

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 FRIENDS OF MARION COUNTY,  
5 DOUG PARROW and  
6 1000 FRIENDS OF OREGON,  
7 *Petitioners,*

8  
9 vs.

10  
11 CITY OF KEIZER,  
12 *Respondent,*

13  
14 and

15  
16 NW NATIONAL LLC, CONFEDERATED  
17 TRIBES OF THE GRAND RONDE COMMUNITY  
18 OF OREGON and CONFEDERATED TRIBES OF  
19 SILETZ INDIANS OF OREGON,  
20 *Intervenors-Respondent.*

21  
22 LUBA No. 2003-036

23  
24 FINAL OPINION  
25 AND ORDER

26  
27 Appeal from City of Keizer.

28  
29 Mary Kyle McCurdy, Portland, filed the petition for review and argued on behalf of  
30 petitioners. With her on the brief was 1000 Friends of Oregon.

31  
32 E. Shannon Johnson, City Attorney, Keizer, filed a response brief and argued on  
33 behalf of respondent. With him on the brief was Lien & Johnson.

34  
35 Wendie L. Kellington, Lake Oswego, filed a response brief and argued on behalf of  
36 intervenor-respondent NW National LLC.

37  
38 Stephen P. Kelly, Grand Ronde, filed a response brief on behalf of intervenor-  
39 respondent Confederated Tribes of the Grand Ronde Community of Oregon.

40  
41 Craig J. Dorsay, Portland, represented intervenor-respondent Confederated Tribes of  
42 Siletz Indians of Oregon.

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

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AFFIRMED

08/29/2003

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 an ordinance that amends the city’s comprehensive plan map and text, the zoning map, and development code text to emphasize commercial uses in a 225-acre area formerly planned and zoned primarily for industrial uses.

**MOTIONS TO INTERVENE**

NW National LLC, the Confederated Tribes of the Grande Ronde Community of Oregon and the Confederated Tribes of Siletz Indians of Oregon move to intervene on the side of respondent. There is no opposition to their motions, and they are granted.

**MOTION TO STRIKE**

Following oral argument in this case, intervenor-respondent NW National LLC (intervenor) sent a letter to the Board attempting to correct several alleged factual misstatements by petitioners during the rebuttal portion of oral argument. Petitioners respond that intervenor’s letter is essentially surrebuttal and, therefore, not allowed under the Board’s rules. Petitioners argue that the Board should disregard or strike the letter. Should the Board decide to consider intervenor’s letter, petitioners dispute that any statements made during rebuttal were inaccurate.

The Board occasionally requests or grants permission for additional briefing following oral argument. However, we do not see that resolution of the issues in this appeal require resolution of the present dispute involving alleged misstatements during the rebuttal portion of oral argument. Accordingly, the Board will not consider the parties’ post-oral argument submissions on the merits of that dispute.

**FACTS**

The challenged decision adopts the Keizer Station Plan (KSP), which applies to a 225-acre area at the interchange of Interstate-5 and Chemawa Road. The subject area is located within city limits, near the northernmost part of the City of Salem(Salem) and City of

1 Keizer (Keizer)urban growth boundary (UGB). The area currently consists mostly of large  
2 vacant parcels.

3 Prior to 1982, Keizer was an unincorporated area included within the Salem UGB and  
4 subject to that city’s comprehensive plan. Keizer was incorporated in 1982, although it  
5 continues to share a regional UGB with Salem. In 1987, Keizer adopted the Keizer  
6 Comprehensive Plan (KCP). Based on earlier studies showing that the subject area is  
7 suitable for manufacturing and industrial uses, the 1987 KCP designated the subject area as  
8 the Chemawa Activity Center, and contemplated that it would be used primarily for  
9 industrial purposes.

10 In 1997, based on a 1993 joint study with Salem, Keizer adopted the Chemawa  
11 Activity Center Plan (CACP), which provided for a mix of housing, commercial, office and  
12 industrial uses in the subject 225-acre area. The CACP zoned 122 acres for industrial uses,  
13 and in certain subareas restricted commercial uses to not more than 50,000 square feet in  
14 size.

15 After several failed attempts to develop the area under the CACP, the city appointed a  
16 citizen task force to evaluate the CACP. The task force concluded that the regulatory  
17 restrictions in the CACP were too burdensome, and recommended changes. The city council  
18 directed the planning commission and city agencies to consider legislative amendments to  
19 the KCP and development code regarding the CACP. The city ultimately came to the  
20 conclusion that there is a lack of commercial land and an oversupply of industrial land within  
21 the city, and that the CACP should be significantly amended to allow for more, and larger,  
22 commercial uses.

23 On February 3, 2003, the city adopted the challenged decision, which adopts the KSP  
24 and repeals the CACP. The KSP creates five sub-areas and significantly alters the zoning for  
25 those sub-areas: Area A (Village), Area A (Sports), Area B (Retail Service), Area C (Keizer  
26 Station) and Area D (Commerce Center). The general effect of the changes is to increase the

1 acres of land on which commercial uses are allowed, and to decrease the acres of land subject  
 2 to industrial zoning. The zoning changes are summarized in Table 1.<sup>1</sup> The decision creates  
 3 a new zone, Employment General (EG), and allocates 93 acres to the EG zone. The EG zone  
 4 allows both industrial and commercial uses as outright permitted uses. However, 25 percent  
 5 of the land zoned EG must be used for listed industrial uses, which include almost all of the  
 6 uses allowed in the Industrial Business Park (IBP) zone. The zoning distribution within each  
 7 sub-area is shown in Table 2.<sup>2</sup> In addition, the city’s decision replaces commercial building  
 8 size limits under the CACP with a 975,000-square foot limit on certain retail uses.

