged to be inconsistent with nearby land uses. For those  
19 reasons, respondents argue that petitioners have not demonstrated that the challenged  
20 amendments significantly affect a transportation facility within the meaning of OAR 660-  
21 012-0060.

22           We agree with respondents that the challenged decision does not change the  
23 functional classification of any transportation facility. We also agree that, even if the

---

“(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[.]”

1 decision is understood to allow a tram over SW Gibbs Street, the decision does not allow  
2 “types or levels of land uses” that increase traffic on SW Gibbs Street in a manner that could  
3 be inconsistent with the functional classification of that street. Petitioners have not  
4 demonstrated that the challenged amendments significantly affect a transportation facility  
5 within the meaning of OAR 660-012-0060.

6 The fourth assignment of error is denied.

7 **FIFTH ASSIGNMENT OF ERROR**

8 Because a portion of the Terwilliger Parkway is located within the Marquam Hill  
9 Plan District, the challenged decision must be consistent with applicable policies set out in  
10 the Terwilliger Parkway Corridor Plan.<sup>21</sup> Goal II.B of the Terwilliger Parkway Corridor Plan  
11 provides that the city “maintain and enhance unobstructed views from Terwilliger Boulevard  
12 and trail.” The city concluded that the challenged decision is consistent with Goal II.B:

13 “Goal [II.B] calls for the maintenance and enhancement of unobstructed views  
14 from Terwilliger Boulevard and Trail. City Council considered the potential  
15 visual obstruction of the views from Terwilliger that could be affected by a  
16 potential suspended cable transportation system and concluded that these  
17 impacts could be reduced to an intermittent intrusion that adds to the mix of  
18 urban and natural elements of the vista. In addition, the Council finds that the  
19 primary viewshed being protected in the Terwilliger Plan is horizontal to and  
20 below the level of Terwilliger Boulevard. The Council also finds that views  
21 can be protected from obstruction by selecting a suspended cable  
22 transportation system that would travel well above this level.” Record 33.

23 “\* \* \* The [MHP] includes objectives and action items that reinforce the  
24 desired Forest Corridor concept along the westside of Terwilliger Boulevard.  
25 Along the eastside of the Boulevard the landscape concept calls for three  
26 major views \* \* \* and portions of two panorama views \* \* \*. As noted \* \* \*  
27 above, the Council finds that the views along the westside of Terwilliger  
28 Boulevard can be protected from obstruction by a suspended cable  
29 transportation system. It is also important to note that significant vegetation  
30 has grown up along the westside of Terwilliger Parkway in the years since the

---

<sup>21</sup> The Terwilliger Parkway is defined as the land owned by the city adjacent to or within 400 feet of Terwilliger Boulevard. The Terwilliger Trail is defined as “the bicycle and pedestrian trail constructed generally to the east of Terwilliger Boulevard and all graded paths \* \* \* or stairs identified in the Terwilliger Plan Map.” Record 13511.

1 Terwilliger Corridor Plan’s adoption. This vegetation significantly blocks the  
2 major views and panorama views called for in this area.” Record 35.

3 Petitioners argue that the phrase “maintain \* \* \* unobstructed views from Terwilliger  
4 Boulevard and trail” is unambiguous and requires that the city “keep the presently  
5 unobstructed views in their current condition.” Petition for Review 21. According to  
6 petitioners, plan policies adopted in the MHP that promote the concept of a tram violate Goal  
7 II.B, in that a tram system will cross over the parkway and trails, and will obstruct panoramic  
8 views of the Portland skyline, the Willamette River, Mount Hood and Mount St. Helens.  
9 Petitioners also argue that to the extent the city relies upon landscaping to ameliorate the  
10 impact of a tramway from the parkway and trails, that option is limited by other Terwilliger  
11 Parkway Corridor Plan policies and Terwilliger Parkway Design Guidelines that restrict the  
12 placement of vegetation where that vegetation will obstruct the scenic views. Petitioners also  
13 argue that the Terwilliger Parkway Design Guidelines prohibit access from bisecting the  
14 parkway, and severely limit development in open space areas surrounding the parkway to  
15 ensure that scenic vistas are preserved. Petitioners argue that the challenged decision  
16 improperly bypasses consideration of the adequacy of the design restrictions for development  
17 in the open space zone surrounding the parkway. Petitioners contend that the decision allows  
18 a tram system to be constructed without satisfying those design restrictions, on the premise  
19 that these restrictions are based on ground level considerations. As a result, petitioners argue,  
20 the city purposefully ignores the aspects of the tram system that will overshadow and  
21 obstruct the more distant views.

