BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBIN JAQUA and JOHN JAQUA,
Petitioners,

and

LANE COUNTY and 1000 FRIENDS
OF OREGON,
Intervenors-Petitioner,

vs.

CITY OF SPRINGFIELD,
Respondent,

and

PEACEHEALTH,
Intervenor-Respondent.

LUBA Nos. 2003-072 and 2003-073

COALITION FOR HEALTH OPTIONS IN
CENTRAL EUGENE-SPRINGFIELD,
ANNE S. HEINSOO,
LINDA MAUREEN CHENEY
and FRED C. FELTER,
Petitioners,

and

LANE COUNTY and 1000 FRIENDS
OF OREGON,
Intervenors-Petitioner,

vs.

CITY OF SPRINGFIELD,
Respondent,

and

PEACEHEALTH,
Intervenor-Respondent.

LUBA Nos. 2003-077 and 2003-078

FINAL OPINION
AND ORDER

Appeal from City of Springfield.

Allen L. Johnson, Portland, filed a petition for review and argued on behalf of petitioners Jaqua. With him on the brief was Johnson and Sherton, PC.

William H. Sherlock, Eugene, filed a petition for review and argued on behalf of petitioners Coalition for Health Options in Central Eugene-Springfield, *et al*. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock, PC.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a petition for review and argued on behalf of intervenor-petitioner Lane County.

Michael K. Collmeyer, Portland, filed a petition for review on behalf of intervenor-petitioner 1000 Friends of Oregon.

Meg E. Kieran, Springfield, filed a response brief and argued on behalf of respondent. With her on the brief were Joseph J. Leahy, Springfield, and Harold, Leahy and Kieran.

Steven L. Pfeiffer, Portland, Michael C. Robinson, Portland, and Steven P. Hultberg, Portland, filed a response brief. With them on the brief was Perkins Coie, LLP. Steven L. Pfeiffer and Steven P. Hultberg argued on behalf of intervenor-respondent.

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

REMANDED 01/05/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal two city ordinances that (1) amend a regional plan and a refinement plan and (2) approve the future rezoning of 99 acres.

FACTS

Intervenor-respondent PeaceHealth (hereafter PeaceHealth) wishes to construct a hospital on approximately 66 acres of land and construct related commercial development on 33 acres of land. The area where this disputed construction would take place is located within the acknowledged regional urban growth boundary (UGB). The property that is at the center of this dispute is subject to (1) a regional plan (the Eugene/Springfield Metro Area General Plan (Metro Plan)); (2) a refinement plan of the Metro Plan (the Gateway Refinement Plan (GRP)); and (3) city land use regulations that have been adopted to implement those plans (the City of Springfield Development Code (SDC)). [1]

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[1] The challenged decision, the parties' briefs and this opinion use a number of some of the more frequently used acronyms and abbreviations. The petition for review filed by petitioners Coalition for Health Options in Central Eugene-Springfield *et al* (CHOICES) includes a helpful compilation of the many acronyms and abbreviations that are used in the challenged decision and the parties' briefs. Petition for Review (CHOICES) 2. We include a modified version of that list below:

Metro Plan	The Eugene/Springfield Metropolitan Area General Plan (a regional comprehensive plan adopted by the Cities of Springfield and Eugene and Lane County). Record 5081-5281.
TransPlan	The Eugene/Springfield Transportation System Plan (a regional transportation system plan or TSP adopted by the Cities of Springfield and Eugene, Lane County and Lane County Transit District). Record 4805-5080.
GRP	The Gateway Refinement Plan (a refinement plan of the Metro Plan adopted by the Cities of Springfield and Eugene and Lane County). Record 4707-4804.
RLS	The Eugene-Springfield Metropolitan Area Residential Lands and Housing Study (a document prepared to allow the Cities of Springfield and Eugene and Lane County to prepare plans and land use regulations that comply with the requirements of Goal 10 (Housing) and the Goal 10 administrative rules). Record 4481-4580.

The GRP area is an approximately 1,000-acre area in the northwestern part of the City of Springfield lying east of Interstate Highway 5 and south of the McKenzie River. Approximately 180 acres of the GRP area is designated Medium Density Residential (MDR) by both the Metro Plan and the GRP.[2] The challenged decisions adopt Metro Plan, GRP and city zoning map amendments for portions of these 180 MDR-designated acres.

The challenged decisions change the Metro Plan and GRP map designations for up to 33 acres to Community Commercial (CC). The challenged decisions authorize a change in city zoning for those 33 acres from MDR to Mixed Use Commercial (MUC).[3] Finally, the challenged decisions authorize application of the city's Medical Service (MS) zone to the 66 acres where the hospital is proposed. The existing Metro Plan and GRP maps for the 66 acres are not changed, and those 66 acres retain their MDR Metro Plan and GRP map designations.

To summarize, the plan map and zoning map changes adopted by the challenged decisions apply to a portion of the 180-acre MDR-designated portion of the GRP area. The decisions (1)

SCLS	Springfield Commercial Lands Study (a study that was adopted by the City of Springfield in February 2000). Record 4401-4479.
MDR	Medium Density Residential (a Metro Plan, GRP and city zoning map designation).
CC	Community Commercial (a Metro Plan and GRP map designation).
MUC	Mixed Use Commercial (a City of Springfield zoning map designation).
SDC	The Springfield Development Code, which includes the city's zoning regulations.
MS	Medical Services (a City of Springfield zoning district).

[2] The GRP itself uses the 180-acre figure in referring to the MDR-designated portion of the GRP area. A number of other figures are used in the decision and by the parties. For purposes of this opinion, it does not appear to be critical that we know the precise number of MDR-designated acres in the GRP area.

[3] The precise location of the 33 acres that will receive the new commercial Metro Plan, GRP and zoning designations is to be identified when the city considers a master plan for the proposed hospital and related commercial development. An application for master plan approval has been submitted and is pending before the City of Springfield, but no final decision has been rendered concerning that master plan.

change the Metro Plan map and GRP Plan map designations for 33 acres to CC; (2) authorize future rezoning of those 33 acres to MUC; and (3) authorize future rezoning of 66 acres to MS.

In addition to the above-described map changes, one of the ordinances also adopts a number of changes to the GRP text. Among other things, those changes *require* development of a large hospital on the MS-zoned area and require a master plan review process to consider any application to develop the hospital and related commercial and residential development on the 99 acres. Both ordinances adopt a number of conditions that, among other things, are intended to limit traffic impacts and to ensure provision of needed supporting public facilities to the development proposed for those 99 acres.

MOTION TO STRIKE

The city attaches local legislative history as an appendix to its brief. The city requests that we consider that legislative history in reviewing petitioners' challenges to the city's interpretation of certain provisions of the Metro Plan. The city concedes that the legislative history that is attached to its brief was not placed before the city decision makers during the proceedings below and is not included in the local record that was filed in this appeal. Respondent's Brief 13 n 3.

Petitioners (Jaqua) move to strike the local legislative history appendix, arguing that LUBA may not take official notice of those documents. Petitioners are correct. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440, 447-48. (1991) (LUBA may not take official notice of local legislative history and therefore may not consider local legislative history unless it is included in the record on appeal). We grant the motion to strike, and we do not consider that legislative history in this opinion.

MOTION TO CONSIDER EXTRA-RECORD EVIDENCE

The city argues that under the Court of Appeals' decision in *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) legislative history is clearly relevant in resolving the interpretive questions presented in this appeal and for that reason LUBA should consider the legislative history appended to its brief. The city argues

> "[LUBA] may take evidence not in the record when there are disputed factual allegations in the parties' briefs concerning 'procedural irregularities.' (OAR 661-010-0045(1))." Response to Petitioners' (Jaqua) Motion to Strike or Disregard Appendix and Motion to take Evidence not in the Record 2.

The city misreads our rule. OAR 661-010-0045(1) sets out the grounds for a motion requesting that LUBA consider extra-record evidence. It states, as relevant:

> "[LUBA] may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * procedural irregularities *not shown in the record* and which, if proved, would warrant reversal or remand of the decision."

The city does not offer the legislative history to resolve "disputed factual allegations * * * concerning procedural irregularities" that are "not shown in the record." The procedural irregularity of the city acting alone, if it was an irregularity, is already shown in the record. Just as importantly, the city does not offer the legislative history to resolve "disputed factual allegations;" it offers that legislative history to bolster its interpretive argument.

OAR 661-010-0045(1) provides no basis for us to consider the legislative history attached to the city's brief. The city's motion is denied.

INTRODUCTION

In this consolidated appeal, petitioners advance a number of challenges to the city's ordinances. Those challenges include assignments of error based on several Statewide Planning Goals and Land Conservation and Development Commission (LCDC) administrative rules that have been adopted to implement those goals. Petitioners also contend that under the Metro Plan, the city improperly assumed the role as sole decision maker in adopting the disputed ordinances and erred by failing to include Lane County and the City of Eugene as co-decision makers. Petitioners further contend that the action taken in this matter is inconsistent with the Metro Plan and that, because the city's action constitutes a *de facto* amendment of the Metro Plan, the amendment must be adopted by all three Metro Plan jurisdictions. If petitioners are correct that the city lacks jurisdiction to act as the sole decision maker or that the decision is inconsistent with the Metro Plan, the city's

ordinances would have to be reversed without regard to the merits of the remaining assignments of error, which rely on the statewide planning goals and related administrative rules. We therefore turn first to petitioners' contentions that the city improperly acted alone in this matter and that its decision is inconsistent with the Metro Plan.

I. METRO PLAN AMENDMENT PROCEDURE

As we have already indicated, the Cities of Springfield and Eugene and Lane County each adopted the Metro Plan and the GRP. Although all three jurisdictions adopted the Metro Plan and GRP, some Metro Plan and refinement plans amendments can be adopted by a single jurisdiction. All Metro Plan and refinement plan amendments are classified as either Type I or Type II amendments. If the challenged ordinances adopt Type II amendments, the county and the City of Eugene are not entitled to participate as decision makers.

The Metro Plan provisions that establish the legal distinction between Type I and Type II Metro Plan and refinement plan amendments appear at Metro Plan IV-2 through IV-3. As relevant here, the challenged ordinances are Type II amendments if they are a "change to the Plan diagram or Plan text that is site specific and not otherwise a Type I category amendment." Metro Plan IV-2.[4] The Metro Plan expressly provides that "[d]ecisions on Type II amendments within city limits shall be the sole responsibility of the home city."[5] The parties dispute whether the challenged amendments are accurately characterized as "site specific" and whether the amendments apply to land outside city limits.

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[4] For purposes of this opinion, we assume both plan map and plan text amendments must be site specific to qualify as a Type II amendment. Based on SDC 7.030, which parallels but is worded slightly differently from Metro Plan IV-2 quoted in the text, the city argues that the site specificity requirement applies only to Metro Plan *text* amendments and does not apply to Metro Plan *map* amendments. Respondent's Brief 10. Given our ultimate conclusion that the challenged amendments are site specific, we need not and do not resolve the issue.

[5] There is no dispute that the City of Springfield is correctly viewed as the home city.

A. Site Specific Amendments

As the city points out in its brief, some of the Metro Plan goals, objectives and policies apply throughout the entire Metro Plan area and others apply only to subareas. The city adopted the following relevant findings to explain its view that the challenged ordinances are properly viewed as Type II site specific map and text amendments:

> "[T]he city council * * * finds that because both the Metro Plan and GRP diagram amendments relate solely to the Gateway MDR site, the diagram amendments are 'site specific.' Site specificity is not limited to ownership of a certain tract or the size of the subject tract. Rather, site specificity refers to whether the amendment applies to the entire area subject to the Metro Plan or whether it is directed towards a discrete location within the City. The City finds that to be non-site specific, the subject amendment would have to apply to the entire Metro Plan area or to property that cannot be readily determined. * * * All other amendments are site specific. * * *
>
> "* * * * *
>
> "In the case of these Amendments, the diagram and text amendments clearly only apply to property wholly within the City and entirely within the GRP area. Consequently, the area subject to the Amendments is a discernable area and is entirely within the boundary of the City. Consequently, the City Council finds that the Amendments are 'site specific.'" Record 61-62.

The city's view that only plan amendments that apply to the "entire Metro Plan area or to property that cannot be readily determined" seems much broader than the words "site specific" would justify. Similarly, the city's view that any plan amendment that is entirely within the city's municipal borders is site specific seems questionable.