9 This appeal followed.

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<sup>1</sup> Table 1, based on the table at Record 164, compares the zoning under the CACP and the KSP:

<u>Zoning</u>	<u>CACP</u>	<u>KSP</u>
Industrial Business Park (IBP)	122.1 acres	52.7
General Industrial (IG)	0.0	30.8
Commercial Mixed-Use (CM)	19.7	11.4
Employment General (EG)	0.0	93.0
Commercial Retail (CR)	0.0	1.5
Mixed-Use (MU)	36.0	34.5
Public (P)	34.9	0.0
Commercial Office (CO)	12.5	0.0
Single Family Residential (RS)	0.0	1.1

<sup>2</sup> Table 2, based on Table 4 to the Petition for Review, shows the zoning of each subarea:

<u>Subarea</u>	<u>Zoning</u>	<u>Acres</u>
Area A (Village)	EG	93.0
	IG	2.0
Area A (Sports)	IBP	37.2
	IG	28.8
Area B (Retail Service)	CM	11.4
	RS	1.1
Area C (Keizer Station)	MU	34.5
	CR	1.5
Area D (Commerce Center)	IBP	15.7

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners argue that the city erred in considering the industrial and commercial land  
3 needs within Keizer city limits, rather than within the entire UGB, in justifying the changes  
4 embodied by adoption of the KSP. According to petitioners, that narrow scope of  
5 consideration is inconsistent with (1) a 1993 periodic review remand order issued by the  
6 Land Conservation and Development Commission (LCDC); (2) several statewide planning  
7 goals; and (3) elements of the KCP that recognize the economic relationship between the  
8 cities of Salem and Keizer.

9 **A. 1993 Periodic Review Remand Order**

10 Petitioners explain that a 1993 LCDC periodic review remand order found that the  
11 cities failed to establish that the Salem/Keizer UGB complied with Goal 9, because there  
12 were not sufficient protections for industrial sites within the combined UGB. Petitioners  
13 argue that that 1993 order was based upon a regional needs analysis for industrial lands.  
14 Given that regional focus, petitioners argue that it is inappropriate for Keizer to rezone and  
15 potentially reduce the supply of industrial lands within the combined UGB, without  
16 conducting a *regional* analysis of industrial land needs.<sup>3</sup>

17 The city responds, and we agree, that whatever the 1993 remand order assumed or  
18 required in terms of a regional analysis for purposes of acknowledging the regional UGB,  
19 nothing in that order explicitly or implicitly requires the city to conduct a regional lands need  
20 analysis when rezoning lands within city limits and the UGB. Even if the 1993 remand order  
21 imposed such a requirement, it does not appear that that requirement is embodied in the

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<sup>3</sup> Petitioners also argue that the periodic review conducted in 1993 has not terminated, and that Keizer has not fully complied with the 1993 remand order. The city responds that periodic review has terminated and that it has fully complied with the 1993 remand order. The city also argues that the status of the 1993 remand order has no bearing on the question of the appropriate geographic scope of consideration to support adoption of the KSP. We agree with the city that the status of the 1993 remand order has no bearing that we can see on that question. Accordingly, we do not attempt to resolve the parties' dispute as to whether periodic review of the regional UGB has terminated or whether the city has complied with the 1993 remand order.

1 city’s comprehensive plan or other regulations applicable to the challenged decision. Absent  
2 such a requirement embodied in an applicable comprehensive plan provision or other  
3 applicable regulation, petitioners’ arguments based on the 1993 remand order provide no  
4 basis for reversal or remand.

5 **B. Statewide Planning Goals**

6 The city conducted an evaluation of the supply of commercial and industrial lands  
7 within the city, and concluded that the city currently has a 12-year supply of commercial land  
8 and a 105-year supply of industrial land. The city also concluded that it has a 20-year need  
9 for 117 to 133 acres of buildable commercial land. Petitioners fault the city for considering  
10 the supply of commercial and industrial lands within the city only, and argue that Statewide  
11 Planning Goals 2 (Land Use Planning), 9 (Economic Development) and 14 (Urbanization)  
12 require the city to consider the supply of commercial and industrial lands within the regional  
13 UGB.

14 With respect to Goal 9, petitioners point out that the Goal 9 rule, at OAR 660-009-  
15 0015, requires that in conducting an Economic Opportunities Analysis (EOA), the city must  
16 consider, among other things, national, state and local economic trends, as well as factors  
17 such as “location relative to markets.” *See* n 6, below. Similarly, with respect to Goal 14,  
18 petitioners point out that one factor governing conversion of urbanizable land to urban uses  
19 requires consideration of the “[a]vailability of sufficient land for various uses to insure  
20 choices in the market place.” We understand petitioners to argue that the cities of Salem and  
21 Keizer form what is effectively one economic unit and market place and, therefore, Goals 9  
22 and 14 require the city to consider the regional supply of commercial and industrial lands in  
23 rezoning commercial and industrial lands within its boundaries. In support of that argument,  
24 petitioners cite to several cases holding that only under limited circumstances may a local  
25 government amend its UGB based on “subregional” analyses or analysis of less than the

1 entirety of the jurisdiction. *See, e.g., Residents of Rosemont v. Metro*, 173 Or App 321, 326,  
2 21 P3d 1108 (2001).

