BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT MASON,
Petitioner,

vs.

CITY OF CORVALLIS,
Respondent,

and

PAHLISCH HOMES, INC.,
Intervenor-Respondent.

LUBA No. 2004-152

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioner.

James K. Brewer, City Attorney, Corvallis, filed a response brief and argued on behalf of respondent.

Dana L. Krawczuk, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Ball Janik LLP.

BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision. DAVIES, Board Member, did not participate in the decision.

AFFIRMED 04/12/2005

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

Petitioner challenges a decision that (1) submits a proposed annexation to the city voters; and (2) adopts city comprehensive plan and zoning map amendments to the property annexed.

FACTS

The annexation area consists of a rectangular 94.62-acre parcel and 1.73-acres of public right-of-way. The parcel carries a city plan designation of Low Density Residential (LDR), and county zoning of Urban Residential (UR). The parcel is undeveloped, and was formerly used for agricultural purposes. The northwest portion of the parcel is steep and wooded. A small stream flows from the northeast corner to the southwest corner, bordered by a city-owned right-of-way. The northern third of the parcel is generally wooded, predominantly with Oregon White Oak. The southern two-thirds of the parcel is generally cleared, and includes 22.7 acres of wetlands. The city's Natural Features Inventory classifies the wetland as a Locally Significant Wetland, and lists certain tree groves on the site as significant.

Lands to the north, west and south are outside the city boundaries but within the urban growth boundary. Directly to the north is a 35-acre area zoned and planned for open space. To the south and west are an Oregon State University Dairy Research facility and a Poultry Research facility, respectively. To the east lie a number of parcels, most of which are developed with residential uses and within the city boundaries.

Intervenor-respondent (intervenor) applied to the city to annex the subject property into the city, and to adopt comprehensive plan and zoning changes on the parcel to facilitate proposed residential development. Intervenor proposed amending the plan designation for 36.87 acres in the northwest and southern portions of the parcel from LDR to Open Space—Conservation, leaving the remainder designated LDR. The portion designated Open Space—Conservation generally includes the wetlands, stream, steep areas, and significant tree groves on the site. Intervenor also proposed rezoning the 36.87 portion designated Open Space—Conservation from UR to Open

Space-Agriculture with Planned Development Overlay (PD(AG-OS)). The remaining 57.75 acres of the parcel would be rezoned from UR to Low Density Residential with Planned Development Overlay (PD(RS-6)).

The city planning commission recommended approval of the annexation request and comprehensive plan changes, and adopted the proposed zoning changes, contingent on voter approval of the annexation. Opponents appealed the zoning change decision to the city council. The city council held a public hearing on the appeal and the planning commission recommendations August 9, 2004, and voted to (1) deny the appeal, (2) refer the annexation to the city voters, and (3) adopt the recommended plan changes, contingent on the voter's approval of the annexation. This appeal followed, but was stayed by stipulation of the parties. After the voters approved the annexation proposal, the parties reactivated the appeal.

MOTION TO RECONSIDER

The city and intervenor move for reconsideration of our February 10, 2005 order denying the respondents' motion to dismiss. In that order we concluded that the date the petition for review is postmarked is not necessarily determinative of the date the petition is "mailed," for purposes of OAR 661-010-0075(2)(a)(B) or the date it is "filed," for purposes of OAR 661-010-0030(1).[1]

---

[1] OAR 661-010-0030(1) provides:

> "Fi1ing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. See OAR 661-010-0025(2) and 661-010-0026(6). The petition shall also be served on the governing body and any party who has filed a motion to intervene. Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) or OAR 661-010-0067(2), shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body. See OAR 661-010-0075(1)(c)."

OAR 661-010-0075(2)(a) provides:

> "Except as provided in OAR 661-010-0015(1)(b) with regard to the notice of intent to appeal, and as provided in OAR 661-010-0021(5)(b) with regard to a refiled original notice of intent to appeal or an amended notice of intent to appeal, filing a document with the Board is accomplished by:
>
> "(A) Delivery to the Board on or before the date due; or

Specifically, based on our decision in *Greenwood v. Polk County*, 11 Or LUBA 408, 409 (1984), we concluded that that "mailing" the petition for review can be accomplished by depositing the petition postage-paid in a post office mailbox on or before the date the petition for review is due. We concluded that the petition for review in the present case was "mailed" and hence filed under OAR 661-010-0075(2)(a)(B) on January 11, 2005, the date it was due, notwithstanding that the petition was postmarked January 12, 2005. That conclusion was based on the certificate of filing and an affidavit of petitioner's attorney, which stated that petitioner's attorney placed the petition postage-paid in a post office mailbox at approximately 11:55 p.m. on January 11, 2005.