Given the significant procedural and decision making consequences that depend on whether a proposed Metro Plan amendment is site specific or not, it is somewhat surprising that neither the Metro Plan nor the GRP provide a definition of "site specific" or provide any real guidance in understanding the meaning the enacting bodies may have intended for those words. That lack of a definition of such an important concept leaves the cities and county to grapple with the question on a case-by-case basis and, in this appeal, leave LUBA to determine whether the city correctly concluded that the challenged ordinances adopt site specific Metro Plan and GRP amendments.

Viewing the Metro Plan Map itself, it is obvious that neither the 11 by 17 inch format plan diagram map nor the large format plan diagram could be used to accurately determine the Metro Plan map designation for individual lots or parcels. The Metro Plan explains that it "is a framework plan, and it is important that it be supplemented by more detailed refinement plans, programs, and policies." Metro Plan I-5. As previously mentioned, the GRP is such a refinement plan. The Residential Element of the GRP includes the following explanation:

> "* * * The purpose of this Element is to provide site-specific application of adopted Metro Plan residential land use designations, to resolve plan/zone conflicts, and to resolve land use conflicts as they relate to the livability of residential neighborhoods." GRP 12.

Similar language appears in the Commercial Element, Industrial Element, Natural Assets, Open Space/Scenic Areas, and Recreation Element, and Historic Resources Element. That language states a purpose of providing "site-specific application of adopted Metro Plan * * * designations." GRP 21, 25, 32, and 44. The maps included in the GRP are also at a relatively small (*i.e.* imprecise) scale, but are much more detailed than the Metro Plan maps. The GRP maps at least show lots and parcels so that it would be possible in most cases to identify the GRP map designations for particular lots and parcels.

Given the lack of any guidance in the Metro Plan concerning the meaning of "site specific" and given the clearly stated purpose of the GRP to provide site specificity, we believe it is reasonable to conclude that adoption of GRP text amendments that are limited in their applicability to the GRP area and adoption of GRP map amendments that are limited to the MDR-designated properties within the GRP area are properly viewed as site specific. We conclude that the challenged amendments are so limited.

Petitioners also point out that the precise location of the 33 acres to be redesignated from MDR to CC on the Metro Plan map and GRP map and rezoned from MDR to MUC, as well as the 66 acres to be rezoned from MDR to MUR, is not known. The precise location of those 33 acres and 66 acres will not be identified unless and until a master plan for the hospital and related

development is approved by the city. Petitioners contend that this presently floating nature of the changed plan and zoning map designations is proof that the changes are not "site specific." This uncertainty concerning the precise location of the plan and zoning map changes does not affect our conclusion concerning site specificity. The GRP area within which those designations are currently floating is sufficiently site specific.

B. Unincorporated Lands

Even a site-specific Metro Plan and GRP amendment could require that Lane County participate in the decision if the amendment changes the plan designation for unincorporated county land outside the existing city limits.[6] Some of the MDR-designated property in the GRP area is currently located outside the city in Lane County. The findings supporting the challenged ordinances include the following:

> "* * * There are approximately 10 acres of MDR property * * * in the [GRP area] that are not presently within the City. When these properties are eventually annexed into the City, the Amendments will apply to those properties. The Amendments do not apply to those properties and reference in these findings to the 'Gateway MDR site' does not include those properties." Record 44.

We agree with the city that the challenged decisions do not adopt plan and zoning map amendments for unincorporated lands. We reject petitioners' arguments that they do. The above-quoted findings expressly limit the present effect of the map amendments to lands that are within the city. The possibility that future annexation of currently unincorporated properties may work in concert with the challenged decision to effect a *future* plan or zoning map change does not mean that the challenged decisions currently constitute an "amendment between the city limits and [Metro Plan] Boundary." *See* n 6.

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[6] As relevant, the Metro Plan provides "a Type II [Metro Plan] amendment between the city limits and [Metro Plan] Boundary, must be approved by the home city and Lane County * * *." Metro Plan IV-3.

For the reasons explained above, petitioners' assignments of error alleging that the challenged ordinances constitute Type I amendments are denied.[7]

II. INCONSISTENCY WITH THE METRO PLAN

Although petitioners' arguments overlap and frequently are intertwined with their arguments that the challenged amendments are not site specific, petitioners also argue that the amendments the city adopted are inconsistent with the Metro Plan MDR map designation that applies to the 99 acres that are the subject of this appeal. We describe below the major provisions of the Metro Plan that the parties cite and rely on in their arguments concerning the consistency of the city's decisions with the Metro Plan.

A. The Metro Plan

The Metro Plan was adopted in 1980 and has been updated and amended numerous times over the years. The 1987 Metro Plan update with subsequently adopted revisions through February 2002 is included in the record. Record 5081-5281. The Metro Plan has been acknowledged by LCDC to comply with the statewide planning goals. The Metro Plan includes a general discussion of 16 Metro Plan land use designations. One of those general Metro Plan designations is "[r]esidential."

> "This category is expressed in gross acre density ranges. Using gross acres, approximately 32 percent of the area is available for *auxiliary uses*, such as streets, elementary and junior high schools, neighborhood parks, *other public facilities, neighborhood commercial services*, and churches not actually shown on the diagram. *Such auxiliary uses shall be allowed within residential designations if compatible with refinement plans, zoning ordinances, and other local controls for allowed uses in residential neighborhoods*. The division into low, medium, and high densities is consistent with that depicted on the 1990 [Metro Plan] diagram. In other words:
>
> "Low-Density Residential—Through ten units per gross acre

[7] Petitioners' first assignment of error (third subassignment of error) (CHOICES) is denied. Petitioners' third assignment of error (Jaqua) is denied. Intervenor-petitioner Lane County's assignment of error is denied in part. We address the remaining parts of intervenor-petitioner Lane County's single assignment of error later in this opinion.

"Medium-Density Residential—Over 10 through 20 units per gross acre

"High-Density Residential—Over 20 units per gross acre

> "These ranges do not prescribe particular structure types, such as single-family detached, single-family attached, manufactured dwellings in parks, or multiple-family. That distinction, if necessary, is left to local plans and zoning ordinances.

"* * * * *" Metro Plan II-E-2 through II-E-3 (emphases added).

The city and PeaceHealth read the above Metro Plan language to recognize expressly that non-residential public facilities will occupy nearly one-third of the land that the Metro Plan designates for residential use and that refinement plans are relied on to ensure compatibility.[8]

Petitioners read the same Metro Plan language to authorize limited "neighborhood commercial uses" and public facilities scaled to serve residential neighborhoods, not large, regional hospital facilities with related medical offices and supporting commercial development.[9] Petitioners bolster this view by noting that both of the region's large hospitals are designated commercial on the Metro Plan map, not residential.[10]

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[8] PeaceHealth cites other parts of the Metro Plan that call for providing "key urban facilities and services," which are described as a minimum level of "emergency medical services" and a full range of "health services." PeaceHealth also cites finding 8 in the Metro Plan Public Facilities and Services Element, which states:

> "Large institutional uses, such as universities and hospitals, present complex planning problems for the metropolitan area due to their location, facility expansion plans, and continuing housing and parking needs." Metro Plan III-G-4.

[9] Petitioners (Jaqua) point out that the Metro Plan Economic Element lists PeaceHealth's existing regional hospital as one of a number of "[m]ajor employment centers." Petition for Review (Jaqua) 22. Petitioners (Jaqua) contend that the Metro Plan map does not designate any of the listed major employment centers as "residential" and instead designates all of them "public, commercial or industrial[.]" *Id*.

[10] Petitioners (CHOICES) contend that the Metro Plan anticipates that "the area's two existing hospitals would remain at their current locations, with possible upgrades and expansions, though it was considered (primarily within the purview of the refinement plans) that satellite specialty clinics would be scattered throughout the metropolitan area." Petition for Review (CHOICES) 24. Petitioners (CHOICES) contend that the challenged decisions are therefore inconsistent with the Metro Plan and are in fact the kind of change in basic assumption that triggers a requirement for "special review" under Metro Plan Review Policy 1, and a decision by all three enacting bodies. This contention, if meritorious, would bear directly on both the Metro Plan consistency issue and the issue of whether the county and the City of Eugene should have joined the City of Springfield as decision makers. However, petitioners (CHOICES) cite nothing in the Metro Plan that would support their contention that the Metro Plan includes *any* specific directives concerning future hospital development, let alone the alleged very specific basic assumption that the existing hospitals would remain where

We note that one threshold issue that is raised by petitioners is the level of deference the city is entitled to in interpreting the Metro Plan and GRP. Petitioners argue that because the city is but one of the three legislative bodies that adopted the Metro Plan and GRP, it is not entitled to deference under *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). We reject the argument. *See Trademark Construction, Inc. v. Marion County*, 155 Or App 84, 88-89, 962 P2d 772 (1998) (board of county commissioners is entitled to deference under *Gage* and *Clark* when interpreting comprehensive plan language that was first adopted by a city and later adopted by the county as part of the county's comprehensive plan). The city council is clearly entitled to deference when it interprets the SDC. As one of the three enacting bodies, the city council is also entitled to appropriate deference under *Clark* and ORS 197.829(1) when it expressly or implicitly interprets the Metro Plan and GRP.

If the relevant interpretive question were whether the above-described Metro Plan provisions, viewed alone, can be interpreted to permit locating a regional hospital and supporting uses on 66 acres of a 180-acre MDR-designated area as an "auxiliary" use to the residential uses that the MDR designation envisions, we would have little trouble agreeing with petitioners that the Metro Plan would not permit such a hospital development on MDR-designated land. The concept of "auxiliary uses" viewed in the context of those Metro Plan provisions is simply not that broad. Even under the "clearly wrong" and "beyond all colorable defense" standard that applied to local government interpretations of their own land use legislation under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992) and *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854, *rev den* 320 Or 272 (1994), it unlikely such an interpretation could be sustained on review. Under the Court of Appeals' most recent formulation of the standard

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they were when the Metro Plan was adopted. The fact that the land where the existing hospitals are located is designated commercial on the Metro Plan map has some bearing in deciding whether the adopting cities and county intended that future regional hospitals might be approved on MDR-designated lands, but that zoning comes nowhere near establishing the "basic assumption" that petitioners allege.

of review that we must apply to city interpretations of its own land use legislation under ORS 197.829(1), it is not even a particularly close question. *See Church v. Grant County*, 187 Or App at 524 ("clearly wrong" is an inaccurate shorthand summary of the standard of review required under *Clark* and ORS 197.829(1)).

However, the relevant question is not whether the above-described Metro Plan provisions, viewed alone, can be construed to permit locating the proposed hospital on 66 acres of MDR-designated land. The above-quoted Metro Plan Residential designation language expressly provides "auxiliary uses shall be allowed within residential designations if compatible with *refinement plans, zoning ordinances, and other local controls for allowed uses in residential neighborhoods*." (Emphasis added.) That language delegates to the individual cities and county authority to further elaborate on the kinds of auxiliary uses that may be allowed on lands that the Metro Plan designates for residential use.[11]

B. The GRP and MS Zone

The GRP was adopted in 1992 and is an acknowledged comprehensive plan. Before it was amended by Ordinance 6051, the GRP clearly embraced petitioners' view that residential development is preferred in the MDR area and that commercial development is to be limited and neighborhood oriented.[12] Because the GRP almost certainly would have prevented city approval of MS zoning for 66 MDR-designated acres within the GRP, Ordinance 6051 adopts a number of amendments to the GRP to specifically authorize the hospital and related development.

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[11] We note that there is evidence in the record that the City of Eugene "has allowed hospitals as a conditional use in most residentially-zoned areas." Second Supp Rec 1.

[12] For example, one of the challenged ordinances amends GRP Residential Implementation Action 12.1. Before the amendment, GRP Residential Implementation Action 12.1 limited commercial zoning in the GRP MDR area to three acres of NC and delayed any possibility that such commercial zoning could be approved until at least 25 percent of the anticipated residential units were constructed. Record 169-70. As amended, those limits are removed and redesignation of up to 33 acres of MDR-designated land to commercial is specifically authorized. Record 170. A new GRP Residential Element Implementation Action 12.6 is adopted to specifically authorize application of MS zoning to MDR-designated land in the GRP area. Record 170-71.

The impediments that existed in the pre-amendment GRP no longer exist. In defending those amendments against petitioners' contentions that they are inconsistent with the Metro Plan, the city relies heavily on its interpretation of its acknowledged MS zone to allow hospitals on lands the Metro Plan designates MDR.