3 We disagree. The Goal 9 rule cited to us requires the city to evaluate commercial and  
4 industrial land need and supply over “the planning area.” *See, e.g., OAR 660-009-0015(4)*  
5 (“The economic opportunities analysis shall estimate the types and amounts of industrial and  
6 commercial development likely to occur in the planning area”). OAR 660-009-0005 defines  
7 “planning area” to include the entire area within a UGB, with the exception of cities and  
8 counties within the Portland, Salem-Keizer and Eugene-Springfield UGBs, which may  
9 “address the urban areas governed by their respective plans as specified in the urban growth  
10 management agreement for the affected area.” Petitioners do not cite to any requirement in  
11 an urban growth management agreement calling for Keizer to consider areas outside its  
12 planning jurisdiction under the present circumstances.<sup>4</sup> The fact that the city must consider  
13 national, state and local economic trends in conducting an economic opportunities analysis  
14 does not mean that the city must provide commercial and industrial lands to satisfy the  
15 economic needs of neighboring jurisdictions, or consider whether other jurisdictions can  
16 satisfy the city’s economic needs.

17 Similarly, nothing in Goal 14 expressly requires the city to consider the regional  
18 supply of and need for commercial and industrial lands, when it considers whether to rezone  
19 commercial and industrial lands within its boundaries. To the extent the reasoning in cases  
20 that limit “subregional” analysis under Goal 14 is applicable outside the context of UGB  
21 amendments, we do not see that the city’s approach in this case is inconsistent with that  
22 reasoning: the city considered the land supply and need within the entire area subject to its

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<sup>4</sup> The city’s response brief argues that the applicable “urban growth management agreement,” set forth in the KCP, requires regional review for certain types of “Regional Planning Actions,” and local review for all others. KCP 71. The city argues, and it appears to be the case, that the challenged decision is not among the listed “Regional Planning Actions” that require regional review.

1 planning authority. Petitioners’ Goal 2 arguments are derivative of their Goal 9 and 14  
2 arguments, and also provide no basis for reversal or remand.

3 **C. KCP provisions**

4 Finally, petitioners argue that the city’s refusal to consider commercial and industrial  
5 land need and supply in the entire UGB is inconsistent with various KCP provisions that  
6 recognize the economic interrelationship between the cities of Salem and Keizer. For  
7 example, petitioners cite to statements such as “[a]dopted regional population and  
8 employment forecasts form the basis for [the KCP]” and “[t]he health of Keizer’s economy  
9 depends on the health of the economy of the Salem metropolitan area.” KCP 35. However,  
10 again, nothing in the KCP provisions cited to us suggests that the city is required to consider  
11 regional commercial and industrial land need and supply when it rezones land within the city  
12 boundaries.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 Petitioners argue that the challenged decision fails to provide sufficient industrial  
16 land to meet the city’s needs, contrary to Goal 9 and the Goal 9 rule.

17 According to petitioners, the challenged decision effectively reduces the supply of  
18 vacant, buildable land within the subject area zoned for industrial uses (*i.e.*, zoned either IBP  
19 or IG) from 68.20 acres to 32.56 acres. Petitioners cite to a finding that the city has a need  
20 for at least 38.5 acres of land suitable for industrial purposes. The city relies upon the newly-  
21 created EG zone, which allows both commercial and industrial uses and which requires that  
22 at least 25 percent of EG-zoned lands be developed with uses allowed in the IBP zone, to  
23 meet any shortfall in the supply of lands zoned for industrial uses. Petitioners contend that  
24 the city erred in failing to take into account the fact that the IBP zone allows some non-  
25 industrial development, and therefore that the 25 percent of the EG zone that the city  
26 contends will be “devoted” to industrial uses could be developed with non-industrial uses.

1 That being the case, petitioners contend, there is no assurance that the areas zoned for and  
2 allegedly devoted to industrial uses will in fact be developed with industrial uses.

3 Therefore, petitioners argue, the challenged decision is inconsistent with the Goal 9  
4 rule, which requires the city to “designate an adequate number of sites of suitable sizes, types  
5 and locations” to meet identified industrial needs. OAR 660-009-0020(2)(b). Further,  
6 petitioners argue that the city has identified the subject area as providing for “specific uses  
7 with special site requirements” pursuant to OAR 660-009-0025(4), and therefore the city’s  
8 decision is inconsistent with its obligation to protect sites for industrial use, as required by  
9 the rule.<sup>5</sup> We understand petitioners to argue that one purpose of the CACP was to provide  
10 large sites for industrial uses that require large sites, and that in reducing the number of acres  
11 devoted to industrial uses the city failed to adequately provide for industrial uses that require  
12 large sites.

13 Intervenor responds that in fact the challenged decision *increases* the number of acres  
14 on which industrial uses are allowed. Intervenor notes that a large number of industrial uses  
15 are allowed outright in the EG zone. According to intervenor, under the CACP only 122  
16 acres of land, all zoned IBP, allowed industrial uses. Under the KSP, intervenor argues, a  
17 total of 176 acres of land zoned IBP, IG and EG allow for industrial uses. *See* Table 1 at n 1.

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<sup>5</sup> OAR 660-009-0025(4) provides:

“Jurisdictions which adopt objectives or policies to provide for specific uses with special site requirements shall adopt policies and land use regulations to provide for the needs of those uses. Special site requirements include but need not be limited to large acreage sites, special site configurations, direct access to transportation facilities, or sensitivity to adjacent land uses \* \* \*. Policies and land use regulations for these uses shall:

- “(a) Identify sites suitable for the proposed use;
- “(b) Protect sites suitable for the proposed use by limiting land divisions and permissible uses and activities to those which would not interfere with development of the site for the intended use; and
- “(c) Where necessary to protect a site for the intended industrial or commercial use include measures which either prevent or appropriately restrict incompatible uses on adjacent and nearby lands.”