Respondents urge us to reconsider that conclusion on both legal and evidentiary grounds. According to respondents, *Greenwood* is inconsistent with more recent cases, which focus on the postmark in determining the date the petition is mailed. Respondents also advance several policy reasons that we should overrule or limit *Greenwood*. To the extent it is permissible at all to rely on evidence other than the postmark, respondents argue, there must be independently verifiable corroborative evidence that the petitioner in fact "mailed" the petition on or before the date due. Respondents contend that such evidence is lacking in the present case.

As we noted in our order, our rules do not define what constitutes "mailing" for purposes of OAR 661-010-0075(2)(a)(B). *Greenwood* interprets "mailing" to include deposit of the petition postage-paid in a post office mailbox. We tend to agree with respondents that there would be greater certainty and clarity if our rules specified that the date of the postmark is the date of mailing the petition for review for purposes of OAR 661-010-0075(2)(a)(B). The policy arguments that respondents advance are excellent arguments for a rule amendment to that effect. However, under the rules as presently written there is no such requirement, and our cases interpreting OAR 661-010-0075(2)(a)(B) impose no such requirement. We are not persuaded to either overrule or limit *Greenwood*.

"(B) Mailing on or before the date due by first class mail with the United States Postal Service."

On the evidentiary question, respondents cite no reason to question the sworn testimony of petitioner's attorney as to the date and time the petition was placed into the mailbox. Respondents identify no other evidence on that point that petitioner could reasonably produce. We decline to require that petitioner submit independently verifiable corroborating evidence as to the time the petition was mailed. We adhere to our order denying respondents' motion to dismiss.

FIRST ASSIGNMENT OF ERROR

Corvallis Land Development Code (LDC) 2.6.30.07 requires that annexations "shall be reviewed to assure consistency with the purposes of this chapter, policies of the Comprehensive Plan, and other applicable policies and standards adopted by the City Council and State of Oregon." The city identified several policies within the Corvallis Comprehensive Plan (CCP) Article 14 ("Urbanization/Annexation") as applicable policies.[2] Petitioner argues that the city's findings addressing the Article 14 policies are inadequate and not supported by substantial evidence.

---

[2] CCP Article 14 sets out the following pertinent policies:

"**14.3.1** Infill and redevelopment within urban areas shall be preferable to annexations.

"**14.3.2** Conversion of urbanizable land to urban uses shall be based on orderly, economic provision of public utilities, facilities, and services.

"* * * * *

"**14.3.5** Annexations can only be recommended to the voters where the following findings are made:

"A. There is a demonstrated public need for the annexation.

"B. The advantages to the community resulting from the annexation shall outweigh the disadvantages.

"C. The City and other jurisdictions are capable of providing urban services and facilities required by the annexed area, when developed.

"**14.3.6** Factors to be considered in evaluating the public need for annexation may include, but are not limited to the following:

"A. The 5-year supply of serviceable land of this type to meet projected demand;

"B. The availability of sufficient land of this type to ensure choices in the market place; and

A. Policy 14.3.1

Policy 14.3.1 states a preference for infill and redevelopment over annexations. *See* n 1. Petitioner contends that the city failed to address Policy 14.3.1 at all, and there is no evidence in the record addressing the availability for infill or redevelopment of land for low density residential development or open space uses. Petitioner points out, as discussed below, that there is a current 584-acre surplus and a projected 2020 surplus of 341 acres of low density residential lands already within the city boundaries.

The city's findings do not specifically address Policy 14.3.1, but respondents argue that (1) Policy 14.3.1 is not an applicable policy that must be reviewed under LDC 2.6.30.07; (2) if it is, then the record shows that the city adequately considered it and there is substantial evidence showing that the challenged annexation is consistent with Policy 14.3.1.

The June 21, 2004 staff report adopted by the city council as part of its findings quotes Policy 14.3.1 under the heading "Applicable Comprehensive Plan Policies," along with six other CCP policies. Record 259-60 (quoted below at n 4). Contrary to the city's brief, the city council's decision appears to take the position that Policy 14.3.1 is one of the applicable CCP policies that must be considered in annexing land. However, we agree with respondents that the city's findings addressing applicable CCP policies adequately explain why the proposed annexation is consistent with Policy 14.3.1, and the evidence in the record is sufficient to support that conclusion.