22 Respondents counter that the Terwilliger Parkway Design Guidelines implement the  
23 Terwilliger Parkway Corridor Plan provisions and, in relevant part, define “obstruct” to mean  
24 that “new buildings should be limited in height and have sufficient setback[s] to preserve  
25 unobstructed Major Views and Panoramas as identified in the Terwilliger [Parkway  
26 Corridor] Plan.” Record 13560. Respondents contend that this policy merely requires that  
27 new buildings must not block a significant portion of the view from the parkway or

1 boulevard. According to respondents, the city found that the pertinent “views” and  
2 “panoramas” are from the perspective of a pedestrian walking along the parkway and trails  
3 and that pedestrians tend to look at the view as a horizontal line and lower. Respondents  
4 emphasize that the city found that any tram system will be constructed above the horizontal  
5 view of most pedestrians located on the parkway, and that as the tram cars and cables  
6 descend to the South Waterfront area, those cars and cables will be screened by existing trees  
7 or buildings, or will blend in with the existing urban landscape. As a result, respondents  
8 argue, a tram from Marquam Hill to the South Waterfront will neither “obstruct” the views  
9 within the meaning of Goal II.B, nor will it be the dominant feature of the view from the  
10 parkway or trails.

11           Petitioners contend that Goal II.B allows *no* interference with the views from the  
12 parkway and trails. We do not believe that Goal II.B is so restrictive, and certainly the city  
13 council did not apply it in the manner petitioners contend it must be applied. We agree with  
14 respondents that the Terwilliger Parkway Corridor Plan and the Terwilliger Parkway Design  
15 Guidelines contemplate that development will occur that will change the scenic views, but  
16 that only construction that will “obstruct” those views is prohibited. We also note that the  
17 city relies on vegetation and landscaping on the *west* side of Terwilliger Parkway to limit the  
18 visual impact of the overhead tram system, and does not rely on screening the views of the  
19 mountains, downtown and rivers to the east to camouflage the tram system. The decision  
20 concedes that the tramway will intrude intermittently into the scenic views to the east, but  
21 concludes that the intermittent intrusion of the tramway into those views will not “obstruct”  
22 the panoramic views from the parkway and trail. We agree with respondents that the city’s  
23 findings adequately explain why the city council believes the challenged decision is  
24 consistent with Terwilliger Parkway Corridor Plan Goal II.B and that the city’s interpretation  
25 of that Goal is within its discretion under ORS 197.829(1).

26           The fifth assignment of error is denied.

1 **SIXTH ASSIGNMENT OF ERROR**

2 Marquam Hill is located in the northeast corner of the Southwest Community Plan  
3 Area, an area encompassing approximately 19.5 square miles. Accordingly, the city adopted  
4 findings addressing certain policies and objectives included in the Southwest Community  
5 Plan. Petitioners challenge the city’s conclusion that the MHP complies with the Southwest  
6 Community Plan Community-wide Objectives 1 and 5 that, respectively, provide that the city  
7 “[e]nsure compatibility of new development with Southwest Portland’s positive qualities”  
8 and “[s]upport protection of historic and scenic resources in Southwest Portland.” Petitioners  
9 also challenge the city’s findings regarding a Southwest Community Plan Transportation  
10 Policy, which requires the city to provide a transportation system that “discourages non-local  
11 traffic in residential areas \* \* \* and focuses on improving and maintaining \* \* \* local  
12 streets.”

13 According to petitioners, the tram concept endorsed by the MHP policies is not  
14 compatible with the existing Historic District and does not “support [the] protection” of that  
15 resource as is required by Objectives 1 and 5. Further, petitioners argue that the city is  
16 attempting to lessen the impact of traffic from the institutional development that is  
17 anticipated will occur on Marquam Hill by directing people to use a tram as the primary  
18 means of transportation from Marquam Hill to the South Waterfront. Petitioners contend  
19 that, as a result, residents of SW Gibbs Street, or residents of one of the neighboring  
20 residential streets within the Historic District, will bear the brunt of the increase in traffic, by  
21 having to contend with tram cars moving over their houses for 18 hours a day.