1 Further, intervenor argues that the KSP reserves for industrial use approximately 55 acres of  
2 land (32.56 buildable acres zoned IBP or IG plus 25 percent of the 93 acres zoned EG),  
3 which is more than sufficient to meet the identified need of 38.5 acres. Intervenor does not  
4 dispute that the IBP and IG zones allow some non-industrial uses, but argues that there is no  
5 requirement in the Goal 9 rule or elsewhere that industrial zones such as the IBP and IG  
6 zones provide exclusively for industrial uses. To the extent petitioners challenge the  
7 adequacy of the IBP and IG zones to provide for industrial uses, intervenor argues, that  
8 challenge is an impermissible collateral attack on zones that are acknowledged to comply  
9 with Goal 9.

10 Finally, with respect to petitioners' arguments under OAR 660-009-0025(4),  
11 intervenor argues that petitioners ignore the city's finding that the city has not adopted any  
12 policies providing for specific uses with specific siting requirements, as provided under  
13 OAR 660-009-0025(4), and therefore that that rule provision is inapplicable. Record 102.

14 We disagree with petitioners that the city failed to provide sufficient industrial-zoned  
15 lands contrary to Goal 9. The IBP and IG zones are industrial zones that have been  
16 acknowledged to comply with Goal 9. Nothing in the Goal 9 rule directed to our attention  
17 requires that the city apply zoning to industrial lands that allows *only* industrial uses. The  
18 fact that those zones allow a limited set of non-industrial uses, and the possibility that lands  
19 zoned either IBP or IG may in fact develop with non-industrial uses rather than the industrial  
20 uses allowed outright in such zones, is not inconsistent with Goal 9. There is no dispute that  
21 the challenged decision provides for at least 55 acres on which allowed uses are limited to  
22 those set forth in the IBP and IG zones, more than the number of acres necessary to satisfy  
23 the identified 38.5-acre need for industrial land.

24 Further, petitioners have failed to demonstrate that the challenged decision is  
25 inconsistent with OAR 660-009-0025(4). Petitioners do not challenge the city's finding that  
26 it has not identified any "special siting requirements" subject to the rule.

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioners argue that the city’s finding of need for additional commercial-zoned  
4 lands is not supported by substantial evidence.

5 That finding is based on the EOA prepared by a consultant and adopted by the city,  
6 pursuant to OAR 660-009-0015, found at Record 296-383.<sup>6</sup> Petitioners first fault the EOA

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<sup>6</sup> OAR 660-009-0015 provides, in relevant part:

“Cities and counties shall review and, as necessary, amend comprehensive plans to provide the information described in sections (1) through (4) of this rule:

“(1) Review of National and State and Local Trends. The economic opportunities analysis shall identify the major categories of industrial and commercial uses that could reasonably be expected to locate or expand in the planning area based on available information about national, state and local trends. A use or category of use could reasonably be expected to locate in the planning area if the area possesses the appropriate locational factors for the use or category of use;

“(2) Site Requirements. The economic opportunities analysis shall identify the types of sites that are likely to be needed by industrial and commercial uses which might expand or locate in the planning area. Types of sites shall be identified based on the site requirements of expected uses. Local governments should survey existing firms in the planning area to identify the types of sites which may be needed for expansion. Industrial and commercial uses with compatible site requirements should be grouped together into common site categories to simplify identification of site needs and subsequent planning;

“(3) Inventory of Industrial and Commercial Lands. Comprehensive plans for all areas within urban growth boundaries shall include an inventory of vacant and significantly underutilized lands within the planning area which are designated for industrial or commercial use[.]

“\* \* \* \* \*

“(4) Assessment of Community Economic Development Potential. The economic opportunities analysis shall estimate the types and amounts of industrial and commercial development likely to occur in the planning area. The estimate shall be based on information generated in response to sections (1) through (3) of this rule and shall consider the planning area’s economic advantages and disadvantages of attracting new or expanded development in general as well as particular types of industrial and commercial uses. Relevant economic advantages and disadvantages to be considered should include but need not be limited to:

“(a) Location relative to markets;

“(b) Availability of key transportation facilities;

1 for considering only commercial needs within the city, rather than within the regional UGB,  
2 for the same reasons expressed in the first assignment of error. We reject the argument, for  
3 the same reasons we rejected that argument under the first assignment of error.

4 Second, petitioners argue that the EOA serves only to justify the choices reflected in  
5 the KSP, and fails to provide an objective analysis of the city’s commercial land needs.  
6 Petitioners argue that the information and analysis required by OAR 660-009-0015 is general  
7 and objective in nature and should not be designed to support a particular conclusion.  
8 Studies commissioned by local governments are often intended to support a particular policy  
9 result, rather than to provide an objective view of policy alternatives. As long as the EOA  
10 contains the information and analysis required by OAR 660-009-0015, we see no error in  
11 taking the further step of evaluating whether a particular proposal is consistent with the  
12 identified need for commercial and industrial lands.

13 Third, and finally, petitioners fault the methodology used in the EOA, arguing that it  
14 (1) relies on household income rather than population and household growth to project future  
15 demand for commercial uses; (2) improperly discounts existing commercial uses; and (3) is  
16 an assessment of market demand rather than an assessment of land need.

17 The city and intervenor respond, and we agree, that petitioners have not demonstrated  
18 reversible error in the methodology used in the EOA, and that the city’s finding regarding  
19 commercial land need is supported by an adequate factual base. OAR 660-009-0015 does  
20 not require the city to predict commercial needs based on population and household growth,  
21 and we see no reason why household income growth may not function as least as well as  
22 population and household growth, for that purpose.