As noted, the staff report lists seven applicable CCP policies, including Policy 14.3.1, and then sets out several pages of findings that are apparently intended to address the listed policies. It is true that the findings do not specifically address Policy 14.3.1, and instead focus on the criteria in Policy 14.3.5 and 14.3.6, set out in n 2. Policy 14.3.5 requires among other things that there be a "demonstrated public need" for the annexation, and that the advantages to the community outweigh

---

"C. Other factors, including livability benchmarks, as delineated in the Land Development Code."

the disadvantages. Policy 14.3.6 requires that in evaluating "public need" the city consider the five-year supply of serviceable land of the type proposed for annexation, and the availability of sufficient land of that type to ensure choices in the marketplace, among other considerations. The city adopted extensive findings on these considerations, which we discuss below. For purposes of Policy 14.3.1, it seems reasonably clear that the city believed that review of the criteria in Policy 14.3.5 and 14.3.5 was sufficient to review Policy 14.3.1 as well. Petitioner argues elsewhere that the city cannot address the Policy 14.3.5 "public need" criterion without addressing the infill and redevelopment preference of Policy 14.3.1. We agree that there is at least some overlap between the "public need" and other criteria in Policies 14.3.5 and 14.3.6 and the preference for infill and redevelopment over annexation, in Policy 14.3.1. We see no error in using a single set of findings to address all three policies, as long as the findings adequately explain why the proposed annexation is consistent with each policy.

The gist of the findings quoted at ns 3 and 4 is that, while the city possesses a large surplus of low density residential lands, there is (1) a need to preserve the significant natural features on the property from development allowed if developed under county land use regulations, and (2) a need for additional low-density residential lands to enhance "market choices." With respect to the second consideration, the findings do not explain why the need to enhance market choices for low density residential cannot be satisfied by infill and redevelopment. If "market choices" were the only basis the city advanced to demonstrate public need, that consideration would likely be insufficient to demonstrate consistency with CCP policy 14.3.1. However, the findings lay particular stress on the first consideration, and it seems relatively clear that the city's ultimate conclusion that the proposed annexation complies with applicable plan annexation policies is driven primarily by the city's objective to preserve open space and significant natural features on the site under more protective city regulations. The stated desire to preserve the significant natural features on the site under city regulations appears to us a sufficient explanation for why the annexation is appropriate, notwithstanding the preference in CCP Policy 14.3.1 for infill and redevelopment over annexation.

No amount of infill or redevelopment within the city will preserve the significant natural features of the site. Indeed, one could argue that Policy 14.3.1 is not implicated at all by an annexation that is justified in large part as a means to preserve open space and significant natural features, because the policy is clearly directed at annexations that propose "development," the need for which might be offset by "infill" and "redevelopment." Whatever the case, we agree with respondents that the city's combined findings addressing the CCP annexation policies are sufficient to demonstrate that that the proposed annexation is consistent with CCP Policy 14.3.1.

B. Policies 14.3.5 and 14.3.6: Public Need

As noted, Policy 14.3.6 sets out three non-exclusive factors to consider in evaluating public need for the annexation under Policy 14.3.5. *See* n 2. The city council's decision includes a finding quoted at n 3 that gives little consideration to the three factors set out in Policy 14.3.6, but concludes based on "other factors" that there is a demonstrated public need for the annexation to "increase available choices in the market place" and to "protect identified significant natural resource areas."[3] Petitioner first faults that finding for ignoring the three Policy 14.3.6(A), (B) and (C) factors. Further, given the excess supply of low density residential lands in the city, petitioner disputes the conclusion that there is a "public need" to increase available choices in the market place. Finally, petitioner questions the city's presumption that annexation and application of the

[3] The city council's decision states, in relevant part:

> "The Council notes that [CCP] Policy 14.3.6 provides clarification as to which factors should be considered in evaluating need, but also allows for additional need factors to be considered, as demonstrated by the language, 'Factors to be considered in evaluating public need for annexation may include, but are not limited to the following." The Council notes that, based on this language, it is possible to find that even if Factors 14.3.6.A, B and C were not satisfied, it would be possible to find that there is a public need for an annexation, based on other factors. Based on this observation, and information in the record, the Council finds that there is a demonstrated public need for the Witham Oaks Annexation. The Council finds that the proposed annexation would add to the amount of low density residential land in the City, thereby increasing available choices in the marketplace. The Council also finds that there is a public need to protect identified significant natural resource areas within the [UGB], and that the proposed annexation is the best currently available means to ensure that the significant resource areas on the site would be protected from development. The Council finds that the protection of the identified natural resource areas on the site is consistent with [CCP] Policies 4.2.2, 4.13.2, 4.13.4, and 5.5.3." Record 30.

Open Space—Conservation plan designation and related zoning will provide any greater protection to significant natural resources than under the county zoning.