22 Respondents contend that the city appropriately considered the “broadly worded,  
23 aspirational nature of the policies and objectives of the [Southwest Community Plan],” and  
24 concluded that, in general, the adoption of the challenged decision complies with Objectives

1 1 and 5 and the Transportation Policy.<sup>22</sup> Respondents’ Brief 27. Respondents point out that  
2 the Transportation Policy encourages a “balanced, multi-modal transportation system” within  
3 the Southwest Portland area. According to respondents, the challenged decision is consistent  
4 with that policy, because it advocates limiting the use of single-occupancy vehicles by  
5 providing alternative transportation options, including an innovative transit concept—the  
6 tram. Respondents contend that the Marquam Hill Plan includes elements that support  
7 Objectives 1 and 5 identifying “positive qualities” that will be enhanced by the  
8 implementation of the Marquam Hill plan, including the promotion of: (1) infill development  
9 and mixed-use areas; (2) high quality design; (3) multiple transit opportunities; and (4)  
10 improved pedestrian connectivity. Respondents argue that petitioners disagree with the  
11 emphasis the city council placed on these positive qualities, but do not dispute that they exist.

12 We agree with respondents that petitioners have not demonstrated that the challenged  
13 decision is inconsistent with the named Southwest Community Plan policies. Those policies  
14 are broadly worded, and apply to a large geographic area. The city could find, as it did here,  
15 that the adoption of the Marquam Hill Plan, and the related provisions, overall, are consistent  
16 with Objectives 1 and 5 and the Transportation Policy.

17 The sixth assignment of error is denied.

18 **SEVENTH ASSIGNMENT OF ERROR**

19 As we note above, one of the effects of the city’s decision is to place “suspended  
20 cable transportation systems” within the category of “Basic Utilities.” This aspect of the  
21 decision is effective city-wide. According to petitioners, because this portion of the city’s

---

<sup>22</sup> The city’s findings with respect to the Southwest Community Plan refer to 15 pages of findings addressing similar policies within the city comprehensive plan and Goal 12 and conclude that, based on those findings, the challenged decision is consistent with the Southwest Portland Community Plan. *See* Record 38 (setting out finding of compliance with the Southwest Community Plan); Record 26-27; 30-38; 41-45; and 50-52 (setting out the referenced findings).

1 decision has city-wide impact, the city must follow local procedures set out at PCC  
2 33.740.020(B)(2) and provide written notice of the proposed amendments to

3 “all recognized organizations within the subject area, all recognized  
4 organizations within 1000 feet of the subject area, affected bureaus, and  
5 interested persons who have requested such notice.”

6 Petitioners argue that the city failed to provide the requisite city-wide notice and, therefore,  
7 the challenged decision must be remanded so that such notice may be given.

8 Respondents concede that the challenged decision adopts amendments to both the  
9 PCC and to the PCP and that those amendments are applicable city-wide. However,  
10 respondents argue that the notice provided by the city prior to the first planning commission  
11 hearing complied with PCC 33.740.020(B)(2), because written notice of the proposed action  
12 was provided to “all recognized organizations in the City more than 30 days prior to the  
13 Planning Commission’s first public hearing on April 2, 2002.”<sup>23</sup> Respondents’ Brief 31.  
14 Respondents point to Record 8851 through 8889 to support their contention that the requisite  
15 notice was provided to the persons entitled to notice pursuant to PCC 33.740.020(B)(2).

16 Respondents also contend that the notice of the city council hearing is governed by  
17 PCC 33.740.030(B), which requires only that the planning director provide written notice of  
18 the hearing to “all persons who have individually responded to the matter in writing, testified  
19 at the previous hearing, or have requested such notice.” Respondents point to findings and to  
20 pages in the record that indicate that notice was properly given as well. Record 1564-1586.

21 The notice included in the record at 8849-8850 generally describes the MHP. The list  
22 of persons who received copies of that notice, found at Record 8851 through 8889, include

---

<sup>23</sup> See Finding 21:

“On February 28, 2002, notice of the Planning Commission hearings on the Bureau of Planning’s Proposed Marquam Hill Plan was mailed to property owners within the proposed plan area and to people who had requested to be on the Marquam Hill Plan or Bureau of Planning Legislative Projects mailing lists. Approximately 1,640 notices were mailed.” Record 20 (italics omitted).

1 persons residing in the Marquam Hill Plan District. However, the list also includes persons  
2 who represent city bureaus, neighborhood groups and other entities throughout the city, and  
3 includes persons with mailing addresses located outside the plan district, and in some cases,  
4 outside of city limits. Absent more focused arguments from petitioners that the mailing list  
5 found at Record 8851 through 8889 does not include the same persons that would be  
6 provided notice under PCC 33.740.020(B)(2) or that the list found at Record 1564-1586 does  
7 not include the list of persons entitled to notice under PCC 33.740.030(B), petitioners'  
8 assignment of error provides no basis for reversal or remand.