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“(c) Key public facilities as defined by OAR chapter 660, division 11 and public services;

“(d) Labor market factors;

“\* \* \* \*”

1           The EOA discounted some of the existing commercial square footage in the city by a  
2 “partition factor,” to account for the extent to which existing commercial uses serve  
3 populations residing outside the city limits, *i.e.*, within Salem. The author of the EOA  
4 explained that because demand for commercial land was evaluated based on the needs of  
5 Keizer residents, and did not take into account the needs of Salem residents, the question of  
6 the existing supply and hence how much more commercial land is needed to meet future  
7 demand must also focus on the extent to which existing commercial uses serve Keizer  
8 residents. Record 7259. Accordingly, the EOA discounted the square footage of existing  
9 commercial uses in the southern part of Keizer that partially serve residents in Salem, in  
10 calculating the existing supply of commercial land. *Id.*

11           Petitioners object to this methodology, arguing that it “appears to treat existing  
12 Keizer businesses and the ones planned for the KSP differently, in terms of how much of  
13 local expenditures will be ‘captured’; it assumes the KSP retail will capture a greater share.”  
14 Petition for Review 23. Petitioners appear to argue that the EOA must apply a similar  
15 “partition factor” to the uses contemplated in the KSP, in order to be consistent. However, as  
16 the author of the EOA explained, the “partition factor” was applied to existing businesses in  
17 the southern part of the city that serve residents within the adjoining City of Salem to the  
18 south. Petitioners do not explain why the EOA must assume that commercial development in  
19 the KSP, which is located in the northeastern portion of Keizer, will serve residents of Salem,  
20 to the same degree as commercial uses located in the southern part of the city.

21           Finally, petitioners fault the EOA for evaluating market demand for commercial uses  
22 rather than need for land zoned for commercial uses. We understand petitioners to suggest  
23 that market demand for commercial uses does not necessarily translate directly into need for  
24 land zoned for commercial uses. That may be so, but we have difficulty seeing any  
25 meaningful difference in the present case. OAR 660-009-0015(4) requires the EOA to  
26 “estimate the types and amounts of industrial and commercial development likely to occur in

1 the planning area.” It would seem impossible to obtain that estimate without taking into  
2 account market demand for commercial uses. Petitioners do not argue that the EOA failed to  
3 take into account other relevant considerations, such as those listed in OAR 660-009-  
4 0015(4)(a) through (d), or otherwise demonstrate that the EOA is insufficient to support the  
5 city’s findings regarding need for lands zoned for commercial uses.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Petitioners contend that the city’s decision fails to comply with Statewide Planning  
9 Goal 12 (Transportation Planning) and the requirements of the Transportation Planning Rule,  
10 at OAR 660-012-0060.<sup>7</sup>

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<sup>7</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;
  - “(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.
- “(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;
  - “(b) Changes standards implementing a functional classification system;

1           The city concluded that the KSP would not “significantly affect” any transportation  
2 facility, as defined by OAR 660-012-0060(2)(d), because it would generate fewer weekday  
3 p.m. peak hour trips than would the CACP, and thus would generate fewer trips than are  
4 already assumed in the Keizer Transportation System Plan. Record 126. That conclusion is  
5 based on a series of traffic studies prepared by a consultant. The consultant evaluated the  
6 traffic impacts of the original proposal, a staff-recommended version of the proposal, and the  
7 final version approved by the city council, and compared those impacts against the traffic  
8 impacts of uses developable under the CACP. Each study concluded that the KSP would  
9 generate fewer peak hour trips than would the CACP.<sup>8</sup>

10           In comparing traffic impacts, the consultant assumed that the subject area would be  
11 developed with “reasonable highest trip generating uses” allowed under applicable zoning.  
12 Record 8609. For example, the initial traffic study generally assumed that lands zoned  
13 commercial would be developed with shopping centers, while lands zoned IBP would be  
14 developed with office parks. Accordingly, in estimating the traffic that could be generated  
15 under the CACP, the initial traffic study assumed that none of the 122 acres of land zoned  
16 IBP under the CACP would develop with industrial uses, and that all of it would instead  
17 develop with relatively traffic-intensive office uses.<sup>9</sup> Record 8616-17. The traffic study  
18 concluded that, if fully developed with the most traffic intensive uses allowed under the

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“(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>8</sup> The traffic study initially concluded that development under the KSP would generate more vehicle trips than development under the CACP. *See, e.g.*, Record 8619. However, the study applied various reductions and discounts that lowered the number of trips generated under the KSP below that of the CACP. *Id.* Petitioners do not argue that the traffic consultant erred in applying these reductions.

<sup>9</sup> A supplemental traffic study explains that office uses tend to generate relatively high weekday p.m. peak hour trips, because that is the time period when office workers travel from the office to home. Record 2242.

1 CACP, the subject area would generate 3,425 new weekday p.m. peak hour trips. Record  
2 8617.

3 The initial traffic study applied similar assumptions to estimate the impacts of the  
4 proposed zoning under the KSP. That is, the study assumed that commercial zones would  
5 develop as shopping centers, while IBP zones would develop with office parks. Unlike the  
6 CACP, the KSP includes 32 acres zoned IG. The initial traffic study assumed that areas  
7 zoned IG would develop with light industrial uses. Record 8615. That assumption was  
8 carried forward in subsequent studies. Record 7278. The final study estimated that the KSP  
9 would generate from 95 to 135 fewer p.m. peak hour trips than the CACP. Record 2244.

10 Petitioners argue that the traffic studies are based on inaccurate assumptions  
11 regarding the most intensive uses and on inconsistent comparisons between the existing and  
12 proposed zoning.