Petitioner's arguments are directed at one finding in the city council's decision, and do not appear to acknowledge the findings the city council incorporated by reference, including the findings in the June 21, 2004 staff report. The staff report expressly considers the three Policy 14.3.6 factors and, like the city council, concludes that the public need criterion is met based on (1) enhancing market choices and (2) protecting significant natural resources.[4] The ultimate

---

[4] The June 21, 2004 staff report includes the following findings:

> "a. The 5-year Supply
>
> "The 1998 Buildable Lands Inventory and Land Need Analysis (BLI) and the 2002 Land Development and Buildable Land Report (LDBLR) both indicate that there is a significant supply of low density residential land to meet the projected demand. * * *
>
> "The 1998 Buildable Lands Inventory and Land Need Analysis does not include an analysis of land needed for Open Space – Conservation or Open Space – Agricultural needs. In fact, the concept of a 5-year supply of open space land doesn't make sense, because these lands are not 'used up' in the same way that development uses land. The concept of open space is that it remains primarily undeveloped and available for agricultural or conservation uses in perpetuity. The question of 'need' for open space lands will therefore be addressed later in this section.
>
> "b. Sufficient Land to Ensure Market Choice
>
> "Providing sufficient land to ensure market choice is a subjective standard. The economic principle of 'supply and demand' dictates that increasing the supply of a commodity will reduce the price. Based on this, one would expect that annexing additional low density residential land into the City would result in the reduction in the price of developable low density residential land within the City. However, a variety of other factors might well influence this outcome and so there is no way to state with confidence that annexing the property will result in more affordable housing within the City. One can say with confidence that annexing additional low density residential land into the City will allow for additional market choices beyond what is currently available. However, Staff are unable to quantify the appropriate degree to which market choice should be enhanced, and cannot say whether that includes a need for the proposed annexation.
>
> "c. Livability Benchmarks
>
> "* * * * *
>
> "One factor that may be considered in assessing the need for the proposed annexation is the need to preserve the proposed Open Space – Conservation areas. * * * As noted above, significant natural features have been identified on the subject property, including groves of White Oaks and other significant vegetation and the wetland area on the southern portion of

"Conclusions on Need and Land Use" concedes that it is arguable whether there is a need for additional low density residential land, but emphasize the perceived need to preserve significant natural features on the site.[5]

---

the site, which qualifies as a Locally Significant Wetland. The applicant has generally followed the boundaries of these areas in determining which areas should be designated Open Space – Conservation. Annexation of the subject site, in conjunction with the proposed [plan and zoning changes], would help to ensure that development does not occur in most areas of the site that contain significant natural features. In a few areas, an anticipated road alignment and the desire to efficiently develop land have resulted in the proposal to designate small portions of significant resource areas for low density residential development, but the applicant's proposal would designate nearly all of the significant resource areas for Open Space – Conservation. Preservation of these significant resource areas is consistent with [CCP] Policies 3.2.1, 4.2.2, 4.13.2, 4.13.4, 5.5.3 and 13.12.18. * * * Based on this policy direction, and the lack of protections for the natural resources on the site under the County's jurisdiction, there is a need for the annexation.

"The applicant argues that * * * the proposed annexation would enhance livability for the surrounding neighborhood and community as a whole in the following ways:

"1. Designating 36.87 acres of the property for Open Space – Conservation would help to ensure conservation of the significant natural resources on the site, including White Oak tree groves, steep slopes, wildlife habitat areas, and wetlands.

2. Conservation of these areas would also result in the preservation of views of the trees and hillsides on the site * * *

"3. Add open space that is contiguous to the City's open space tract to the north.

"4. Prevent undesirable uses and development patterns that could be allowed under the County's development standards.

"5. Ensure trail connections consistent with the City's Park and Recreation Facilities Plan.

"6. Provide development that is close to goods and services, in a location relatively near the City center; thereby reducing the pressure for 'sprawl development' further from the City center." Record 261-62.

[5] The June 21, 2004 staff report states:

"Conclusions on Need and Land Use

"There is not currently a shortfall of Low Density Residential land in the City with respect to the 5-year supply. However, the provision of additional Low Density land within the City Limits will serve to enhance market choice for housing options within the city. Although it is arguable whether there is a need for additional Low Density Residential land in the City, a number of [CCP] Policies, and Statewide Planning Goals 5 and 6 support the proposed preservation of identified significant natural features. This preservation can be achieved if the property is annexed. The proposed Low Density Residential and Open Space – Conservation areas proposed to be annexed into the City Limits would not result in undue impacts to

A review of the incorporated findings makes it clear that the city council did not ignore the three Policy 14.3.6(A), (B) and (C) factors. The findings address all three factors, and appear to treat protection of significant natural features as an appropriate consideration under Factor C. We tend to agree with petitioner that if enhancing "market choice" were the only factor supporting the proposed annexation, the city's findings regarding public need would be inadequate and likely unsupported by substantial evidence. As petitioner notes, under that view, no annexation request could ever fail to meet the public need criterion. Further, Policy 14.3.6(B) speaks of "ensuring" market choices, not "enhancing" them, and there is no explanation for why adding to the existing large surplus of low density residential lands is necessary to "ensure" market choices. However, we need not address these questions, because as noted above the city's findings emphasize protection of significant natural resources as the decisive factor in demonstrating public need. That reasoning seems a sufficient basis to demonstrate public need under Policies 14.3.5 and 14.3.6, if supported by substantial evidence. We turn then to petitioner's arguments regarding protection of significant natural features.