The city adopted the MS zone in 1989 and that zone is part of the city's acknowledged land use regulations. The MS zone that Ordinance 6051 authorizes the city to apply to 66 acres of MDR-designated land expressly authorizes a number of primary uses. SDC 22.020.[13] It would appear that the proposed hospital and related facilities fall under several of those primary uses. One of the MS zone siting standards requires that a MS zoning site include "three or more acres," but imposes no *maximum* site size limit. SDC 22.040(1). The SDC provides the following description of the purpose and applicability of the MS zone:

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[13] Those primary uses include the following uses and any similar uses that the planning director may identify:

"(1) Hospital services

"(2) Medical clinics

"(3) Physicians services

"(4) Medical laboratory services

"(5) Dental services

"(6) Dental laboratories

"(7) Wellness, fitness and nutrition services

"(8) Physical rehabilitation centers

"(9) Housing for the elderly and handicapped, independent of care facilities.

"(10) Residential care facilities

"(11) Day care facilities that meet Children's Services Division * * * regulations.

"(12) Adult day care facilities subject to any applicable State regulations.

"(13) Certain Wireless Telecommunications Systems Facilities * * *."

"ESTABLISHMENT OF THE MS MEDICAL SERVICES DISTRICT.

"(1) In order to implement the policies of the Metro Plan, regulate the use of land, structures and buildings, and protect the public health, safety and welfare, the MS District is established in this Article.

"(2) The MS District is designed to provide for *hospital expansion and for suitable, geographically dispersed areas for the development of hospitals and associated medical residential facilities*. These facilities shall be developed comprehensively and shall be designed to ensure compatibility with the surrounding neighborhood.

"(3) The provisions of this Article may apply:

"(a) In the vicinity of the McKenzie-Willamette Hospital, as delineated in the Centennial-Mohawk Refinement Plan;

"(b) On arterial streets where Community Commercial, Major Retail Commercial, *Medium Density Residential* or High Density Residential Metro Plan designations exist." SDC 22.010 (emphases added).

The city and PeaceHealth rely heavily on the existence of the acknowledged MS zoning district and the apparently undisputed fact that the 66 acres that are ultimately to receive the MS zoning will have to be "[o]n arterial streets where * * * Medium Density Residential * * * Metro Plan designations exist." Simply stated, the city and PeaceHealth argue the Metro Plan should not be interpreted to prohibit the proposed regional hospital and related development in the MDR-designated portion of the GRP, because the acknowledged MS zone allows such a hospital and related development.

It would have been a relatively simple matter for the city to include language in the MS zone to limit the hospitals and hospital expansions authorized in the MS zone to sub-regional or limited, community-oriented facilities. However, there is no such limiting language. In addition, the list of primary uses noted earlier in no way suggests that new hospitals and hospital expansions are limited to *neighborhood* hospitals when the MS zone is applied to property that the Metro Plan and GRP designate MDR. To the contrary, the siting standard requiring a *minimum* site size of three acres seems to suggest a concern that the development site not be too small. There is no expression of a

maximum site size, which lends further support to a conclusion that there was no legislative intent to limit hospitals in the MS zone so that they would not be larger than necessary to serve the immediate neighborhood or some other sub-regional area. All of these factors support the city's and PeaceHealth's view that the MS zone does not impose any explicit size limits on the hospitals that may be allowed in the MS zone. That the MS zone is acknowledged and therefore presumably consistent with the Metro Plan supports the city's and PeaceHealth's view that the challenged decision is not inconsistent with the Metro Plan MDR designation, if the Metro Plan is viewed in context with the acknowledged MS zone that was specifically adopted to implement the Metro Plan.

Beyond the lack of any textual support for limiting MS zones to community-oriented sub regional facilities, or perhaps *because* of the lack of any textual support, any attempt on our part to articulate and give meaning to that limit in this appeal, or any attempt on the city's part to do so in a decision applying the MS zone, would face obvious difficulties.[14] We agree with the city that nothing the parties have identified in the MS zone precludes siting a large regional hospital on MDR-designated land, as a matter of law. The city clearly interprets its MS zone to allow hospitals, without regard to size. In response to an argument below that the MS zone does not allow large hospitals, the city adopted the following findings:

> "SDC * * * 22.010(2) states that the District was established to provide for suitable, geographically dispersed areas for the development of hospitals and associated medical residential facilities. Section 22.020 lists hospital services as a primary use. While it is clear that the intent of SDC Article 22 is to allow for hospital uses there is no restriction or guidance in the Article related to the size of the use." Record 162.

[14] For example, would a hospital sized to serve the portion of the Metro Plan area east of I-5 be permissible on MDR-designated land? If that area is too large, would the hospital have to be limited to serve the GRP area or some other subarea of the city? If the limit on hospital size were to be accomplished in some other way, such as by limiting the physical size of the hospital and related facilities or the hospital site, how would the appropriate size limit be identified?

Our review of the city's interpretation is governed by ORS 197.829(1) and the Court of Appeals' recent decision in *Church*.[15] No party identifies any "state statute, land use goal or rule" that might be implicated by the city's interpretation of the MS zone to allow siting large hospitals in MDR areas. Therefore the city's interpretation does not run afoul of ORS 197.829(1)(d). As we conclude above, we do not read the Metro Plan to permit large hospitals in areas that are designated MDR as a residential auxiliary use. To the extent that omission represents an "underlying policy" of the Metro Plan, the city's interpretation could potentially be reversible under ORS 197.829(1)(b) or (c) as inconsistent with that "underlying policy" or the "purpose" of the MS zone or Metro Plan. However, the Metro Plan did not purport to be the last word on the scope of auxiliary uses that may be allowed in the MDR zone. A related "underlying policy" and "purpose" of the Metro Plan is to authorize the cities and county to elaborate on and impose their own regulations on the auxiliary uses that may be allowed in each jurisdiction in the MDR zone. The MS zone presumably was an exercise of that discretion that was not appealed and is now acknowledged. We therefore conclude that the city's interpretation is not inconsistent with the "underlying policy" or "purpose" of the Metro Plan or MS zone. Finally, the city's interpretation is not inconsistent with the express language of the MS zone or the Metro Plan.

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[15] Under ORS 197.829(1):

> "[LUBA] 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;
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

There may be other reasons why the proposed hospital cannot be approved, but such a hospital is not inconsistent with the city's acknowledged MS zone or the Metro Plan, if the Metro Plan is read in context with the acknowledged MS zone.[16] To summarize, we agree with petitioners that the Metro Plan, read in isolation, does not authorize local approval of regional hospitals on MDR-designated lands as a use that is auxiliary to residential use. However, the Metro Plan specifically authorizes the cities and county to elaborate on the particular auxiliary uses that may be allowed in the city's MDR-designated areas and impose any additional regulations that may further local goals and needs. The city exercised that discretion when it adopted the MS zone. We do not mean to suggest that the city has absolute discretion to develop its own list of auxiliary uses that are allowed in MDR-designated areas. However, the Metro Plan is somewhat ambiguous in how it views hospitals and expressly states that they present complex siting questions. *See* n 8. Other than disagreeing with the city's interpretation of the scope of the MS zone, petitioners offer no basis for us to conclude that the city's interpretation of the acknowledged MS zone, or the manner in which it harmonizes that zone with the Metro Plan, is beyond the city's interpretive discretion under ORS 197.829(1).

For the reasons explained above, we reject petitioners' arguments that the city's decision to authorize up to 66 acres of MDR-designated land to be zoned MS to allow consideration of the proposed hospital through a master planning process violates the Metro Plan as a matter of law.[17]

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[16] We emphasize that the only question that we are addressing in this part of our opinion is whether Ordinance 6051, which authorizes 66 acres of MDR-designated property to be zoned MS so that a hospital and related development could be considered in a subsequent master planning process, violates the Metro Plan as a matter of law. If it does, Ordinance 6051 must be reversed. Whether Ordinance 6050 and Ordinance 6051 violate one or more of the statewide planning goals or administrative rules that petitioners cite and whether the hospital is approvable in the master planning process that will follow under whatever siting and other regulations may apply are separate questions.

[17] Petitioners' fourth assignment of error (Jaqua) is denied. Intervenor-petitioner Lane County's assignment of error is denied in part. Petitioners' first assignment of error (first subassignment of error) (CHOICES) is denied.

III. INCONSISTENCY WITH UNAMENDED GRP PROVISIONS

SDC 7.070(3)(b) requires that amendments to the Metro Plan "must not make the Metro Plan internally inconsistent." By our count, petitioners (CHOICES) identify eight parts of the GRP that they contend are inconsistent with particular GRP amendments. The first two are actually quotations of language from the section of the GRP that describes its relationship with other plans.[18] We agree with PeaceHealth that petitioners fail to establish that the challenged amendments are inconsistent in the way SDC 7.070(3) proscribes.

Petitioners next cite language from the General Overview of the Gateway Area section of the plan, which states that currently vacant, underdeveloped and agricultural areas "serve as a buffer between the urbanized areas to the south, and the natural features (which provide habitat and movement corridors for wildlife) along the McKenzie River." We fail to see how the adopted changes are any more inconsistent with that language than the prior GRP, which provided for development of a more residential nature in this area. Petitioners also cite additional language from that section of the plan, which they characterize as an essential planning objective:

> "South of the [Special Light Industrial] site is an area of approximately 180 acres, which is designated for MDR development. This area represents a significant portion of the remaining vacant land allocated for MDR development in Springfield and in the metropolitan area. This large MDR area is important to meet the future housing needs of a growing metropolitan population that has nearly exhausted the area's housing supply." Petition for Review (CHOICES) 17 (quoting from Record 4722).

Petitioners' entire argument is that "the GRP amendments which allow residential land to be dedicated to commercial uses do not amend this overarching policy objective." Petition for Review (CHOICES) 17. Petitioners make no attempt to explain their characterization of the quoted language as an "overarching policy objective" and make no attempt to explain why the measures

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[18] The quoted language is as follows:

> "The GRP was intended 'to provide certainty for developers and residents and 'to minimize the negative impacts of development on existing residential neighborhoods and natural resources." Petition for Review (CHOICES) 16.

taken in the challenged decision to ensure that residential development will continue to occur in this MDR-designated area are not sufficient to maintain consistency with the quoted language. Petitioners' arguments are insufficiently developed to establish an inconsistency that would violate SDC 7.070(3).

Petitioners next argue that changes the challenged ordinances make to "GRP Residential Policy Elements and Implementation Actions are inconsistent with the unchanged Residential Goals, from which Policy Elements and Implementation Actions are supposed to follow." Petition for Review (CHOICES) 17. Petitioners' concern appears to be with the increase in opportunity for commercial development on 33 formerly MDR-designated acres and reduced emphasis on residential development in the Gateway MDR area. There can be no doubt that the challenged decisions will allow considerable hospital, hospital related and commercial development on 99 of the 180 acres that the pre-amendment GRP and SCD designated MDR. The approach the city and PeaceHealth have taken to address that concern is to take measures to ensure that considerable residential development will still be possible in the Gateway MDR area. Petitioners do not even identify the Residential Goals that they believe are inconsistent with the cited amendments. Without a more focused and developed challenge from petitioners that explains why petitioners believe the cited changes are inconsistent with particular Residential Goals, they fail to establish that they leave the GRP internally inconsistent.

Petitioners' first assignment of error (second subassignment of error) (CHOICES) is denied.

IV. GOAL 2

The petitioners in this appeal couch many of their arguments as Goal 2 plan consistency or coordination arguments or evidentiary and findings failures under Goal 2. We address elsewhere in this decision their arguments that the disputed Metro Plan and GRP amendments conflict with other unamended plans or constitute a Goal 2 failure because they also constitute failures under other statewide planning goals. We reject without further discussion their separate, related Goal 2

arguments.[19] We address here intervenor-petitioner Lane County's contention that the city inadequately coordinated its decision with Lane County and inadequately addressed its concerns.

In *Turner Community Association v. City of Stayton*, 37 Or LUBA 324, 353-54 (1999), we described local governments coordination obligation under ORS 197.015(5) and Goal 2 as follows:

> "The coordination obligation requires an exchange of information and an attempt to accommodate the legitimate interests of all affected governmental agencies. *Rajneesh v. Wasco County*, 13 Or LUBA 202, 210 (1985). Goal 2 and ORS 197.015(5) do not mandate success in accommodating the needs or legitimate interests of all affected governmental agencies, but they do mandate a reasonable effort to accommodate those needs and legitimate interests 'as much as possible.' For LUBA to be able to determine that this coordination obligation has been satisfied, a local government must respond in its findings to 'legitimate concerns' that are expressed by affected governmental agencies. *Waugh*, 26 Or LUBA [300,] 314-15 (1993)." (Footnote omitted.)

