

1
2
3
4
5

REMANDED

4/20/2005

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

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

NATURE OF THE DECISION

Petitioners and intervenors-petitioners (petitioners) appeal a city decision that approves a master plan of development for a mixed residential and commercial development on a 553-acre parcel.¹

FACTS

The subject parcel lies near the Pacific Ocean and Cape Ferrelo, on the east side of Highway 101, across from Samuel Boardman State Park. The property is rugged topographically and includes a number of streams and wetland sites. Approximately 371 acres of the 553 acres, about two-thirds of the property, will remain in open space and will not be developed. On the remaining approximately 182 acres, intervenor-respondent U.S. Borax, Inc. (Borax) proposes to develop 1000 dwelling units, 540 single-family detached dwellings, 150 single-family attached dwellings and 310 multi-family dwelling units.² Borax also proposes to develop a 2.43-acre commercial site and a 10-acre college campus. The site was recently annexed by the city and included within its urban growth boundary.

FIRST ASSIGNMENT OF ERROR

The City of Brookings Land Development Code (BLDC) includes a number of zoning districts. One of those zoning districts is the Master Plan Development (MPD) District. The MPD District requires approval of a Master Plan of Development (MPoD) and a Detailed Development Plan (DDP) before building permits may be issued for development. Petitioners and intervenors-petitioners (petitioners) view the requirements for MPoD approval and the role that an MPoD plays

¹ The record in this matter includes a three-volume record, a one-volume supplemental record and two separately bound documents with their own internal page numbers: (1) Lone Ranch Master Plan of Development (Lone Ranch MPoD) and (2) Lone Ranch Technical Appendix. The Technical Appendix is a collection of separate studies.

² Intervenor-respondent filed a brief in this appeal and the city joins in that brief. We refer to them together as respondents and to the brief filed by intervenor-respondent as respondents' brief.

1 in subsequent approval of a DDP somewhat differently. Petitioners believe a high level of detail and
2 precision is required in the MPoD because it largely dictates the development of DDPs. Therefore,
3 petitioners contend, a relatively high level of detail and precision is required in the technical studies
4 that are prepared to support the MPoD. The city and Borax, on the other hand, contend that the
5 MPoD is a more conceptual document and that while the MPoD certainly guides and limits
6 preparation of DDPs, the MPD District anticipates that those DDPs will both refine the concepts
7 that are included in the MPoD and, within specified parameters, may deviate from those concepts.
8 Those different views are the subject of petitioners' first assignment of error and the city's and
9 Borax's response to that assignment of error.³ We discuss several key sections of the MPD District
10 first and resolve the parties' dispute about the respective roles that the MPoD and DDP play in
11 authorizing development in the MPD District. To facilitate reference to key BLDC language later in
12 this opinion, we set out relevant portions of the BLDC text in the margin.

13 **A. MPD District Purpose (BLDC 70.010)**

14 The first paragraph of BLDC 70.010 explains that the MPD District implements the city's
15 MP Comprehensive Plan designation and is applied to large parcels within the city's UGB. The
16 remainder of BLDC 70.010 sets out the purposes of the MDP District in significant detail. We
17 discuss some of these purposes later in this opinion and set out the relevant text of the BLDC
18 70.010 purpose statement in the margin.⁴

³ Later in this opinion, we address petitioners' contentions that the city has improperly deferred to the DDP approval stage certain specific considerations that petitioners argue must be resolved finally in approving the MPoD.

⁴ BLDC 70.010 provides in relevant part:

"The MPD zone is to be implemented through the approval of an MPoD that describes in detail, as outlined in this section, how the development of the property will occur and how the development will implement applicable goals and policies of the City's Comprehensive Plan, and applicable provisions of the Land Development Code. The MPoD will assess and minimize, to an acceptable level, the impacts of the development on the City's services, infrastructure, transportation systems and neighboring properties. As the MPD zone is implemented through an approved MPoD, no development shall be allowed until applicable requirements of Section 70 are met. Compliance with applicable plan goals and policies is

1 **B. General Provisions (BLDC 70.020)**

2 The general provisions at BLDC 70.020 describe that an MPoD may be developed in a
3 single phase or in multiple phases. One or more DDPs may be developed after the MPoD is
4 approved or DDPs may be approved with the MPoD. In either case, BLDC 70.020 provides that
5 “prior to issuing any building permits a DDP must be approved by the Planning Commission.”
6 Borax’s proposal is to be developed in multiple phases and the DDPs are to be developed at a later
7 date.