Petitioner disputes the city's presumption that significant natural resources on the site are better protected under the amended plan and zoning designations than they were under the previous LDR plan designation and UR zoning. Petitioner cites to CCP policies governing the Open Space—Agriculture plan designation indicating that such designated parcels should be protected for commercial forest uses, among other uses. Petitioner suggests that the Open Space—Agriculture plan designation would allow the significant tree groves on the property to be cut down.

However, as respondents point out, the city amended the plan designation from LDR to Open Space—Conservation, not Open Space—Agriculture. Policies under the Open Space—Agriculture designation have no apparent bearing on uses allowed under the Open Space—Conservation designation. Petitioner also cites CCP Policies 4.6.5 and 4.6.6, which require that on

---

surrounding properties and, if the Comprehensive Plan Amendment is approved, would be consistent with applicable land use regulations and Comprehensive Plan policies." Record 264.

tree-covered hillsides development shall preserve as many trees as possible, suggesting that it is possible to cut down at least some trees on forested hillsides. Be that as it may, respondents argue and it appears to be the case that in applying the Open Space—Conservation plan designation and the PD(AG-OS) zone to the 36.87 acres of significant natural resources, the city has applied the most resource-protective plan designations and zoning possible under the city's plan and land use regulations. Those plan and land use regulations are considerably more protective than the previous plan and zoning. Respondents explain that the AG-OS zone allows the least intensive uses under the city's zoning scheme, and that the PD overlay requires review that ensures the least impacts to natural resources from development. The city's conclusion that significant natural resources on the property are better protected by annexation and application of the amended plan and zoning than it would under the previous plan and zoning regulations is supported by substantial evidence.

C. Policy 14.3.5(B): Advantages Versus Disadvantages of Annexation

Policy 14.3.5(B) requires a finding that the advantages of annexation to the community outweigh the disadvantages. *See* n 2. The city's findings include an extensive discussion of the advantages and disadvantages, including a list of eight advantages. Petitioner argues that to the extent that discussion relies on preservation of significant natural resources, the city's findings under Policy 14.3.5(B) are not supported by substantial evidence. Petitioner argues that the AG-OS zone allows several uses outright, including agricultural uses and "research facilities" related to agriculture, that might be inconsistent with preservation of natural resources.

Respondents point out that petitioner does not challenge the other listed advantages of annexation discussed in the city's findings. In any case, respondents emphasize that the applicant does not plan development or agriculture on the AG-OS zoned area, and the city's decision places a PD overlay on the area, which ensures that no uses are permitted except as approved as part of the planned development process. We agree with respondents that petitioner has not demonstrated reversible error in the city's findings under Policy 14.3.5(B).

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENT OF ERROR

Petitioner challenges the city's findings that the plan amendment from LDR to Open Space—Conservation for 36.87 acres and the zone change to PD(AG-OS) for the property complies with plan and land use regulations that govern comprehensive plan and zoning amendments.

A. Public Need

CCP Policy 1.2.3 and LDC 2.1.30.06 require in relevant part findings that there is a demonstrated "public need" for a comprehensive plan amendment."[6] Petitioner repeats his arguments that the city erred in concluding that the Open Space—Conservation plan designation protects natural resources on the property better than the previous plan designation. We rejected those arguments above, and we do so again here.

B. Compatibility Factors

LDC 2.1.30.06(b) requires that certain "compatibility factors" be considered for proposed plan amendments. *See* n 6. LDC 2.2.40.05 imposes a similar requirement for zoning changes. The

---

[6] LDC 2.1.30.06 provides, in relevant part:

"a. Amendments shall be approved only when the following findings are made:

"A. There is a public need for the change;

"B. The change being proposed is the best means of meeting the identified public need; and

"C. There is a net benefit to the community that will result from the change.

"b. In addition, the following compatibility factors shall be considered for proposed amendments to the Comprehensive Plan map:

"1. Visual elements (scale, structural design and form, materials, and so forth);
"2. Noise attenuation;
"3. Noxious odors;
"4. Lighting;
"5. Signage;
"6. Landscaping for buffering and screening;
"7. Traffic;
"8. Effects on off-site parking;
"9. Effects on air and water quality."

city adopted extensive findings addressing these compatibility factors, based on the assumption that development on the subject parcel would consist primarily of low density residential development. The city found that given the PD(AG-OS) zoning, steep slopes, wetlands and other limitations on the 36.87-acre portion that was redesignated from LDR to Open Space—Conservation, and the applicant's desire to preserve that area rather than develop it, it "is unlikely that an intensive development proposal would be approved in these areas."[7]

Petitioner challenges that assumption, arguing that the AG-OS zone allows several uses, such as animal husbandry and agricultural research facilities, that might have adverse impacts such as noxious odors on nearby properties. According to petitioner, the city's consideration of the "compatibility factors" must assume that the most intensive use that is possible under the AG-OS zone will occur.