Lane County argues that the city's findings inadequately respond to issues that it raised in a four-page letter to the city. Record 1225-1228. The county quotes most of that letter in the statement of facts in its petition for review. Petition for Review (Lane County) 4-6. Neither the county nor the city nor PeaceHealth make any attempt to summarize or identify the issues raised in that letter. That makes it much more difficult for us to determine whether the challenged decision adequately responds to the issues the county raises. Our summary of the issues the county raises is set out below:[20]

1. The city should approve a master plan, a nodal development plan, and any required GRP and Metro Plan amendments for the proposed development together.

2. How will "the proposed 'trip caps' * * * be codified, verified, and enforced?" Petition for Review (Lane County) 5.

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[19] Accordingly, petitioners' first and second assignments of error (Jaqua) are denied, and petitioners' first assignment of error (CHOICES) is denied in part.

[20] The numbers we have assigned to issues in this opinion are ours.

3. According to the applicant's traffic study, the Pioneer Parkway Extension will require "two southbound left turn lanes and an exclusive right turn [lane] southbound." *Id*. Has the city "determined whether additional right-of-way may be needed, and is there funding available or any additional cost to Lane County?" *Id*.

4. Hayden Bridge Way between Pioneer Parkway and Fifth Street is a "two-lane urban collector with parking." *Id*. How will this road handle "the two southbound to eastbound turn lanes on Pioneer Parkway extension?" *Id*. at 5-6.

5. TransPlan project #737 "is a two-lane urban standards project." *Id*. at 6. "Will the current proposal cause changes to this project or any cost to Lane County?" *Id*.

6. Will TransPlan project #727 have to be moved from the "Future List (Beyond 20 years)" to the "Financially Constrained List" so that it can be constructed to accommodate the proposal? *Id*.

Later in its brief, Lane County again alleges the issues in its letter were not addressed by the city and argues:

> "The need for a 'comprehensive traffic circulation system for the Gateway MDR site' went unaddressed [Issue 7]. A concern about 'how the proposed 'trip caps' will be codified, verified, and enforced' was not specifically addressed in the findings [Issue 8]. Concerns with the need and cost responsibility for additional right-of-way and road improvements occasioned by the amendments are not mentioned in the findings [Issue 9]." Petition for Review (Lane County) 16.

PeaceHealth only responds specifically to issues 6-9. We turn first to those issues.

PeaceHealth identifies a finding that responds directly to Issue 6. Record 157-58. Lane County makes no attempt to explain why that finding is inadequate to satisfy the city's coordination obligation under Goal 2 to respond to legitimate issues.

With regard to issue 7, PeaceHealth cites the 15 pages of findings in the decision that address Goal 12 and "discuss in detail the traffic circulation system for the Gateway MDR site." Intervenor-Respondent's Brief 13. PeaceHealth also cites the seven pages of findings that address Metro Plan transportation issues in the GRP MDR area. PeaceHealth points out that the county

neither acknowledges nor makes any attempt to explain why these findings are inadequate to respond to issue 7.

Issues 2 and 8 are the same issue. PeaceHealth does not cite any specific findings that respond to the issue. However, PeaceHealth points to Condition Number 1 and Residential Implementation Action 13.7, which codify the trip cap requirement. Record 37, 193. PeaceHealth argues:

> "Regarding enforcement, Condition 1 * * * establishes the trip cap, explains how the trips will be measured and, because it is a condition of approval, may be enforced by the City like any other condition of approval. The County does not reference any of the City's findings related to the trip cap and makes no effort to explain how the trip cap findings and conditions of approval do not address the County's trip cap concerns. * * *" Intervenor-Respondent's Brief 13.

We agree with PeaceHealth that the county does not demonstrate that the city failed to respond to issues 2 and 8.

Issue 9 is a more general statement of the concerns expressed in issues 3, 4 and 5. PeaceHealth cites a finding that explains that future developers will be required under the amendments and an annexation agreement to pay "11 million dollars to construct off-site transportation improvements." Record 124. The findings go on to explain that "the City has a policy of exacting additional improvements that are proportional to the impacts of the proposed development." *Id*. The challenged decision also includes the following findings:

> "The issue now before the city is whether the proposed PeaceHealth plan amendments would allow development that could impact one or more transportation facilities in ways not consistent with the adopted TransPlan. The criteria for deciding this issue are established in LCDC's Transportation Planning Rule (TPR) as set forth in OAR 660-012-0060, which implements Statewide Land Use Planning Goal 12. OAR 660-012-0060 specifically applies to the adoption of comprehensive plan and land-use regulation amendments.
>
> "Staff believes the PeaceHealth application – with recommended conditions of approval – adequately addresses the TPR requirements. In addition, local requirements are in place to ensure that site development under the amended plan designations will remain consistent with adopted plans.

> "The PeaceHealth annexation agreement requires that a master plan for the PeaceHealth site be approved before any development can occur. During this process the transportation infrastructure needed to support each proposed phase of development can be specifically identified. Conditions can then be placed on the master plan approval to ensure that adequate transportation facilities will be in place to serve each development phase.
>
> "In addition, development of specific sites on the PeaceHealth property must have subdivision approval and/or site plan approval before construction can occur. This will provide additional opportunities to ensure that adequate transportation facilities will be in place to serve each site development." Record 152.

While the above-quoted findings are clearly sufficient to respond to the more general concern expressed in issue 9, a much closer question is presented with regard to issues 3, 4, and 5. PeaceHealth cites no findings that respond directly to the particular concerns those issues present regarding particular facilities. However, we understand from the above-quoted findings that the city believes that current requirements under Goal 12 and the TPR are satisfied for the disputed plan and zoning amendments and that any individual facility concerns can and will be addressed during master plan review.[21] The county suggests that its specific concerns "cannot be left to master plan processes." Petition for Review (Lane County) 10. However, the county does not explain why that is the case. We conclude that the city adequately responded to issues 3, 4, 5 and 9.

PeaceHealth does not cite any findings addressing issue 1. That is perhaps because issue 1, as we have summarized it from two pages of the record, is not really stated as we have summarized it. In response to a similar concern, that the master plan should be reviewed before the plan amendments, the city adopted the following findings:

> "In the GRP there is no policy directive to allow for the submittal of a master plan for the Gateway MDR site; the Conceptual Development Plan requirement is still in place. The policy pieces that will allow for the submittal of a master plan are replacing the current GRP requirements. Additionally, Criteri[on] (2) of Article 37 Master Plans requires that the master plan conform to the refinement plan. Therefore, the amendments to the refinement plan that make the proposed uses allowable must take place before the master plan is submitted." Record 151.

[21] Petitioners' arguments concerning Goal 12 and the TPR are addressed later in this opinion.

We conclude that the above finding is adequate to fulfill any obligation the city had under Goal 2 to explain why it is considering the disputed plan amendments before other planning efforts and permitting.

Intervenor-petitioner Lane County's assignment of error is denied in part.

V. GOAL 7

Goal 7, among other things, requires that "[d]evelopments subject to damage or that could result in loss of life shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards." Much the GRP MDR area is in the McKenzie River floodplain. The findings supporting the challenged decisions conclude that the decisions are consistent with Goal 7 for two reasons. First, the findings point out that the pre-amendment Metro Plan and GRP already designate the GRP MDR area for development and both of those plans are acknowledged to comply with Goal 7. The city then finds "because no specific development is approved, and the Amendments merely redesignate property already zoned for development, the Amendments are consistent with Goal 7." Record 72.

Secondly, the city also explained that approval of development in the GRP MDR area in the future will be subject to SDC floodplain development standards that will ensure that any development is elevated to avoid or mitigate flood damage. PeaceHealth explains:

> "* * * The findings outline the requirements of SDC Article 27 regarding development within a floodplain, and explain that, under its annexation agreement with the City, PeaceHealth would: (a) be subject to even stricter standards than those included in SDC Article 27, and (b) would be required to prepare a plan to mitigate development impacts based on the conclusions of the finalized * * * floodplain report. That mitigation plan will then be reviewed by the City as part of the master plan application. In other words, the City does not actually rely on any specific evidence set forth in the floodplain report in order to make its findings of compliance with Goal 7. The reference to the draft floodplain report is simply part of the City's explanation of the extensive process that the applicant must go through, a process that ensures that all development on the subject property will be in compliance with Goal 7." Intervenor-Respondent's Brief 42.

With regard to the city's first basis for finding the decisions are consistent with Goal 7, petitioners CHOICES argue that basis for finding Goal 7 compliance is without merit because the RLS (*see* n 1) assumes that inventoried residential lands in floodplains will not be developed. PeaceHealth responds that just because the RLS assumes that lands located in the floodplain will not be developed, for purposes of ensuring there is an adequate supply of land for residential development, does not mean that the GRP MDR area is not planned and zoned for development and could be developed for residential development under the SDC. We agree.

We also reject petitioners' (CHOICES) substantial evidence challenge to the city's alternative basis for concluding that the decisions comply with Goal 7. Petitioners' (CHOICES) substantial evidence challenge is based on the city's reliance on a "draft" flood study that has not yet been subject to peer review. We have previously held that draft transportation and parking management plans could constitute substantial evidence. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261, 274-78 (2002). Moreover, as PeaceHealth points out, the challenged decisions adopt plan and zoning changes that would be applied by the city in the future to approve development that will be subject to review under city regulations to protect development in floodplains and that review will require additional study. Viewed in that context, the city's reliance on a draft flood study to conclude that the challenged plan and zoning amendments are not inconsistent with Goal 7 is not unreasonable.

Petitioners' fourth assignment of error (CHOICES) is denied.

VI. GOAL 9

A. Goal 9 and the Goal 9 Administrative Rule

Among other things, Goal 9 requires that the city "[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies[.]" OAR 660 Division 9 is LCDC's Goal 9 administrative rule. Among other things, the rule requires that cities and counties complete an

"Economic Opportunities Analysis." OAR 660-009-0015.[22] Based on the Economic Opportunities Analysis, cities and counties are to prepare Industrial and Commercial Development Policies. OAR 660-009-0020. Finally, OAR 660-009-0025 requires that cities and counties designate industrial and commercial lands sufficient to meet short term and long term needs.

OAR 660-009-0010(2) provides that the detailed planning requirements imposed by OAR 660 Division 9 apply "at the time of each periodic review of the plan (ORS 197.712(3))." In 2001, LCDC amended OAR Chapter 660 Division 9 to add OAR 660-009-0010(4), which expands applicability of the rule outside periodic review in certain circumstances. OAR 660-009-0010(4) provides as follows:

> "Notwithstanding [the OAR 660-009-0010(2) limit of the applicability of this division to the time of each periodic review], a jurisdiction which changes its plan designations of lands in excess of two acres to or from commercial or industrial use, pursuant to OAR 660, division 18 (a post acknowledgment plan amendment), must address all applicable planning requirements; and:
>
> "(a) Demonstrate that the proposed amendment is consistent with the parts of its acknowledged comprehensive plan which address the requirements of this division; or
>
> "(b) Amend its comprehensive plan to explain the proposed amendment, pursuant to OAR 660-009-0015 through 660-009-0025; or
>
> "(c) Adopt a combination of the above, consistent with the requirements of this division."

When a post acknowledgment plan amendment (PAPA) affecting more than two acres triggers the requirements of the Goal 9 rule, as is the case here, the city is required to do one of three things: (1) demonstrate that the PAPA complies with the parts of the acknowledged

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[22] OAR 660-009-0015 requires that cities and counties provide four kinds of information. First, a review of national, state and local trends to identify the "major categories of industrial and commercial uses that could reasonably be expected to locate or expand" in the city or county. OAR 660-009-0015(1). Second, the types of industrial and commercial sites that are likely to be needed. OAR 660-009-0015(2). Third, an inventory of vacant and underutilized industrial and commercial land within the city or county. OAR 660-009-0015(3). Fourth, an estimate of the types and amounts of economic development likely to occur in the city or county. OAR 660-009-0015(4).

comprehensive plan that were adopted to comply with the Goal 9 rule; (2) comply with the planning requirements in OAR 660-009-0015 through 660-009-0025 in adopting the PAPA; or (3) pursue a combination of 1 and 2. In the decisions challenged in this appeal, the city argues that it properly selected and has demonstrated compliance with the first option.