9 The seventh assignment of error is denied.

#### 10 **NINTH ASSIGNMENT OF ERROR**

11 PCC chapter 33.500 permits the city to adopt special plan districts and to adopt  
12 special regulations for those plan districts to address unique circumstances within that  
13 district. Those specialized regulations do not apply outside plan district boundaries. PCC  
14 33.500.010.<sup>24</sup> Petitioners contend that the policies adopted in the MHP extend beyond the  
15 boundaries of the Marquam Hill Plan District, and affect land uses outside of the district, in  
16 violation of PCC 33.500.010. Specifically, petitioners allege that the challenged amendments  
17 adopt plan policies that promote the establishment of a tram over the Historic District to the  
18 South Waterfront, and neither one of those areas is located in the Marquam Hill Plan District.  
19 Petitioners argue that if the city wants to permit the installation of a tram over the Historic

---

<sup>24</sup> PCC 33.510.010 provides, in relevant part

“Plan districts address concerns unique to an area when other zoning mechanisms cannot achieve the desired results. An area may be unique based on natural, economic or historic attributes; be subject to problems from rapid or severe transitions of land use; or contain public facilities which require specific land use regulations for their efficient operation. Plan districts provide a means to modify zoning regulations for specific areas defined in special plans or studies. Each plan district has its own nontransferable set of regulations. This contrasts with base zone and overlay zone provisions which are intended to be applicable in large areas or in more than one area. \* \* \*”

1 District to the South Waterfront, the city must amend the Southwest Community Plan, the  
2 subarea plan that is applicable to those two neighborhoods.

3 Respondents argue that PCC 33.500.010 limits the applicability of specific  
4 *regulations* implementing MHP policies to the area described in the MHP; it does not limit  
5 the direct or indirect influence MHP *policies* may have on land use planning in areas outside  
6 of that plan district. Respondents argue that there is nothing in the city’s comprehensive plan  
7 or in the PCC that prohibits adoption of special district plan policies that relate to facilities  
8 that may extend beyond the borders of the district.

9 Respondents also argue that the MHP policies ensure that any suspended cable  
10 transportation system that is built within the Marquam Hill Plan District is consistent with  
11 that plan. To the extent a suspended cable transportation system is located within other areas  
12 of the city, respondents contend that installation of a suspended cable transportation system  
13 in those areas will be governed by planning policies and zoning regulations that apply to  
14 those areas.<sup>25</sup>

15 PCC 33.500.010 limits the applicability of specific development *regulations* that  
16 implement subarea plan policies to the district itself. In this case, the city chose to adopt plan

---

<sup>25</sup> Respondents further argue that the tram policies adopted in the MHP are consistent with policies contained within the Southwest Community Plan because the tram promotes “balanced, multimodal transportation system in Southwest Portland that encourages increases in transit use \* \* \* manages congestion, and focuses on improving and maintaining arterial and local streets.” Record 11586 (Transportation Policy, Southwest Community Plan). In addition, respondents argue that the policies supporting tram development implement Southwest Community Plan, Transportation Objective 5, which provides, in relevant part, that the city

“[s]upport major institutions in neighborhoods, including [OHSU] \* \* \* by encouraging the provision of high-quality transit service and facilities to serve them; \* \* \* and improving the adjacent and internal pedestrian facilities surrounding and within to enhance access.” *Id.*

According to respondents, a tram provides an alternative form of transportation between two areas of Southwest Portland, thereby avoiding additional single occupancy vehicle trips and providing a connection between pedestrian facilities on Marquam Hill and pedestrian facilities within the South Waterfront area.

We need not address this argument, because, as we explain below, we agree with respondents that the city did not err by adopting plan policies for the Marquam Hill Plan District that may incidentally affect development in other areas of the city.

1 policies that promote development of a tram system between Marquam Hill and South  
2 Waterfront. Those plan provisions are implemented in the Marquam Hill Plan District in part  
3 by permitting suspended cable transportation systems as a permitted use in the Marquam Hill  
4 OS zone. In other areas of the city, installing such a system in an area designated OS would  
5 require conditional use review. We agree with respondents that there is nothing in the city's  
6 plan or implementing regulations requiring that *policies* pertaining to development have *no*  
7 effect on land development outside plan district boundaries.

8           The ninth assignment of error is denied.

9           The city's decision is remanded.