We see no error in assuming that the PD(AG-OS)-zoned area will not be developed with intensive uses, given that the applicant contemplates no such development, the limited intensity of uses allowed in the AG-OS zone, the PD review standards, and the steep slopes and other

---

[7] The city's findings set out its reasoning under the "visual elements" compatibility factor, and then refer back to that reasoning in discussing other factors:

> "The entire site is currently designated Low Density Residential (LDR). Under this designation, the primary pattern of development is typically single family residences. Under the proposal, only 57.75 acres of the site would remain designated for Low Density Residential development. The remaining 36.87-acre portion of the site would be designated for Open Space – Conservation uses. At this time, the only zoning district available to implement this designation is the Open Space – Agricultural zone. In this zoning district, the primary allowed activities on the site are agriculturally oriented, such as animal husbandry, horticulture, and tree crops. However, research facilities and services are also permitted in this zone, which could represent a more intensive pattern of activity than the other agricultural uses. * * * The applicant has stated that they do not intend to harvest timber, conduct other agricultural activities, or develop an agricultural research facility on the site. The applicant has requested that a [PD] overlay be placed on the Agricultural – Open Space portion of the site to require that any proposal for development in these areas would be reviewed through a public hearing. Given the steep slopes and significant natural features in these areas, it is unlikely that an intensive development proposal would be approved in these areas through the [PD] process. * * * Given this analysis, the designation of the significant resource areas for Open Space – Conservation, and the approval of the associated zone change request, would strictly limit activities and permitted uses in these areas, but it would not absolutely prohibit timber harvest in these areas." Record 284-85.

limitations on development in that portion of the property. It seems highly unlikely that an intensive animal husbandry or agricultural research facility, or other uses incompatible with surrounding development, could be developed on the PD(AG-OS)-zoned portion, even if the applicant contemplated such development. Petitioner does not explain why LDC 2.1.30.06(b) or LDC 2.2.40.05 require the city to assume hypothetical and unlikely uses of the property, and we do not see that they do.

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends that the comprehensive plan and zoning amendments are inconsistent with the Transportation Planning Rule (TPR), at OAR 660-012-0060, as well as city provisions governing transportation.

A. OAR 660-012-0060

OAR 660-012-0060 requires in relevant part that amendments to plans and land use regulations that "significantly affect" a transportation facility shall assure that allowed land uses are consistent with the function, capacity, and performance standards of that facility.[8] The city council

[8] OAR 660-012-0060 provides, in relevant part:

> "(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:
>
> > "(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
> >
> > "(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
> >
> > "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
> >
> > "(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle

found that the proposed amendments would not "significantly affect" any transportation facility and thus trigger application of OAR 660-012-0060, because the amendments reduce the intensity of allowed uses and hence reduce traffic impacts, compared to the previous plan and zoning designations.[9]

Petitioner first faults the city's findings for comparing the uses allowed under the previous LDR *plan* designation and uses allowed under the amended *zoning*. According to petitioner, the city must compare uses allowed under the previous county UR zone and the proposed city zones. Intervenor responds that the city's transportation system plan (TSP) assumed that the subject property would be developed under the LDR plan designation, which allows a residential density of between two and six dwellings per acre. According to intervenor, because the TSP made assumptions based on the plan designation rather than on the county UR zone, the city did not err in using a plan-to-zone comparison rather than a zone-to-zone comparison. The city points out that each of the low density residential zoning districts that implement the LDR plan designation allow a

---

congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.

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

"* * * * *

"(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP."

[9] The city council's findings state:

"The Council notes that the [TPR] requires actions such as Comprehensive Plan and [LDC] Amendments be evaluated for impacts to transportation facilities. * * * The Council notes that 'significantly affects' is defined as a set of results generally associated with proposals that increase trip activity. The Council notes that the proposed [CCP] amendment would change the [CCP] Designation for the property from 94.62 acres of Low Density Residential to 57.75 acres of Low Density Residential and 36.87 acres of Open Space – Conservation. The Council notes that the Traffic Impact Analysis submitted for this application found that there would be a reduction in traffic impacts resulting from the proposed change. The Council notes that staff concur with this analysis. Based on this analysis, and upon information in the record, the Council finds that the proposed [CCP] Amendment and [LDC] Change would not significantly affect a transportation facility and, therefore, no OAR 660-012-0060(1) action is required. * * * Record 36.

range of two to six units per acre. In other words, the city argues, in assuming that the subject property would develop as allowed under the LDR plan designation, the TSP necessarily assumed that the property would be rezoned to one of the three low density residential zones and develop at the same urban densities contemplated by the LDR designation.