13 **A. Most Intensive Use**

14 According to petitioners, in several instances the traffic study did not assume the  
15 most intensive use allowed under the KSP. For instance, the study generally assumed that  
16 shopping centers are the most intensive retail commercial use and generate the greatest peak  
17 hour traffic. However, petitioners cite to evidence that other types of retail commercial uses,  
18 such as supermarkets, convenience stores, restaurants and movie theatres, generate more  
19 traffic per 1,000 square feet than shopping centers. Similarly, petitioners argue that the  
20 traffic study erred in assuming that office parks are the most intensive use allowed in the IBP  
21 zone (and the 25 percent of the EG zone limited to uses allowed in the IBP zone). Petitioners  
22 cite to evidence that other uses allowed in the IBP zone, such as supermarkets and  
23 restaurants, generate more traffic per 1,000 square feet than office parks.

24 As the city's findings explain, the threshold question the city asked and answered  
25 under OAR 660-012-0060(2)(d) was whether development under the proposed zoning will  
26 cause greater traffic impacts than development under the existing zoning. Record 126. If the

1 answer is no, the inquiry under OAR 660-012-0060(2)(d) ends there. *See ODOT v. City of*  
2 *Klamath Falls*, 39 Or LUBA 641, 647-48, *aff'd* 177 Or App 1, 34 P3d 667 (2001)  
3 (OAR 660-012-0060(2)(d) applies where the proposed amendments cause a net increase in  
4 impacts on transportation facilities as compared to the unamended plan and code). If the  
5 answer is yes, then the city must go on to evaluate whether the increased traffic will “reduce  
6 the performance standards of the facility below the minimum acceptable level identified in  
7 the TSP” within the meaning of OAR 660-012-0060(2)(d). Under that further inquiry, it is  
8 important that the city assume the most traffic-intensive uses allowed under the proposed  
9 amendments.

10           Petitioners are correct that the threshold question posed by OAR 660-012-0060(2)(d)  
11 requires the use of consistent assumptions in order to obtain a meaningful comparison of the  
12 traffic impacts between the existing and proposed plan and code. For example, the city  
13 would clearly err if it assumed without adequate justification that the most traffic-intensive  
14 uses would develop under existing zoning but the least traffic-intensive uses would develop  
15 under the proposed zoning. We address, below, petitioners’ arguments that the traffic study  
16 employed inconsistent assumptions in comparing the impacts under the existing and  
17 proposed zoning. The precise issue here, however, does not involve inconsistent  
18 assumptions. As far as we can tell, the traffic study consistently assumed that any  
19 commercial zone within either the CACP and KSP would be developed with shopping  
20 centers, while IBP zones within the CACP and KSP would be developed with office parks.  
21 The precise issue here, we understand, is whether the city must assume the most traffic-  
22 intensive uses under the existing and amended plan and code, in answering the threshold  
23 question posed by OAR 660-0012-0060(2)(d).

24           We assume for purposes of our analysis that petitioners are correct that there are more  
25 traffic-intensive uses than shopping centers and office parks allowed in commercial and IBP  
26 zones, respectively. However, petitioners have not demonstrated that the county erred in

1 failing to consider such higher traffic-generating uses in answering the threshold question  
2 posed by OAR 660-012-0060(2)(d). As relevant here, the primary effect of the KSP is to  
3 increase the percentage of land in the area on which commercial uses are allowed and  
4 decrease the percentage of land that is zoned IBP. The KSP does this principally by reducing  
5 the acreage zoned IBP and by rezoning 93 acres EG, which permits both commercial uses,  
6 such as shopping centers, and nearly all of the uses allowed in the IBP zone, including office  
7 uses.<sup>10</sup> In other words, the *types* of commercial and industrial uses allowed under the CACP  
8 and the KSP are virtually identical, and the main effect of the proposed amendments, we  
9 understand, is to shift the relative proportion of lands on which commercial and industrial  
10 uses are allowed. That being the case, if the city evaluates a more traffic-intensive use in  
11 areas of the KSP zoned IBP, in order to make a consistent comparison it must *also* evaluate  
12 the same use in areas of the CACP zoned IBP. In effect, petitioners argue that the city must  
13 assume a *less* intensive use in the IBP zone under the CACP (office parks), while assuming a  
14 *more* intensive use under the KSP in the areas zoned IBP or the 25 percent of the EG zone  
15 that allows uses listed in the IBP zone. Petitioners offer no justification for that approach.

16 Similarly, even if petitioners are correct that there are more traffic-intensive uses than  
17 shopping centers allowed in commercial zones, petitioners do not argue that the *types* of  
18 commercial uses allowed in commercial zones under the CACP and KSP are materially  
19 different, or otherwise explain why the city must assume a less intensive commercial use  
20 under the CACP (shopping centers), but a more intensive commercial use under the KSP.<sup>11</sup>

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<sup>10</sup> The city argues, and it appears to be the case, that the EG zone allows 30 out of the 33 uses allowed in the IBP zone. Both zones appear to allow the uses petitioners cite as more traffic-intensive than office parks.

<sup>11</sup> The KSP increases the maximum square footage for certain commercial uses in certain subareas. However, except as discussed below, we do not understand petitioners to argue that the traffic study failed to take into account the difference in the size of commercial uses allowed, in comparing the traffic impacts of commercial development allowed under the CACP and KSP.

1 In sum, petitioners have not demonstrated that the city erred in failing to assume the  
2 most traffic-intensive uses, in answering the threshold question posed by OAR 660-012-  
3 0060(2)(d).

4 **B. Inconsistent or Unsupported Assumptions**

5 Petitioners argue that in several respects the traffic study used inconsistent or  
6 unsupported assumptions in comparing the traffic impacts of the CACP and KSP.