8 BLDC 70.020 also specifically allows an applicant for MPoD approval to propose
9 alternative development standards, if the applicant “demonstrates that such alternative standards
10 equally or better meet the purpose of the existing regulations.”⁵ In their second assignment of error
11 below, petitioners challenge the city’s approval of alternative development standards.

deferred until the MPoD review. Master Planned Development review procedures are established in this chapter for the following purposes:

- “A. Promote flexibility in design and permit diversification in location of structures;
- “B. Promote efficient use of land and energy and facilitate a more economical arrangement of buildings, circulation systems, land uses, and utilities;
- “C. Preserve to the greatest extent possible existing landscape features and amenities, and utilize such features in a harmonious fashion;
- “D. Provide for more usable and suitably located recreation facilities and other public and common facilities than would otherwise be provided under conventional land development procedures;
- “E. Combine and coordinate architectural styles, building forms and building relationships within the Planned Development;
- “F. Provide the applicant with reasonable assurance of ultimate approval before expenditure of complete design monies, while providing the City with assurances that the project will retain the character envisioned at the time of approval;
- “G. Promote and encourage energy conservation; and
- “H. Provide greater compatibility with surrounding land uses than what may occur with a conventional project.”

⁵ This portion of BLDC 70.020 is as follows:

1 **C. MDP District Allowed Uses (BLDC 70.030)**

2 The MPD District simply allows the same uses that are allowed in a number of other city
3 residential, commercial and industrial zoning districts.⁶

4 **D. MPoD Application and Evaluation (BLDC 70.040, 70.050, 70.060)**

5 These sections set out in some detail the graphic and narrative requirements for an MPoD
6 and explain that upon acceptance of an application for MPoD approval, the city’s planning staff will
7 evaluate and prepare a recommendation to the planning commission.⁷

8 **E. MPoD Approval Criteria (BLDC 70.070)**

9 BLDC 70.070 sets out seven approval criteria for MPoD approval. In their fourth, sixth
10 and seventh assignments of error, petitioners contend that the applicant and city failed to
11 demonstrate that the approved MPoD complies with several of these criteria and improperly
12 deferred that demonstration to the DDPs.⁸

“An applicant for MPoD approval may propose one or more alternative development standards for all or any specific areas within the plan boundaries, which supersede corresponding development regulations or standards otherwise applicable to the project area through existing regulations. Such alternative standards shall be clearly and specifically identified within the plan submittals, and shall include an explanation and/or drawings, which demonstrates that such alternative standards equally or better meet the purpose of the existing regulations.”

⁶ BLDC 70.030 provides:

“The following uses are allowed outright when they are included in an approved MPoD.

“A. All uses allowed outright and conditionally in the R-1, R-2, R-3 zones;

“B. All uses allowed outright and conditionally in the C-1, C-2, C-3 and C-4 zones;

“C. All uses allowed outright in the I-P and M-2 districts.”

⁷ The BLDC 70.040 graphic and narrative requirements that are cited by respondents in their response to petitioners’ first assignment of error are lengthy. We do not set those provisions out verbatim, because doing so would needlessly lengthen this opinion.

⁸ BLDC 70.070 provides:

“**Review Criteria** The Planning Commission shall approve an application for MPoD upon finding that the following approval criteria be met:

1 **F. MPoD Modification (BLDC 70.130)**

2 BLDC 70.130 anticipates that MPoDs may need to be modified. Depending on the
3 significance of the modification, BLDC 70.130 requires that it be subject to “a minor review” or “a
4 major review.”

5 **G. Detailed Development Plans**

6 Because the challenged decision does not approve a DDP, the BLDC provisions that
7 govern approval of a DDP are not directly relevant. However, a comparison of the application
8 requirements and the approval criteria for MPoDs and DDPs is useful in understanding the
9 relationship between those plans and the level of detail and supporting documentation that is
10 required for each of those kinds of plans.

11 As was the case with the application requirements for MPoDs at BLDC 70.040, setting out
12 the application requirements for DDPs at BLDC 70.140 verbatim would needlessly lengthen this

“A. The proposed MPoD is consistent with the purposes identified in Section 70.010 and the intent of the MPD zone;

“B. The proposed phasing schedule, if any, is reasonable and does not exceed 10 years between commencement of development on the first and last phases unless otherwise authorized by the Planning Commission either at the time of approval of the MPoD or by a modification to the MPoD. If at the end of 10 years the project is not built out, the Planning Commission shall review the MPoD and shall have the ability to require changes to or rescind the plan based on existing conditions;

“C. The proposed MPoD will demonstrate that adequate utilities and infrastructure are available or can reasonably be made available at each phase. The proposed MPoD will further demonstrate that existing utility services and water supplies for adjacent properties will not be negatively affected at each phase;

“D. The proposed MPoD will demonstrate that the plan respects the physical characteristics of the site;

“E. The applicant demonstrates that all deviations from the development standards are warranted;

“F. The circulation proposed MPoD will demonstrate that adequate transportation facilities are available, and the plan promotes the most economic, safe and efficient movement of traffic;

“G. The proposed MPoD meets the applicable requirements of the Urban Growth Boundary Joint Management Agreement.”