Petitioner does not explain why the residential density allowed under the UR zone is less than that allowed under the LDR plan designation.[10] Even assuming that is the case, we agree with respondents that it was appropriate for the city to compare traffic impacts based on the residential densities allowed by the LDR plan designation, not the county UR zone. The general purpose of OAR 660-012-0060 is to ensure that allowed land uses are consistent with the *planned* function, capacity and performance standards of transportation facilities. If the applicable TSP assumes greater development density for a particular property than allowed under the pre-amendment zoning district, it seems more consistent with the purpose of OAR 661-010-0060 to compare development density (and hence traffic impacts) actually assumed by the TSP with the amended zoning rather than the pre-amendment zoning.

Petitioner next faults the city for assuming that the PD(AG-OS)-zoned portion of the property would not develop with a research facility, and for failing to include traffic generated by such a facility in comparing the traffic impacts of uses allowed under the previous and proposed plan and zoning.[11] However unrealistic development of a research facility might be, petitioner argues,

---

[10] Although it is not entirely clear to us, the county UR zone appears to be a zone intended to preserve large urbanizable parcels in unincorporated areas within UGBs from subdivision or other development inconsistent with urbanization. In other words, despite its name the UR zone appears to be an intermediate "holding" zone rather than a urban residential zone *per se*. That goes a long way toward explaining why the city's TSP used the city plan designation in addressing traffic impacts of urbanizing the subject property.

[11] The city council adopted the following findings:

> "* * * The Council notes that the TIA [traffic impact analysis] evaluates traffic impacts resulting from full development of 57.75 acres of the site under the [PD(RS-6)] zoning designation, but does not anticipate significant traffic impacts from the 36.87-acre portion of the site proposed to be zoned [PD(AG-OS)]. The Council notes that significant traffic impacts were not anticipated from the PD (AG-OS) portion of the site for the following reasons:

OAR 660-012-0060(1) focuses on *allowed land uses*, not realistically expected or likely land uses, and therefore the city must assume that if a research facility is allowed it will be built.

Petitioner is correct that the focus of OAR 660-012-0060(1) is on *allowed* land uses rather than *proposed* land uses. Petitioner is also correct that the local government must generally assume the most traffic-intensive uses allowed under the amended and unamended plan and zoning, in conducting a comparison of traffic impacts under OAR 660-012-0060(2)(d). *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236, 254, *aff'd* 191 Or App 148, 82 P3d 184 (2003). In *Friends of Marion County*, however, we held that it was not necessarily error to assume

---

"1. Nearly all outright permitted uses within the AG-OS district, including animal husbandry, horticulture, cultivation and storage [and] row field crops, are not significant generators of traffic.

"2. The applicant clearly states their desire to protect the natural resources on the AG-OS portion of the site, and are unlikely to develop a use in those areas which would be likely to create compatibility conflicts with the portion of the site they intend to develop with residential uses. * * *

"3. Development of one outright permitted use in the AG-OS zone which could generate significant traffic, 'Research Facilities and Services,' is not a realistic expectation, considering the following factors:

"a. The configuration and location of the properties proposed for the AG-OS zone would not easily lend themselves to this type of development. Much of this area contains steep slopes and is difficult to access, and all of these areas contain significant natural features.

"b. Given the requested Planned Development Overlay on the AG-OS portion of the site, any development on these properties would be subject to Planned Development approval. In this approval process, impacts to natural features would be a key consideration and would make approval of any significant development proposal in these areas problematic. The Planned Development approval process would also require an analysis of traffic impacts resulting from the proposed development, and would ensure that traffic impacts from the development would be addressed at that time.

"c. The applicant has stated its desire to preserve the areas with natural features and is unlikely to allow development in these areas in a manner that would create compatibility conflicts with the residential development it wishes to pursue on the remaining 57.75 acres of the site.

"Given the above analysis and information in the record, the Council finds that the submitted [TIA] adequately anticipates traffic impacts that would result from the proposed Annexation, Comprehensive Plan Amendment and Zoning District Change. * * *" Record 32-33.

something other than the most traffic-intensive uses, as long as the assumptions are consistent and the uses compared provide a meaningful comparison of the traffic impacts between the existing and proposed plan and zoning. *Id*. We explained, for example, that a local government "would clearly err if it assumed without adequate justification that the most traffic-intensive uses would develop under existing zoning but the least traffic-intensive uses would develop under the proposed zoning." *Id.* We understand petitioner to argue that there is no "adequate justification" in the present case for the city to assume anything other than the most traffic-intensive use allowed under the AG-OS zone: agricultural research facilities.