7 **1. Retail Commercial**

8 Petitioners first note that Area A under the KSP allows 800,000 square feet of  
9 commercial retail. Nonetheless, the traffic study assumed that only 760,000 square feet of  
10 retail would develop in Area A, based on the view that additional commercial development is  
11 “unlikely” under applicable floor area ratios. Record 2243. Petitioners argue that no  
12 evidence supports this view and that the traffic study erred in failing to assume at least  
13 800,000 square feet of commercial development in Area A.

14 As intervenor points out, the final traffic study conducted a “sensitivity check” under  
15 which it assumed that a full 800,000 square feet of commercial retail would be developed in  
16 Area A. Record 2244. The study found that the additional retail footage would result in 40  
17 additional weekday p.m. peak hour trips, reducing the net difference between CACP traffic  
18 impacts and KSP traffic impacts from 135 to 95. *Id.* Thus, contrary to petitioners’ argument,  
19 the traffic study did assume 800,000 square feet of retail commercial uses in Area A, and  
20 reached the same conclusion that development under the KSP will generate less traffic than  
21 the CACP.

22 Second, petitioners note that the KSP limits certain retail uses in Area D to 70,000  
23 square feet, while limiting certain retail uses in Area A (Sports) to 15,000 square feet. The  
24 KSP zones these areas IBP. The traffic study found that development of retail uses of this  
25 size under IBP zoning restrictions was “unlikely” and therefore assumed that these areas  
26 would develop entirely as office uses. Record 2243. Petitioners contend that this conclusion

1 is unexplained, and that it is unreasonable to assume that there will be no retail development  
2 as allowed in the IBP zone.

3 For the reasons expressed above with respect to more intensive uses, we do not  
4 believe remand is warranted to require the city to explain why it assumed that no retail uses  
5 would occur in the IBP-zoned portions of Areas A and D. The retail uses that petitioners  
6 argue must be assumed are allowed in the IBP zone, and therefore were potentially allowable  
7 in the 122 acres zoned IBP under the CACP. The traffic study assumed that areas zoned IBP  
8 under the CACP (as well as the KSP) would be developed with office uses. Petitioners  
9 contend here that the city must assume some retail commercial development will occur in  
10 areas zoned IBP under the KSP. However, as explained above, making that assumption  
11 would require that the traffic study also assume some retail commercial development in areas  
12 zoned IBP under the CACP, in order to make a consistent comparison between KSP and  
13 CACP traffic impacts. We conclude that the traffic study did not err in failing to assume  
14 some retail commercial uses in the areas zoned IBP.

15 Third, petitioners note that Area B includes 11.4 acres zoned CM. The KSP restricts  
16 certain types of commercial uses in Area B, such as food stores and restaurants, by imposing  
17 a 25,000 square foot size limit. The initial traffic studies assumed that CM-zoned portion of  
18 Area B would develop with shopping centers. Record 8631, 7278. However, the final traffic  
19 study changed that assumption. The study explained:

20 “Commercial development in Area B is limited to the 25,000 square feet set  
21 by the City Council. The remainder of the Commercial Mixed Use (CM)  
22 zoned land in Area B is assumed to be developed with the next highest trip  
23 generating use for this zoning, which is office.” Record 2243.

24 Petitioners argue that the final traffic study erred in assuming that the 25,000 square  
25 foot limit applies to all commercial uses in Area B. According to petitioners, some  
26 commercial uses allowed in the CM zone, including day care centers, post offices, banks and  
27 movie theatres, are (1) not subject to the 25,000-square foot limit and (2) generate more

1 traffic than office uses. Therefore, petitioners argue, the traffic study should have assumed  
2 that development in Area B beyond the 25,000 square foot limit would consist of these  
3 higher trip-generating uses rather than office uses.

4 The CACP included approximately 41 acres zoned CM, in two areas. The traffic  
5 consultant assumed that areas zoned CM under the CACP would develop as shopping  
6 centers. Record 8615. The initial traffic studies assumed that CM-zoned areas under the  
7 KSP would also develop as shopping centers. Based in part on that comparison, the initial  
8 traffic studies concluded, as did the final study, that net traffic impacts under the KSP would  
9 be less than under the CACP. Petitioners may well be correct that the final traffic study erred  
10 in assuming that the 25,000 square foot limit applies to all commercial uses, and accordingly  
11 the final traffic study should have assumed that the CM-zone portion of Area B would  
12 develop entirely with commercial uses. However, that appears to be precisely the  
13 assumption the initial traffic studies made. Petitioners offer no reason to believe that remand  
14 to correct an erroneous assumption in the final traffic study will alter the ultimate conclusion  
15 that net traffic impacts under the KSP will be less than under the CACP, when the same  
16 conclusion is supported by initial traffic studies that assume, as petitioners urge, that the CM-  
17 zoned portion of Area B will develop entirely with commercial uses.

## 18 **2. Industrial Uses**

19 As noted, the traffic study assumed no industrial development under the CACP, but  
20 instead assumed that all areas zoned IBP would develop as office parks, a relatively traffic-  
21 intensive use allowed in the IBP zone. In evaluating traffic impacts under the KSP, however,  
22 the traffic study assumed that approximately 28 acres in two subareas of Area A would be  
23 developed with light industrial uses. Record 7278. Petitioners argue that there is no basis in  
24 fact for this apparent inconsistency, and that the traffic study erred in assuming light  
25 industrial development, rather than more traffic-intensive office uses, in portions of Area A  
26 under the KSP.

1           Although it is not entirely clear, it appears that the traffic study assumed that the areas  
2 zoned IG within Area A would be developed with light industrial uses, rather than with  
3 office uses. Record 8615. The CACP zoned 122 acres of the area IBP, which allows light  
4 industrial uses as well as other uses, such as office parks. The CACP did not include any  
5 lands zoned IG, which provides for a variety of light and heavy industrial uses, but not office  
6 uses. *See* Keizer Development Code (KDC) 2.114.02. We can think of no reason, and  
7 petitioners offer none, why the traffic study must assume that areas rezoned from IBP to IG  
8 will be developed with office uses that are not allowed in that zone.