1 opinion. We agree with the city and Borax that BLDC 70.140 generally requires more detail for
2 DDP's than BLDC 70.040 requires for MPoDs.⁹ However, turning to the DDP approval criteria
3 for DDPs, we generally agree with petitioners that the BLDC 70.170(A) criteria for DDP approval
4 appear to serve a somewhat different purpose than the BLDC 70.070 criteria for MPoD
5 approval.¹⁰ The BLDC 70.070 MPoD approval criteria impose a number of substantive criteria.

⁹ Respondents set out a useful comparison of the level of detail that is required for each kind of plan. For example BLDC 70.040(A)(3)(a) requires that the MPoD include site plans that show “[e]xisting site conditions including contours at intervals sufficient to indicate topographic conditions, watercourses, flood plains, and any unique natural features.” The parallel requirement for DDPs at BLDC 70.140(A)(1) requires:

“[t]opographic contours at 2-ft minimum intervals for slopes under 20 percent and at 5-ft. minimum intervals for slopes at or greater than 20 percent. Where the grade exceeds 15 percent or where the development site abuts existing developed lots, a grading plan shall be required. If a grading plan is required, it shall conform to the standards established in Section 100, unless alternative standards are proposed at the time of the DDP approval.”

Similarly, BLDC 70.040(A)(3)(e) requires that the MPoD include a site plan that shows “[g]eneral location and size of areas to be conveyed, dedicated, or reserved as common open spaces, public parks, recreational areas, school sites, and similar public and semipublic uses[.]” (Emphasis added). Whereas BLDC 70.140(A)(7) requires that a DDP must show the “[l]ocation and dimensions of all areas to be conveyed, dedicated, or reserved as common open spaces, public parks, recreational areas, school sites, and similar public and semipublic areas.”

¹⁰ BLDC 70.170 sets out the following DDP approval criteria:

“Request for approval of a DDP shall be reviewed to determine whether it is in substantial conformance with the MPoD. The DDP shall be deemed to not be in substantial conformance with the MPoD if it results in any of the following types of changes from the MPoD.

- “1. Increase in development density and/or intensity that results in a peak hour trip generation of greater than 10 percent of the total approved in the MPoD;
- “2. Increase in the floor area proposed for nonresidential use by more than 10 percent from what was previously specified;
- “3. Reduction of more than 10 percent of the area reserved for common open space and/or usable open space from what was previously specified;
- “4. Increase in the total ground area proposed to be covered by structures by more than 5 percent from what was previously specified;
- “5. Reduction of specific setback requirements by more than 25 percent where previously specified;

1 See n 8. BLDC 70.170(A) imposes a single, overarching, substantive criterion—the DDP must be
2 “in substantial compliance with the MPoD.” The seven considerations listed in BLDC 70.170(A)
3 are simply more specific standards by which the city determines whether that single substantive
4 criterion (substantial compliance with the MPoD) is satisfied.

5 Petitioners essentially contend that all of the relevant substantive standards are applied at the
6 time of MPoD approval and none of those substantive standards can be revisited during DDP
7 approval. From this contention, petitioners argue that the necessary technical studies to
8 demonstrate compliance with those standards must be performed at the time of MPoD approval.
9 The city and Borax essentially contend that for at least some of those substantive standards,
10 compliance cannot be demonstrated until the technical studies that will be done at the time of DDP
11 approval are available.

12 It is fair to say that while petitioners probably overstate the role of the MPoD and
13 understate the potential role of the DDP, the city and Borax probably understate the role of the
14 MPoD and overstate the role the DDP may play in many cases. Petitioners’ view is probably
15 closer to a literal reading of the above-noted BLDC provisions. However, a final BLDC provision
16 that has not previously been noted provides a basis for a more accurate view of the respective roles
17 that the MPoD and the DDP may play in any given case (and in this case) and that role likely lies
18 somewhere between the above-described positions of the petitioners on the one hand and the city
19 and Borax on the other. BLDC 70.080 describes the action the planning commission is to take at
20 the conclusion of its review of MPoD. As relevant, BLDC 70.070 provides “[f]ollowing the close
21 of the hearing the Planning Commission shall recommend the approval, conditional approval or
22 denial of the MPoD.” This authority to condition MPoD can significantly broaden the permissible

“6. Reduction of project amenities provided such as recreational facilities, screening, and/or landscaping provisions by more than 10 percent from what was previously specified; and

“7. If subdivision or partition, the application does not meets the applicable requirements of Section 176 of this code.”