B. The Springfield Commercial Lands Study (SCLS)

The city's findings explain that in 1994, DLCD adopted a periodic review work task which directed the city to "complete a city-wide commercial lands study * * *, analysis and policy document consistent with statewide [p]lanning [g]oal 9." Record 76. The city adopted the Springfield Commercial Lands Study on February 7, 2000, to comply with this DLCD directive. Record 4478. The city's findings go on to explain:

> "* * * On July 11, 2001 [DLCD] issued an order of approval of this Periodic Review work task. This document constitutes the City's obligation under the rule to propose economic opportunities coordinated with projected demand and consistent with the Metro Plan. * * *" Record 76.

The SCLS includes Implementation Strategy 1-B (2), which provides:

> "Prepare Gateway Refinement Plan and Metro Plan amendments and designate and rezone 10-15 acres of commercial land in the Gateway MDR site for neighborhood commercial development. Delete the reference to the 3 acres recommended in the McKenzie-Gateway Conceptual Development Plan." Record 4446.

In addressing the apparent inconsistency of redesignating 33 acres of the GRP MDR area to CC and rezoning those 33 acres MUC instead of NC, the challenged decision explains:

> "The [S]CLS provides the following relevant policies to guide the City in making land use decisions.
>
> "At page 19, the [S]CLS states that there is a demonstrated demand for 255 acres of commercial development land to the year 2015. This figure should also be considered independent of redevelopment sites identified in TransPlan for nodal development.[23]

[23] Petitioners (CHOICES) dispute the accuracy of the finding concerning the 255 acres reflecting "the low end of the development spectrum," and the finding concerning the relevance of "redevelopment sites." Given our disposition of this assignment of error, we do not attempt to resolve that dispute.

> "The [S]CLS contains the following policies:
>
> "Policy 1--B *'Ensure that an adequate amount of commercial land is designated in undeveloped nodes such as Jaspre/Natron and McKenzie/Gateway, to accommodate a portion of the demand for commercial acreage, and to implement the policies and objectives of TransPlan.'*
>
> "Policy 3--A *'Redesignate and rezone portions of [industrial land or] residential land within identified Neighborhood Center or Commercial Center nodes to Mixed Use Commercial to achieve the objectives of TransPlan, TPR 12, and to incorporate higher intensity development in conjunction with residential and employment opportunities.'*
>
> "While it is true that the proposed plan amendments exceed the acreage recommended by the [S]CLS for this site in implementation strategy 1--B(2), dropping the 3 acre recommendation is on point, as is the recommendation to rezone nodal sites identified in the TransPlan with Mixed Use commercial zoning." Record 76-77.

Petitioners (CHOICES) dispute the city's findings "that the proposed amendments to open almost two-thirds of the McKenzie-Gateway MDR Area to regional-scale commercial uses are on point." Petition for Review (CHOICES) 29. Petitioners (CHOICES) contend those findings "are unsupported by the Springfield Commercial Lands Study or any other evidence in the record." *Id*.

Even if we assume the SCLS identifies a need for at least 255 acres of additional commercially designated land and that the 255 acre figure is not affected by redevelopment potential within the city, the above-quoted findings rely on general policies in the SCLS that are either not geographically specific or are less geographically specific than SCLS Implementation Strategy 1--B(2). SCLS Implementation Strategy 1--B(2) calls for redesignating "10-15 acres of commercial land in the [GRP] MDR site for neighborhood commercial development." The challenged decisions redesignate 33 acres from MDR to CC and zone those 33 acres MUC. That means that more than twice the number of commercially designated acres SCLS Implementation Strategy 1--B(2) calls for are designed for commercial use and those acres are designated MUC rather than the less intensive neighborhood commercial that the implementation strategy calls for. The potential significance of the designation of an additional 18 acres of commercial land and the MUC zoning is

even greater, since it comes with a requirement that those 33 acres be developed in conjunction with a hospital and supporting uses on the 66 acres of MDR land that is being rezoned MS.

If the city wishes to redesignate more than two acres for commercial use, it must follow one of the three courses of action set out in OAR 660-009-0010(4) to demonstrate that the amendment complies with Goal 9. So long as the commercial land redesignation approved by the disputed decisions is shown to comply with the SCLS, we agree with the city that it is not necessary for the city to follow one of the courses of action set out in OAR 660-009-0010(4)(b) or (c), which would require preparation of an economic opportunities analysis. However, we agree with petitioners (CHOICES) that the city has failed to demonstrate that the challenged decisions are consistent with the SCLS. The city's findings concede that the 33 acre of MUC zoning is inconsistent with SCLS Implementation Strategy 1--B(2) and do not adequately explain how, given that inconsistency, the ultimate finding that the challenged decisions are consistent with the SCLS can be affirmed.

Finally, we note that no party argues that the *policies* in the SCLS that the city relies on should be given more weight than *implementation strategies*. The SCLS includes the following discussion of the concepts:

> "A *policy* is a statement adopted to provide a consistent course of action, moving the community towards attainment of its goals.
>
> "An *implementation strategy* is a specific course of action the City can take to accomplish the objectives of the policy." Record 4445 (emphases in original).

In part because no party offers any argument concerning the comparative legal significance of SCLS policies and implementation strategies, we do not mean to foreclose the possibility that the city might be able to adopt additional findings that explain why an action that seems so inconsistent with SCLS Implementation Strategy 1--B(2), which is directed specifically at the GRP MDR area, is nevertheless consistent with the SCLS. We decide here only that the explanation in the challenged decision is inadequate.

Petitioners' third assignment of error (CHOICES) is sustained.

VII. GOAL 10

Goal 10 imposes the following requirement:

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

The city adopted the following findings addressing Goal 10:

> "Within the Eugene-Springfield area, Metro Plan compliance with Goal 10 is achieved through the metropolitan Residential Land and Housing Study (RLS), which was adopted and acknowledged in 1999. As noted in the RLS Policy Recommendations Report * * *, there is a net surplus of all types of residential lands necessary to serve the metropolitan area. Specifically, the RLS concluded there is a surplus of 239 acres of land designated Medium Density Residential on the Metro Plan diagram * * *.
>
> "The surplus identified in the RLS did not account for any mixed-use, nodal development, nor – in Springfield – did it account for development that could occur on lands subject to SDC Article 27 (Floodplain Overlay District) provisions.[24] Additionally, the RLS did not include in its inventory the vacant 18-acre parcel owned by PeaceHealth off Goodpasture Island Road. This parcel is zoned R-3 but is designated for High Density Residential. All of the above exclusions from the RLS suggest that there is an additional margin beyond the inventoried surplus." Record 81-82.

For purposes of resolving petitioners' Goal 10 assignments of error, the critical findings include the city's finding that the RLS identifies a 239-acre surplus of MDR-designated land and, for the reasons explained in the findings, that surplus likely understates the city's actual residential development potential since land such as floodplains and MUC zoned lands that may not be counted in assessing the adequacy of the city's inventory of MDR-designated land nevertheless may be developed residentially. Therefore, as the city explains elsewhere in its findings, even if the 99 acres that are being planned and zoned to allow commercial and hospital use were to result in those

[24] The findings point out that both the MUC zoning district applied to the 33 acres that are redesignated from MDR to CC and the MS zoning district that is applied to 66 acres of MDR-designated land allow residential development.

99 MDR-designated lands no longer being capable of residential development, the Metro Plan inventory of MDR-designated land would still retain a surplus of such land.

Petitioners largely ignore the above-described findings. Petitioners (CHOICES) do suggest that the city should not have relied on the RLS because

> "in the almost 20 years since the RLI inventories were completed, Springfield and Eugene have re-zoned a significant number of residential parcels, to the point that there is no documentation that the buildable lands 'surplus' upon which Springfield now relies even exists anymore. The findings point to a PeaceHealth parcel in Eugene that has been brought into the inventory, but they do not identify the numerous other parcels that have been re-zoned for other uses. * * *" Petition for Review (CHOICES) 28.

We tend to agree with petitioners (CHOICES) that if the city wants to consider the surplus that may be attributed to plan and zoning changes that postdate the RLI, the city must also consider actions that may have reduced the surplus. But the primary foundation of the city's Goal 10 findings is its point that under the acknowledged RLI, which was adopted by the city in 1999, both before and after the challenged decisions there is a surplus of MDR-designated land. The city is entitled to rely on its acknowledged inventory. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384, 395 (2001). It might be permissible for the city to update the RLI in the context of these amendments to account for all post-RLI plan and zoning map amendments and determine whether the acknowledged RLI surplus remains, or has increased or decreased. *See Craig Realty Group*, 39 Or LUBA at 396 (considering post inventory rezoning decisions). However, we are aware of no legal requirement that it must do so. Having failed to demonstrate error in the city's findings that there is a surplus of MDR-designated land under the RLI before and after the disputed ordinances, petitioners' Goal 10 arguments provide no basis for reversal or remand.

The city does not rest solely on the post-decision surplus of MDR-designated land. The city takes a number of steps to ensure that its decisions to plan and zone 99 acres of the 180 GRP MDR-designated acres to allow hospital and other commercial development in fact *do not* prevent realization of the residential development potential of that MDR-designated area. Those steps include allowing density transfers and imposing a condition of approval that the applicant

demonstrate during the master plan process that development of the GRP MDR area as amended will include a number of residential units that falls within the range that would have been possible under the pre-amendment GRP. Most of petitioners' challenges are directed at this aspect of the two decisions, arguing that it will produce housing in the floodplain that has not been shown to be needed or housing that exceeds the MDR 20 unit per acre maximum. However, as PeaceHealth points out, Goal 10 does not prohibit the city from providing more high-density housing than it may have identified as being needed in the RLI. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20, 32 (2000). Similarly, while the OAR 660-008-0005(2) definition of "[b]uildable [l]and" states that "land within the 100-year floodplain is generally considered unbuildable for purposes of density calculations," there is nothing in Goal 10 that prohibits residential development within floodplains.[25]

To summarize, given the surplus of MDR-designated lands that remains after the challenged decisions, petitioners' Goal 10 arguments concerning the impact the challenged decisions will have on the type of housing that may in fact be approved in the master plan review process for the 33 acres that will be planned CC and zoned MUC, the 66 MDR-designated acres that will be zoned MS and the remaining MDR-designated acres that will remain zoned MDR provide no basis for reversal or remand.

Petitioners' second assignment of error (CHOICES) and petitioners' fifth assignment of error (Jaqua) are denied.

VIII. GOAL 12 AND THE TRANSPORATION PLANNING RULE

The Transportation Planning Rule (TPR), OAR Chapter 660 Division 12, was adopted by LCDC to implement Goal 12. Among other things, the TPR requires that local governments prepare transportation system plans (TSPs). The city's TSP, TransPlan, is also a Metro Plan Functional Plan. If an acknowledged comprehensive plan or land use regulation is amended to alter

[25] The city's Floodplain Overlay District imposes a number of limitations designed to protect such housing from flood damage.

allowed land uses in a way that will "significantly affect a transportation facility," OAR 660-012-0060(1) identifies a number specific measures that must be considered to ensure that those altered land uses "are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the [transportation] facility."[26] Accordingly, when amending an acknowledged comprehensive plan or land use regulation, a threshold question under the TPR is whether the amendment "significantly affects a transportation facility." OAR 660-012-0060(2) sets out four circumstances in which a plan or land use regulation amendment "significantly affects a transportation facility." OAR 660-012-0060(2)(d) sets out the circumstance that is relevant here, and it provides that a comprehensive plan or land use regulation amendment will "significantly affect a transportation facility" if it will allow land uses that "[w]ould reduce the performance standards of [a transportation] facility below the minimum acceptable level identified in the TSP."[27] For state facilities those performance standards are expressed as a volume to capacity

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[26] OAR 660-012-0060(1) provides:

> "Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which *significantly affect a transportation facility* shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:
>
> "(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
>
> "(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
>
> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
>
> "(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided."

[27] OAR 660-012-0060(2) provides:

> "A plan or land use regulation amendment significantly affects a transportation facility if it:
>
> "(a) Changes the functional classification of an existing or planned transportation facility;

(V/C) ratio; for local facilities those performance standards often are expressed as one of five levels of service (LOS), A through F. For most of the state transportation facilities that would be affected by the disputed amendments, the maximum V/C performance standard is .85; for the affected local facilities, the maximum LOS is D. In other words, a state facility that operates at V/C .86 or higher is failing, and a local facility that operates LOS E or higher is failing.