The decision justifies not assuming that the AG-OS portion would develop with an agricultural research facility based on (1) site characteristics such as steep slopes and protected natural resources that limit potential for such development; (2) reliance on the PD process to address any traffic impacts from such development; and (3) the applicant's expressed intent to preserve that area for open space and natural resources. We tend to agree with petitioner that the last two bases do not justify assuming something other than the most-traffic intensive use allowed in the AG-OS zone. However, the first justification seems entirely appropriate. Respondents argue, and it appears to be the case, that city regulations protecting steep slopes, wetlands and significant natural features severely limit the amount of developable land within the portion zoned AG-OS. It seems highly improbable given those limitations that an agricultural research facility of any appreciable size or traffic-generating capacity could be developed within that portion.[12]

[12] Although petitioner does not advance this argument, one could argue that the same site limitations should be taken into account in estimating the number of dwellings that could be developed and hence traffic impacts generated under the unamended plan and zoning. *See Friends of Marion County*, 45 Or LUBA at 254 (assumptions must be consistent in comparing uses allowed under amended and unamended plan and zoning). However, as far as we are informed the city's TSP did not take such site characteristics into account, and instead assumed that the entire property would develop with low density residential dwellings, generating a certain range of residential density per acre. As explained elsewhere in this opinion, the city correctly based its findings under OAR 660-012-0060 on the uses and residential density allowed under the LDR plan designation, because that is what the TSP assumed.

In any case, even if the city's TPR analysis should have assumed that some portion of the 37.85-acre area zoned PD(AG-OS) would develop with an agricultural research facility of some size, petitioner has not established that that error, if any, warrants reversal or remand. We held, above, that because the city TSP planned transportation facilities based on the residential density allowed under the LDR plan designation, the city correctly compared traffic impacts based on the LDR plan designation. As respondents point out, the TSP assumed that the entire 94.62-acre parcel would develop at residential densities of between two and six units per acre, resulting in somewhere between 189 and 567 dwelling units. The challenged decision allows residential development on only 57.75 acres at a density of two to six units per acre, yielding somewhere between 116 and 346 units, a difference of 73 to 221 units. That difference between residential development assumed by the TSP and residential development allowed under the proposed zoning is at the heart of the city's conclusion that the rezoning will not "significantly affect" any transportation facility: because the new zoning significantly reduces allowed residential density. Petitioner does not argue, and it seems highly unlikely, that an agricultural research facility on the PD(AG-OS) portion of the property would generate anything remotely close to the same amount of traffic as 73 to 221 dwelling units, even assuming an agricultural research facility of any significant size could be built on the PD(AG-OS) portion notwithstanding its development limitations. In short, even if the city should have assumed that the PD(AG-OS) portion would develop with an agricultural research facility, petitioner has not demonstrated that that error warrants reversal or remand.

Finally, petitioner argues that the TIA identified three intersections near the subject property that will operate at unsatisfactory levels of service under the build scenario, compared to the no-build scenario. According to petitioner, the TIA itself demonstrates that the rezone to PD(RS-6) allows uses that will "significantly affect" transportation facilities within the meaning of OAR 660-012-0060(2)(d). Petitioner goes on to argue that the city erred in failing to apply one or more of the measures described in OAR 660-012-0060(1)(a) to (d) with respect to these intersections.

Implicit in OAR 660-012-0060(2)(d) is a causative element that triggers application of the rule only when the challenged amendments (1) allow uses that generate more traffic than uses allowed under the unamended plan and zone, and (2) the additional traffic would "reduce the performance standards of the facility below the minimum acceptable level identified in the TSP" during the relevant planning period. *ODOT v. City of Klamath Falls*, 39 Or LUBA 641, 647-48, *aff'd* 177 Or App 1, 34 P3d 667 (2001). Here, the city found, based on substantial evidence, that the amended plan and zoning would generate *less* traffic from the subject property than uses allowed under the unamended plan and zoning. It follows that there is no additional traffic that could possibly "reduce the performance standards of the facility below the minimum acceptable level identified in the TSP" within the meaning of OAR 66-012-0060(2)(d).

Stated differently, petitioner errs in assuming that the proper point of comparison is the build scenario versus the no-build scenario. As explained above, the proper comparison is between (1) development allowed under the unamended plan and zoning (here, development of the entire parcel at two to six dwellings per acre, as assumed by the TSP) and (2) development allowed under the amended plan and zoning. The fact that three intersections will worsen or fail under the build scenario compared to the no-build scenario is irrelevant, as that result is not caused by the challenged plan and zoning amendments.

The fourth assignment of error is denied.

The city's decision is affirmed