9           Finally, petitioners repeat their argument that the traffic studies erred in failing to  
10 assume the most traffic-intensive uses allowed in the IG-zone under the KSP. According to  
11 petitioners, the IG zone provides for “food stores and eating and drinking places,” which  
12 would allow supermarkets, convenience stores and restaurants. KDC 2.114.02(H). We  
13 understand petitioners to contend that supermarkets, convenience stores and restaurants  
14 generate more traffic than light industrial uses.

15           The challenged decision rezones approximately 32 acres in Area A from IBP to IG.  
16 Both industrial zones allow “food stores” and “eating and drinking places,” which petitioners  
17 allege generate more traffic than either office parks or light industrial uses. Therefore, if the  
18 city were to assume that the area zoned IG under the KSP would develop with supermarkets,  
19 convenience stores and restaurants, in order to make a consistent comparison it would also  
20 have to assume that the same acreage zoned IBP under the CACP would develop with similar  
21 uses. Petitioners offer no reason to believe that that comparison would affect the traffic  
22 studies’ ultimate conclusion that the uses allowed by the KSP will generate less traffic than  
23 uses allowed under the CACP.

24           The fourth assignment of error is denied.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners contend that the challenged decision is inconsistent with a KCP policy and  
3 with zone change criteria.

4 **A. Employment Area Service Center**

5 According to petitioners, a “Special Land Use Policy” at KCP 44 directs the city to  
6 provide an “employment area service center” at the Chemawa interchange. The KCP  
7 describes an “employment area service center” as follows:

8 “A[n] employment area service center should:

9 “(1) Be from 20 to 50 acres in size.

10 “(2) Have direct access from I-5 and an arterial street.

11 “(3) Provide facilities and services to adjacent industrial areas and to the  
12 traveling public.

13 “(4) Not encourage traffic through residential neighborhoods.

14 “(5) Be a unified district with coordinated circulation, parking and  
15 landscaping, not a collection of small unrelated commercial  
16 developments.”

17 Petitioners argue that the 93-acre EG zone under the KSP is two to five times the size  
18 of the area identified for an employment area service center under the KCP, and therefore the  
19 challenged decision is inconsistent with the KCP.

20 The city responds that petitioners confuse the EG zone with the described  
21 “employment area service center.” According to the city, the challenged decision does not  
22 establish the “employment area service center” described in the KCP, but defers  
23 establishment of that center to later decisions.<sup>12</sup>

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<sup>12</sup> The city council’s decision addresses this KCP policy as follows:

“The KSP provides the opportunity to establish an employment area service center within the activity center’s boundary. As this policy notes, an employment area service center is envisioned to be a part of the overall development approach within the CACP. \* \* \* The specific location of the employment area service center is not known at this time, but the mix

1 The city’s findings regarding this KCP policy, which petitioners do not challenge,  
2 make it clear that the EG zone will allow for, but is not intended to constitute, the  
3 “employment area service center” described in the KCP. To the extent petitioners argue that  
4 the above-quoted KCP policy prohibits the city from providing any land or zoning in that  
5 area for “employment” other than the described 20 to 50 acre “employment area service  
6 center,” we disagree that the KCP policy contains such a prohibition.

7 **B. Zone Change Criteria**

8 In approving a zone change, KDC 3.110.04(F)(2) requires a demonstration that:

9 “The supply of vacant land in the existing zone is adequate, assuming the  
10 zone change is granted, to accommodate the projected rate of development of  
11 uses allowed in the zone during the next 5 years.”

12 Petitioners’ entire argument consists of the following:

13 “The KSP plan rezones all of the land in the project area that was previously  
14 zoned for commercial office uses (CO) and public uses to other zones. This  
15 would leave less than an acre of vacant land in the CO zone in the entire City  
16 of Keizer. The decision does not address the adequacy of land in the CO or  
17 public uses zone. Therefore, the decision should be reversed or remanded.”  
18 Petition for Review 30.

19 The city responds that KDC 3.110.04(F)(2) is concerned with “uses allowed in the  
20 zone,” rather than the amount of land in particular zoning districts *per se*. The city argues  
21 that all of the uses allowed in the CO zone are also allowed in the CM zone. Further, the city  
22 argues that the uses allowed in the P zone are also allowed in the IBP and IG zones, with  
23 minor exceptions.

24 The city is correct that KDC 3.110.04(F)(2) is concerned with “uses allowed” under  
25 existing zoning rather than the amount of vacant land under that zoning. Petitioners’  
26 argument is thus misdirected. Even if petitioners’ argument is understood more broadly,  
27 petitioners provide no reason to question the city’s response that most if not all of the uses

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of uses, which are considered to be a part of such a center, are allowed within the proposed zoning and the area of the Keizer Station Plan is sufficient to allow a 20-50 acre employment area service center within its boundary.” Record 146.

1 allowed in the CO and P zones are allowed in other zones in the subject area and throughout  
2 the city. While the city’s response does not identify any evidence that there is sufficient land  
3 in these other zones to “accommodate the projected rate of development” for uses allowed in  
4 the CO and P zones during the next five years, and the city’s findings of compliance with  
5 KDC 3.110.04(F)(2) do not specifically address that issue, absent a more focused challenge  
6 from petitioners, we have no basis to conclude that city’s decision is inconsistent with  
7 KDC 3.110.04(F)(2).

8 The fifth assignment or error is denied.

9 The city’s decision is affirmed.