The parties' dispute under this assignment of error is not limited entirely to the meaning of OAR 660-012-0060(2)(d). Another important provision is Oregon Highway Plan (OHP) Action 1F.6. The parties agree that OHP Action 1F.6 imposes what they characterize as a "nondegradation" performance standard.[28] However, the parties do not agree on what nondegradation means or how and at what times that nondegradation standard applies.

In this case, the transportation impact analysis (TIA) that was prepared by PeaceHealth identified over 50 state and local transportation facilities that will be impacted by the traffic that would be generated by the development that could ultimately be approved under the challenged ordinances. The TIA analyzed those impacted transportation facilities under two development scenarios.

> "? 'Existing Designation' Scenario – this scenario assumed the current plan designation and MDR zoning for the site and the future-year land-use

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

[28] OHP Action 1F.6 provides, in pertinent part:

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

allocation included in the regional transportation model as used to develop TransPlan.

"? 'Proposed Designation' Scenario – this scenario assumed specific types and levels of development through the 2018 [TransPlan planning] horizon year based on the applicant's intended future uses." Record 90

First, the TIA assumed that 14 TransPlan projects that are included on the "Financially Constrained Roadway Projects map and list" would be constructed some time before the end of the 2018 planning period.[29] Record 89-90. Although petitioners in one place suggest that the city is not entitled to rely on proposed transportation facilities or improvements where funding is uncertain, we reject the suggestion. *See Craig Realty*, 39 Or LUBA at 389-90 (new and improved transportation facilities that are anticipated in an adopted TSP are considered in determining whether plan and land use regulations will significantly affect transportation facilities under OAR 660-012-0060). Nothing in the TPR requires that a local government provide funding certainty for anticipated transportation facility improvements that are identified in a TSP. To the contrary, both

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[29] Within the Financially Constrained Project List, TransPlan distinguishes between "Programmed and Unprogrammed projects:"

"? Programmed (0-5 years) projects have been identified in a local agency's CIP, the regional TIP, or the STIP. These projects have funding sources identified that will enable them to proceed to project construction.

"? Unprogrammed (6-20) projects may not have specific funding sources identified, but are expected to be funded with reasonable assumptions about expected revenues." Record 4879.

TransPlan goes on to explain the significance of a third category, "Future Projects," and the significance of TransPlan funding assumptions generally:

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

"As described in the Capital Investment Action Implementation Process * * *, in all cases, inclusion of a project in a particular phase does not represent a commitment to complete the project during that phase. It is expected that some projects may be accelerated and others postponed due to changing conditions, funding availability, public input, or more detailed study performed during programming and budgeting processes." *Id*. (Emphasis added.)

OAR 660-012-0040 [30] and TransPlan (*see* n 29) make it clear that transportation facility funding and timing uncertainty is expected.

With that assumption concerning the 14 planned-for transportation facilities that are included in TransPlan, the TIA found that with one exception, all 50 impacted facilities (1) would meet performance standards in 2018 under the Proposed Designation scenario, or (2) would not meet performance standards under either the Existing Designation scenario or the Proposed Designation scenario, but that failure would not be any worse in 2018 under the Proposed Designation scenario

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[30] OAR 660-012-0040(1) requires that urban areas with more than 2,500 persons include a transportation financing program in their TSP. The remaining sections of that rule recognize that the timing of and funding for those facilities may be uncertain:

> "(2) A transportation financing program shall include the items listed in (a)–(d):
>
> "(a) A list of planned transportation facilities and major improvements;
>
> "(b) A general estimate of the timing for planned transportation facilities and major improvements;
>
> "(c) A determination of rough cost estimates for the transportation facilities and major improvements identified in the TSP[.]
>
> "* * * * *
>
> "(3) The determination of rough cost estimates is intended to provide an estimate of the fiscal requirements to support the land uses in the acknowledged comprehensive plan and allow jurisdictions to assess the adequacy of existing and possible alternative funding mechanisms. In addition to including rough cost estimates for each transportation facility and major improvement, the transportation financing plan shall include a discussion of the facility provider's existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each transportation facility and major improvement. These funding mechanisms may also be described in terms of general guidelines or local policies.
>
> "(4) Anticipated timing and financing provisions in the transportation financing program are not considered land use decisions as specified in ORS 197.712(2)(e) and, therefore, cannot be the basis of appeal under ORS 197.610(1) and (2) or ORS 197.835(4).
>
> "(5) The transportation financing program shall provide for phasing of major improvements to encourage infill and redevelopment of urban lands prior to facilities and improvements which would cause premature development of urbanizable lands or conversion of rural lands to urban uses."

than it would be under the Existing Designation scenario.[31] The one exception concerned Pioneer Parkway at Highway 126, which under the Existing Designation scenario is expected to violate the TransPlan performance standard and will violate that performance standard by a greater margin under the Proposed Designation scenario.

The city adopted the above-described TIA findings and, to address the Pioneer Parkway at Highway 126 facility, imposed a condition of approval that PeaceHealth provide the funding necessary to implement the planned facility that will be needed to correct that failure before 2018.[32] Based on those findings and the funding condition, the city concluded that the challenged ordinances would not reduce the performance of the 50 impacted facilities "below the minimum acceptable level identified in the TSP," and for that reason would not "significantly affect a transportation facility," within the meaning of OAR 660-012-0060(2).

In this case, the city interpreted OAR 660-012-0060(2) to allow it to limit its analysis to comparing the impact of the Proposed Development scenario to the impact of the Proposed Development scenario with regard to the performance of the 50 impacted facilities at the end of the planning period, 2018. If that interpretation and application of OAR 660-012-0060(2) is correct, we do not understand petitioners (Jaqua) to dispute the above-described city analysis. Rather, petitioners argue that the city misinterprets the rule and that the city's analysis is too limited, because it only considers whether the 50 identified facilities will result in a reduction of performance standards at the end of the planning period, or 2018. According to petitioners, the city must consider the impact of the disputed amendments throughout the planning period:

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[31] This conclusion concerning the Proposed Designation scenario relies in part on an amendment to the GRP which "requires the applicant to submit with the required master plan, a 'Trip Allocation Plan' that caps the maximum number of vehicle trips from areas that are zoned MUC or MS to 1,840 at the P. M. Peak Hour." Record 95. Petitioners do not challenge the city's use of vehicle trip limits in the trip allocation plan to avoid a finding that the proposed amendments "significantly affect" certain transportation facilities, for purposes of OAR 660-012-0060(2)(d).

[32] That facility improvement project is currently a "Future" project. *See* n 29. The city found that accelerating the expected funding of that facility did not require an amendment to TransPlan, and petitioners do not challenge that finding.

> "The City erred in determining that the 50-plus intersections, ramps, roads and other facilities identified in the TIA as 'affected transportation facilities' would not be 'significantly affected' as long as they would not be in failure in 2018, the end of the planning period. That finding is inadequate. The LCDC's [TPR] and Goal 12 require findings and substantial evidence in the whole record showing that affected facilities will not fail or fail sooner during the planning period because of the amendments even if they will be back in compliance at the end of the planning period. That evidence and those findings are missing." Petition for Review (Jaqua) 33-34.

We understand petitioners to argue that, in addition to comparing the Proposed Designation scenario and the Existing Designation scenario and answering the questions the city answered concerning the expected performance of impacted facilities in 2018, the city must also consider whether the proposed amendment will cause or accelerate the failure of a transportation facility within the planning period, even if that failure may in fact be *temporary* assuming that improvements identified in the TSP are in place by the end of the planning period. If so, we understand petitioners to argue, the city must conclude that the proposed amendments "significantly affect" those transportation facilities, and proceed to apply one or more of the mitigations described in OAR 660-012-0060(1), for example, by "[l]imiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility," at least until the identified improvements are in fact constructed, when and if they are.

Petitioners cite no TPR language that expressly supports their position. Petitioners rely on two decisions by this Board, and a Court of Appeals' decision that affirms one of those decisions, for their legal argument under this assignment of error. We describe and set out the relevant parts of those decisions in some length below before considering whether they support petitioners' argument under this assignment of error.

In *Craig Realty*, 39 Or LUBA at 389-90, we considered whether, in determining whether a plan amendment would significantly affect transportation facilities, a city may rely on the additional transportation facility capacity that would be provided by transportation facility improvements that

are currently included in the TSP but have not yet been constructed. We answered that question in the affirmative and explained:

> "[T]he relevant inquiry under OAR 660-012-0060(2) is whether the proposed amendment 'would reduce the level of service of the facility below the minimum acceptable level identified in the TSP.' The city must first determine whether the city's existing transportation facilities are adequate to handle, *throughout the relevant planning period*, any additional traffic that the proposed amendment will generate. If the answer to that question is yes, then the proposed amendment will not significantly affect a transportation facility for the purposes of OAR 660-012-0060(1), and no further analysis is necessary. If the answer is no, then the city must consider whether any new and improved facilities anticipated by the TSP will generate sufficient additional capacity, *and will be built or improved on a schedule that will accommodate the additional traffic that will be generated by the proposed amendment*. If the answer to that question is yes, then, again, the proposal will not significantly affect a transportation facility. If, however, the answer is no, then the city must adopt one or more of the strategies set out in OAR 660-012-0060(1) to make the proposed amendment consistent with 'the identified function, capacity and level of service of the [affected] facility.'" (Emphases added.)

The second LUBA decision that petitioners rely on is *ODOT v. City of Klamath Falls*, 39 Or LUBA 641, *aff'd* 177 Or App 1, 34 P3d 667 (2001). In that case, the applicant-intervenor (Southview) first argued that the "avoid further degradation standard" in OHP Action 1F.6 was invalid, because it was "an impermissible amendment to OAR 660-012-0060(2)(d)."[33] 39 Or LUBA at 656. Based on that argument, Southview also argued that a plan amendment, which would only further degrade a transportation facility that is already projected to fail before the end of the TSP planning period *with or without the proposed plan amendment*, could not *cause* that facility to fail and, therefore, could not "significantly affect that facility" as OAR 660-012-0060(2) defines that concept. Southview cited the Court of Appeals' decision in *Dept. of Transportation v. Coos County*, 158 Or App 568, 976 P2d 68 (1999) in support of its second argument. We rejected both arguments:

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[33] *See* n 28. No party in this appeal challenges the validity of OHP Action 1F.6.

> "[Southview] presents essentially the same arguments we considered and rejected in *DLCD v. City of Warrenton*[, 37 Or LUBA 933 (2000)], and provides no reason to overrule that decision. Moreover, we disagree with the premises underlying intervenor's causation analysis. It is important to recognize that *Dept. of Transportation v. Coos County* involved facilities that were already below the applicable standard at the time of the challenged decision, and the proposed amendment therefore could not reduce the facilities below the standard. In that circumstance, [Southview] is correct that the causation element inherent in OAR 660-012-0060(2)(d) cannot be present unless the performance standard itself is one of no further degradation. In the present case, the affected facilities are currently in compliance with the V/C standard, but are projected to violate the V/C standard sometime during the relevant planning period, as a result of a combination of impacts from the proposed amendment and increases in background traffic. *In other words, the proposed amendment will cause these facilities to violate the V/C standard sooner than they otherwise might. If the proposed amendment will cause the facility to violate the V/C standard in year 2010, for example, the causation element in OAR 660-012-0060(2)(d) is present, notwithstanding that the facility would fail anyway in the year 2020 due to increased background traffic.* We therefore disagree with [Southview's] premise that the validity of the OHP 'avoid further degradation' standard is essential to the causation analysis under OAR 660-012-0060(2)(d), as applied to the facts in this case." 39 Or LUBA at 657 (emphasis added).

In affirming our decision in *ODOT v. City of Klamath Falls*, 177 Or App 1, 34 P3d 667 (2001), the Court of Appeals identified two premises in Southview's argument. The Court of Appeals adopted the following reasoning in rejecting both premises:

> "* * * Southview's first premise is that, whether the amendment 'significantly affects' a transportation facility is measured at the *end* of the planning period, in this case, a 20-year period. * * * Specifically, it contends that, because the intersections could fail at any time during the 20-year planning period, 'it is impossible to conclude that the proposed amendment, which adds approximately 225 p.m. peak hour trips to the surrounding transportation facilities, will cause the facilities to fail sooner than they otherwise would.' Southview's second premise is that the effects of the amendment must be the sole cause of the reduction in performance in order for them to 'significantly affect' a transportation facility. In other words, the only decision during the planning period that can be said to 'significantly affect' the transportation facility is the one that takes the V/C ratio over the maximum acceptable level. Southview relies on our decision in *Dept. of Transportation v. Coos County*, * * * for both premises.
>
> "We conclude that Southview's arguments are not supported by the text and context of the rules. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n

> 4, 859 P2d 1143 (1993). There is simply nothing in the text and context of the rules that can be read to require that the effects of a proposed action may be measured only at the end of a planning period. If that were the case, the provisions of OAR 660-012-0060(1), providing alternative means of ensuring that amendments that significantly affect a facility are consistent with applicable performance standards, would be meaningless. Further, Southview does not cite anything in OAR chapter 660, division 12, the OHP, or any other authority suggesting that OAR 660-012-0060(1) and (2) apply only if the amendment is the sole cause of an immediate increase in the applicable V/C ratio to a point in excess of the proscribed acceptable level. Southview's position would require us to read substantive provisions into ICDC's rule that are not there. As did LUBA, we decline to do so." *Id*. at 8.

None of the above-described decisions dealt with the precise issue that is presented in this appeal, which is whether a plan or land use regulation amendment that will cause or accelerate a facility performance standard failure at any point during the planning facility "significantly affects" that facility, notwithstanding that under the existing TSP the performance standard failure may be corrected at the end of the planning period. That said, the language in our decision in *Craig Realty* certainly suggests that the TSPs that are required by the TPR envision a measure of concurrence between transportation needs and the planned facilities that are included in the TSP to meet those needs. Our decision in *ODOT v. City of Klamath Falls* explicitly finds that a plan amendment that will hasten the failure of a transportation facility that is expected to fail with or without the plan amendment causes that facility to fail and therefore "significantly affects" a transportation facility within the meaning of OAR 660-012-0060(2). The Court of Appeals decision *ODOT v. City of Klamath Falls* is even more explicit and direct in rejecting the argument presented in that case that the exclusive focus should be on the performance of transportation facilities at the end of the planning period. While petitioners' argument under this assignment of error requires that we extend the reasoning in those cases to apply to the question presented in this appeal, neither the city nor PeaceHealth offers any compelling practical or Goal 12-based or TPR-based argument why that reasoning should not be extended.

As the concurrence correctly notes, OAR 660-012-0060(1) is ambiguous or, at least, nonspecific with respect to precisely how local governments should go about determining whether a

proposed amendment "significantly affects" a transportation facility within the meaning of OAR 660-012-0060(2)(d).[34] The above cases have to some extent provided a framework for conducting that determination. The above cases do not directly resolve the issue before us, which is whether OAR 660-012-0060 is concerned with amendments that may cause *temporary* failure in one or more transportation facilities. The nonspecific text of OAR 660-012-0060 does little to resolve that issue one way or the other. However, for the following reasons we believe that answering that question in the affirmative is more consistent with the above cases, with the text and context of OAR 660-012-0060, and with what we understand to be the purpose of that rule, than answering that question in the negative.

The basic commandment of OAR 660-012-0060 is that plan and land use regulation amendments "*shall assure* that allowed land uses *are* consistent with the identified function, capacity, and performance standards" of transportation facilities. OAR 660-012-0060(1) (emphasis added). OAR 660-012-0060(1) is written in the present tense. If the rule drafters had intended to require only that uses allowed by an amendment "will be" consistent with the function, capacity and performance standards of affected transportation facilities at the end of the planning period, that intent certainly could have been more plainly expressed. Reading the rule to be unconcerned with a temporary, but potentially long-lasting facility failure caused by uses allowed by an amendment does little to "assure" that allowed land uses "are" consistent with the identified function, etc. of that facility.

It is true, as the concurrence notes, that the standards applicable to development of a TSP do not require local governments to identify funding for planned transportation improvements or to provide a particular schedule for those improvements. However, that is not surprising, given the purpose of and limitations inherent in a TSP. In contrast to new amendments and new allowed uses

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[34] Actually, OAR 660-012-0060(5), added to the rule in 1998, now provides some guidance to local governments, by clarifying that "[i]n determining whether proposed land uses would affect or be consistent with planned transportation facilities as provided in [OAR 660-012-0060(1) and (2)], local governments shall give full credit for potential reduction in vehicle trips for uses located in mixed-use, pedestrian-friendly centers * * *[.]"

governed by OAR 660-012-0060, development of a TSP necessarily addresses uses (and associated traffic impacts) that are *already allowed* by acknowledged plan and land use regulations. Development of a TSP is intended in part to require local governments to evaluate whether the local transportation system can adequately accommodate such already allowed uses within the planning horizon and, if not, take steps to identify needed transportation improvements. The TPR does not go further and require that a TSP identify particular funding sources or assure that funding for improvements needed to accommodate uses already allowed by the acknowledged plan or code will actually be constructed, presumably because such a requirement would be a fiscal impracticability. The funding and hence the timing of future transportation projects is almost always uncertain.

OAR 660-012-0060 serves a different purpose, in our view, and thus the purpose and limitations inherent in a TSP shed little light on what OAR 660-012-0060 requires in the context of approving amendments that allow uses (and associated traffic impacts) not anticipated by the TSP. We believe that the TSP standards are intended in relevant part to *correct* historic patterns of decision-making whereby some local governments may have allowed uses in the acknowledged plan and code without adequately considering whether the transportation system can accommodate those uses. OAR 660-012-0060 serves a different, but complementary purpose, to *prevent* local governments from engaging in that pattern of decision-making when choosing whether to amend the plan or code to allow new uses not provided for in the plan and code, or anticipated in the TSP. The TSP may be unconcerned with temporary failures of transportation facilities caused by already allowed uses, because there may be little the local government can do to address such temporary failures. But it does not follow that OAR 660-012-0060 is also unconcerned with temporary facility failures, or that its regulatory concerns are confined to those that animate the standards for developing a TSP.

There are additional textual and policy reasons to understand OAR 660-012-0060 to be concerned with amendments that allow uses that cause temporary facility failures. First, it is

something of a polite fiction to assume that all improvements identified in the TSP, at least those that are not "committed transportation facilities" with approved funding within the meaning of OAR 660-012-0005(5), will in fact be constructed by the end of the planning period. They may indeed be funded and constructed by the end of the planning period, but then again they may not. Reading OAR 660-012-0060 to be unconcerned with "temporary" facility failures during the planning period, as the city does, ignores the fact that the "temporary" period of failure caused by the amendment may extend well beyond the planning period. Even if it is assumed as a matter of law that identified but unfunded transportation improvements will be in place by the end of the planning period, in particular circumstances there may be a lengthy period of temporary failure caused by the amendments. To conclude that OAR 660-012-0060 is unconcerned with such potentially lengthy periods of failure seems inconsistent with the rule's prime directive: to assure that allowed uses are consistent with the function, capacity, etc. of transportation facilities.

Further, we note that OAR 660-012-0060(1) provides a set of flexible tools that local governments can and indeed must use to "assure" allowed uses are consistent with the function, capacity and performance standards of transportation facilities. Most if not all of those tools would seem to work well to mitigate "temporary" failures caused by amendments and to assure that such amendments do not contribute to permanent failures. For example, the local government might choose to limit allowed uses to be consistent with the planned function, capacity and performance standards of the facility. It might choose to amend the TSP to provide transportation facilities adequate to support the proposed land uses. It might choose to alter land use designations, densities or design requirements to reduce demand for automobile travel. Or it might choose to amend the TSP to modify the planned function, capacity and performance standards of the facility to accept greater motor vehicle congestion, where multimodal travel choices are provided. Under the city's view of OAR 660-012-0060, however, a local government will never consider applying such mitigations prior to approving uses that will cause a transportation facility to fail, because under the

city's interpretation amendments that cause "temporary" facility failures do not and cannot "significantly affect" a transportation facility within the meaning of OAR 660-012-0060(2)(d).

For the foregoing reasons, we conclude that the city's interpretation of OAR 660-012-0060 is inconsistent with the reasoning in the above-cited cases, with the rule's text and context, and with the purpose of the rule as we understand it.

Petitioners' sixth assignment of error (Jaqua) is sustained.

IX. SEVENTH ASSIGNMENT OF ERROR (JAQUA)

Petitioners' (Jaqua) attack a number of individual amendments that the challenged ordinances adopt. We address those challenges below.

A. Gateway Plan Map Amendment

Petitioners point out that "Ordinance 6051 defers but authorizes a [GRP] map change of 'up to 33 acres' from [MDR] * * * to [CC] with * * * [MUC] commercial zoning." Petition for Review (Jaqua) 38-39. Petitioners argue "[t]hese changes are erroneous an ineffective for the same reasons that the Metro Plan Diagram amendments are erroneous." *Id*. at 39.

We agree with PeaceHealth that this subassignment of error is insufficiently developed to provide an independent basis for reversal or remand.

B. GRP Text Amendments

Petitioners identify a number of new and amended GRP provisions, and argue that those amendments violate various provisions and in doing so incorporate arguments presented elsewhere in the petition for review, frequently without specifically identifying the referenced argument.[35]

The amendments to GRP Residential Element Goal 2, GRP Residential Element Policy 12.0 and GRP Residential Implementation Action 12.1 were adopted in part to allow 33 acres of the 180 GRP MDR planned and zoned acres to be designated CC on the Metro Plan and GRP maps

[35] These include amendments to GRP Residential Element Goal 2, GRP Residential Element Policy 12.0, GRP Residential Implementation Action 12.1, GRP Residential Element Action 12.4, new GRP Residential Element Implementation Action 12.6, and new GRP Residential Element Implementation Action 13.7.

and zoned MUC. We have already sustained petitioners' third assignment of error (CHOICES) that challenges that aspect of the challenged ordinances under Goal 9. Petitioners' arguments under these subassignment of error provide no additional basis for reversal or remand.

With regard to amended GRP Residential Element Action 1.4, petitioners contend that the amendment may permit development that would not have been allowed without the amendment and thereby violate Metro Plan policies that protect the river corridors. PeaceHealth identifies findings that address the only Metro Plan river corridor protection policy that petitioners specifically cite, and states that this challenge should be denied because petitioners neither acknowledge nor challenge those findings. We agree.[36]

With regard to new GRP Residential Element Implementation Action 12.6, petitioners contend that new GRP provision will allow conversion of up to 99 acres of the 180 acre MDR-designated area to commercial and hospital use and thus violate Goal 10 and Metro Plan provisions that were adopted to implement Goal 10. Petitioners' arguments here add nothing the arguments that they presented in their assignment of error under Goal 10. We reject them here for the same reason we rejected them there.

Finally, petitioners challenge new GRP Residential Element Implementation Action 13.7. Petitioners contend that this change incorporates measures that are inadequate to satisfy the TPR and are inconsistent with lands that are planned and zoned to satisfy Goal 10 housing requirements. Petitioners' arguments here provide no additional TPR-related basis for reversal or remand. Petitioner's Goal 10 argument fails because the city is relying on the Metro Plan surplus of MDR-designated lands to ensure continuing compliance with Goal 10 and is not relying on residential development on the MUC zoned 33 acres or the MS zoned 66 acres of land that remain designated MDR on the GRP and Metro Plan.

Petitioners' (Jaqua) seventh assignment of error is denied.

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[36] Petitioners also fault the city for deleting the prior 4,000 square foot maximum on any single NC use. However, petitioners cite no legal requirement that is violated by removing that limitation.

Ordinances 6050 and 6051 are remanded.

Holstun, Board Member, concurring.

I do not agree with the majority's resolution of petitioners' sixth assignment of error (Jaqua). I understand the majority's resolution of that assignment of error to require additional city findings in two circumstances before the city can conclude that the amendments adopted by the challenged ordinances will not significantly affect transportation facilities that will be impacted by the development that is made possible by the challenged ordinances.

In the first circumstance, new or improved transportation facilities are already planned-for in the TSP (TransPlan) and are expected to result in an impacted facility operating in compliance within the applicable performance standard at the end of the planning period (2018). In that circumstance, the majority concludes that it is not sufficient for the city to find that a plan amendment will not generate sufficient additional traffic to cause the affected facility to violate the applicable performance standard in 2018.[37]

In the second circumstance, an affected facility is already expected to operate in violation of the applicable performance standard in 2018. In that circumstance, it is not sufficient for the city to find that the disputed amendments will not worsen the performance standard failure that is already expected for 2018 at the affected facility under the existing comprehensive plan and land use regulations.[38]

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[37] The majority decision effectively requires the city to determine whether, without the disputed amendments, the expected new and improved facilities in the TSP will be constructed in time to prevent an impacted facility from violating the applicable performance standard. If they are expected to be constructed in time to avoid failure, the city must find that the amendments will not generate additional traffic that may cause the affected facility to fail prior to construction of the new or improved facilities. If they will not be constructed in time to avoid failure of the facility during the planning period, the plan amendments must not accelerate the date the facility would fail under the existing plan and land use regulations. Whatever the case, these findings are required, notwithstanding that planned improvements that are already included in the TSP are expected to cause the affected facility to meet the applicable performance standard at the end of the planning period.

[38] The city must also find that the disputed amendments will not hasten the date the affected facility will fail.

I concede that there is language in our decisions in *Craig Realty* and *ODOT v. City of Klamath Falls* and in the Court of Appeals' decision in *ODOT v. City of Klamath Falls* that can be read to lend indirect support for the majority's resolution of petitioner's sixth assignment of error (Jaqua). I also concede that there could be sound planning or public policy reasons that might support requiring an applicant for a plan or land use regulation amendment to conduct any additional study that might be required to support the demonstration that is required under the majority's resolution of that assignment of error, before the city can find that a plan or land use regulation amendment will not significantly affect a transportation facility. However, I believe the majority errs in doing so, for two reasons.

First, viewed in context with what the TPR requires of cities when they initially prepare a TSP, a requirement that an applicant for a plan or land use regulation amendment establish that the amendment will not lead to facility failure or degradation *at any point in the planning period*, or mitigate that failure under OAR 660-012-0060(1), lacks textual support in the TPR rule.

Second, the reasoning in those opinions that the majority cites and relies on addresses a very different question and, I believe, should not be relied on to find such a requirement in OAR 660-012-0060(1) and (2). Given the lack of textual support in the TPR for imposing that obligation, I would not rely on our decisions or the Court of Appeals' decision to find that obligation in OAR 660-012-0060(1) and (2). If LCDC believes far more detailed planning and study should precede a plan amendment or land use regulation amendment than is required at the time a TSP and the supporting plan and land use regulations are adopted in the first place, they should amend the TPR to impose that requirement expressly.[39]

Turning to the TPR first, the TPR requires that local governments adopt Transportation System Plans (TSPs). The TPR includes detailed requirements for preparing TSPs and for what a

[39] It bears noting, that the plan amendment stage is not necessarily the last time that transportation impacts may be considered. In issuing discretionary permits for development during the planning period, adequacy of public facilities is frequently a major consideration.

TSP must include. OAR 660-012-0015 and 660-012-0020. Among other elements, a TSP must include the following: (1) a plan for roads and streets; (2) a public transportation plan; and (3) a bicycle and pedestrian plan. OAR 660-12-0020(2)(b)-(d). For each of these three elements, OAR 660-012-0020(3) imposes detailed planning requirements. As particularly relevant here, OAR 660-012-0020(3)(b) requires "[a] system of planned transportation facilities, services and major improvements."[40] OAR 660-012-0035(1) requires that local governments evaluate a number of alternatives to meet anticipated transportation needs.[41] OAR 660-012-0045(1) sets out

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[40] The text of OAR 660-012-0020(3) is set out below:

> "Each element identified in subsections (2)(b)–(d) of this rule shall contain:
>
> "(a) An inventory and general assessment of existing and committed transportation facilities and services by function, type, capacity and condition:
>
> "(A) The transportation capacity analysis shall include information on:
>
> "(i) The capacities of existing and committed facilities;
>
> "(ii) The degree to which those capacities have been reached or surpassed on existing facilities; and
>
> "(iii) The assumptions upon which these capacities are based.
>
> "* * * * *
>
> "(b) *A system of planned transportation facilities, services and major improvements*. The system shall include a description of the type or functional classification of planned facilities and services and their planned capacities and levels of service;
>
> "(c) A description of the location of planned facilities, services and major improvements, establishing the general corridor within which the facilities, services or improvements may be sited. This shall include a map showing the general location of proposed transportation improvements, a description of facility parameters such as minimum and maximum road right of way width and the number and size of lanes, and any other additional description that is appropriate;
>
> "(d) Identification of the provider of each transportation facility or service." (Emphasis added).

[41] OAR 660-012-0035(1) provides

> "The TSP shall be based upon evaluation of potential impacts of system alternatives that can reasonably be expected to meet the identified transportation needs in a safe manner and at a

parameters for how local governments are to review and approve planned-for transportation facilities and improvements. Significantly, the TPR does not require or suggest that the facilities that a city identifies as needed and includes in its TSP must be constructed before or at the time they are needed.

For larger urban areas, OAR 660-012-0040(1) requires a financing program for proposed facilities that are included in the TSP. As relevant here, OAR 660-012-0040(2) through (5) is particularly significant. *See* n 30. OAR 660-012-0040(2) through (5) simply do not envision, much less require, that anticipated new transportation facilities and improvements must be built in advance of the transportation demands those new and improved facilities are expected to satisfy. Reading OAR 660-012-0040(2) through (5) in context with the planning requirements that lead up to that section of the rule, it is reasonably accurate to say that the required planning is designed to identify the new and improved facilities that will be required by the end of the planning period to accommodate anticipated transportation needs. OAR 660-012-0040(2) through (5) then recognize that the timing and funding of many of those facilities is likely to be highly uncertain, with no reason to expect that the needed facilities will be built at all during the planning period, much less in advance of the time they are needed to avoid failure of transportation facilities.[42] Given the apparent acceptability of that approach in preparing the TSP originally, I see no textual or contextual basis in

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reasonable cost with available technology. The following shall be evaluated as components of system alternatives:

"(a) Improvements to existing facilities or services;

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

"(c) Transportation system management measures;

"(d) Demand management measures; and

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

[42] OAR 660-012-0040(4) provides that decisions concerning timing and financing are not even appealable land use decisions.

the TPR for the detailed analysis, and the additional study that will likely be required before the city could adopt the additional findings that will be required under the majority opinion.[43]

As a final contextual point, I note that OHP Action 1F.6 was adopted to work in concert with amendments to OAR 660-012-0060(2)(d) and address the potential for further degradation of already-failing transportation facilities that was possible under *Dept. of Transportation v. Coos County*. *See ODOT v. City of Klamath Falls*, 39 Or LUBA at 656. By its terms, OHP Action 1F.6 applies "in situations where the [V/C ratio] for a highway segment, intersection or interchange is above the standards [established in the OHP] *and transportation improvements are not planned within the planning horizon to bring performance to standard*. *See* n 28 (emphasis added). By its terms, the nondegradation policy expressed in Action 1F.6 does not appear to apply where transportation improvements *are already* "planned within the planning horizon to bring performance to standard." OHP Action 1F.6. Given the wording of OHP Action 1.F.6 and the ambiguity of OAR 660-012-0060(2)(d), it is difficult to see how the majority's extremely broad interpretation of OAR 660-012-0060(2)(d) can be justified.

Turning to the *Craig Realty* case, our decision in that case does not explain the source of the legal requirement for transportation facility concurrency with transportation need that the decision suggests is required by the TPR. As I have already explained, I do not believe there is any textual support for that suggestion in the TPR.

The language in our decision and the Court of Appeals' decision in *ODOT v. City of Klamath Falls* is more problematic. However, the precedent those cases provide for the issue that

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[43] I am not a transportation engineer, but it strikes me that performing the studies that will be necessary to make the required findings could be a burdensome proposition, if the TSP does not identify the date during the planning period when facilities are expected to fail. The documents in the record do not show that TransPlan identifies an expected date of facility failure. On the other hand, if the TSP is not based on specific or detailed assumptions concerning the expected pace or rate of development throughout the planning period, and the applicant has a fair amount of discretion in making its own assumptions about the pace and rate of development under the pre-amendment plan and land use regulations for particular periods of time within the planning period, it likely would be easy to manipulate the estimated date of failure and potentially make value of the whole exercise dubious at best.

must be answered in this appeal is suspect in view of the somewhat unique and obscure issue the cited language in those decisions was addressing. In those cases both LUBA and the Court of Appeals were responding to a challenge to the OHP amendments that adopted the OHP Action 1.F.6 nondegradation standard. If that challenge had been sustained it might be possible that OAR 660-012-0060(2)(d) must be interpreted to allow an unlimited number of additional traffic-generating plan amendments that would further degrade a facility that is already expected to fail during the planning period and to continue in that failing condition at the end of the planning period. Such a construction might be possible under *Dept. of Transportation. v. Coos County* because those amendments, viewed individually, would not *cause* a failure of a facility if it were already expected to fail.[44]

I think it is questionable whether our decision and the Court of Appeals' decision in *ODOT v. City of Klamath Falls* would have been reasoned in the way that they were if the much broader question that we decide today had been presented.[45] In *ODOT v. City of Klamath Falls* the applicant argued that the question of significant effect is *only to be measured* at the end of the planning period, the Court of Appeals held:

> "There is simply nothing in the text and context of the rules that can be read to require that the effects of a proposed action may be measured only at the end of a planning period." 177 Or App at 8.

I agree with that statement. But it does not necessarily follow from that statement that in all contexts the TPR is concerned with *any* failure or *any lengthened* failure *at any point during the planning period* notwithstanding that the new facility or improved facility that will be needed for the facility to

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[44] The potential scope of the court's decision in *Dept. of Transportation v. Coos County* is somewhat uncertain because it held only that where a plan amendment would not generate sufficient additional traffic to cause a failing facility that was operating at a LOS E to operate at a lower LOS F, it did not significantly affect that facility within the meaning of OAR 660-012-0060(2)(d).

[45] For example, but for the Court of Appeals' decision to leave the issue of the validity of OHP Action 1F.6 unresolved, the Court of Appeals might have reasoned that a plan amendment significantly affects an already failing facility, not because it would hasten its failure, but instead because it would make the failure more serious at the end of the planning period. As I have already explained, I believe the latter view of OAR 660-012-0060(2)(d) is far more consistent with the general approach taken in the TPR than the former.

meet the applicable performance standard *is already included in the TSP*. There is nothing in the text or context of the rules to require such a precise manner of measurement either.

In rejecting the applicant's argument that a plan amendment can only have a significant affect on a transportation facility if it is the sole cause of an immediate performance standard failure, the court explained.

> "* * * Southview does not cite anything in OAR chapter 660, division 12, the OHP, or any other authority suggesting that OAR 660-012-0060(1) and (2) apply only if the amendment is the sole cause of an immediate increase in the applicable V/C ratio to a point in excess of the proscribed acceptable level." *Id*.

I also agree with that statement. But it does not necessarily follow from that statement either that in all contexts the TPR is concerned with *any* failure the amendment may cause or *any lengthened* failure *at any point during the planning period* the amendment may cause notwithstanding that the new facility or improved facility that will be needed for the facility to meet the applicable performance standard *is already included in the TSP*.

The majority expresses concern that the mitigation measures required by OAR 660-012-0060(1) may not be applied under the city's interpretation of OAR 660-012-0060(2) "because under the city's interpretation amendments that cause 'temporary' facility failures do not and cannot 'significantly affect' a transportation facility within the meaning of OAR 660-012-0060(2)(d)." Slip op at 48. To borrow the phrase the majority uses in a different context, I believe it is a "polite fiction" to expect that an applicant for a plan or land use regulation amendment will be able to predict with any reasonable level of accuracy (1) the moment a transportation facility that is expected to fail during the 20-year planning period will actually fail and (2) how much a proposed plan amendment would hasten that failure. Both estimates would be necessary before the proposed amendment could be said to "cause" a temporary failure and thus necessitate application of the OAR 660-012-0060(1) mitigation measures to avoid the hastened failure.

I would not extend the reasoning in *ODOT v. Klamath County* to decide the broader question presented in this appeal. Instead, I would limit our decision and the Court of Appeals'

decision to the narrow and specific questions that were decided by those cases and let LCDC amend OAR 660-012-0060(2)(d) to address the ambiguities that are present in that rule.

Although I do not agree with the majority's resolution of petitioners' sixth assignment of error (Jaqua), I join the balance of the majority opinion.