1 options the city has in reviewing multi-stage applications for land use approval. In *Rhyne v.*
2 *Multnomah County*, 23 Or LUBA 442 (1992), we explained several ways a local government
3 may go about demonstrating compliance with applicable approval criteria in reviewing an application
4 for discretionary land use approval, where a multi-stage approval process is employed and early
5 stage approvals occur in a public planning process but later stage approvals might not include an
6 opportunity for public hearings:

7 “Where the evidence presented during the first stage approval proceedings raises
8 questions concerning whether a particular approval criterion is satisfied, a local
9 government essentially has three options potentially available. First, it may find that
10 although the evidence is conflicting, the evidence nevertheless is sufficient to support
11 a finding that the standard is satisfied or that feasible solutions to identified problems
12 exist, and impose conditions if necessary. Second, if the local government
13 determines there is insufficient evidence to determine the feasibility of compliance
14 with the standard, it could on that basis deny the application. Third, if the local
15 government determines that there is insufficient evidence to determine the feasibility
16 of compliance with the standard, instead of finding the standard is not met, it may
17 defer a determination concerning compliance with the standard to the second stage.
18 In selecting this third option, the local government is not finding all applicable
19 approval standards are complied with, or that it is feasible to do so, as part of the
20 first stage approval (as it does under the first option described above). Therefore,
21 the local government must assure that the second stage approval process to which
22 the decision making is deferred provides the statutorily required notice and hearing,
23 even though the local code may not require such notice and hearing for second
24 stage decisions in other circumstances.” 23 Or LUBA 447-48 (footnotes
25 omitted).¹¹

26 Consistent with the above discussion in our decision in *Rhyne*, even though the evidence is
27 conflicting or less detailed than petitioners believe it should be, the city may find that MPoD
28 approval criteria are satisfied, so long as the evidence the city relies on is evidence a reasonable
29 person would rely on to make the required finding. That the city may have believed that additional
30 evidence will be submitted during DDP approval that will confirm the correctness of their finding
31 does not provide a basis for reversal or remand.

¹¹ Unlike the Multnomah County ordinance at issue in *Rhyne*, the BLDC requires that a public hearing be held in advance of approval of a DDP in all cases. BLDC 70.150.

1 In addition, while we agree with petitioners that the MPoD substantive criteria at issue in
2 petitioners' assignments of error would not necessarily apply at the time of DDP approval under
3 BLDC 70.140(A), if the city has properly deferred a finding of compliance with any of those criteria
4 to the time of DDP approval and imposed an adequate condition to require a demonstration of
5 compliance with the MPoD approval standard at the time of DDP approval when more detailed
6 information is available, the required finding can be made at the time of DDP approval and the city's
7 failure to adopt that finding in its decision approving the MPoD is not error. With this understanding
8 of the respective roles of the MPoD and the DDP, we turn to petitioners' remaining assignments of
9 error.

10 **SECOND ASSIGNMENT OF ERROR**

11 As we earlier noted, BLDC 70.020 allows an applicant for an MPoD to "propose one or
12 more alternative development standards * * * which supercede corresponding development
13 regulations or standards otherwise applicable to the project area through existing regulations." *See*
14 n 5. However, BLDC 70.020 also requires that the applicant demonstrate that the "alternative
15 development standards equally or better meet the purpose of the existing regulations." In their
16 second assignment of error, petitioners allege the city erroneously concluded that because the MPD
17 District imposes no minimum lot size, lot width, building coverage, front or rear setbacks or building
18 height standards, there was no need for the applicant to demonstrate that its proposed lot sizes, lot
19 widths, building coverages, front or rear setbacks or building heights "equally or better meet the
20 purpose of the existing regulations," within the meaning of BLDC 70.020.¹²

¹² Borax proposes to deviate from a number of standards that would otherwise apply under the BLDC. Lone Ranch MPoD 36-37. The city council approved some of those requested deviations from BLDC standards that apply in all zoning districts. Record 35-36. However, the city council also concluded that many of the requested deviations were not really deviations, because the city council concluded the MPD District itself imposes no such standards. Record 34-35 (finding 46). Although the scope of petitioners' second assignment of error is somewhat unclear, we understand petitioners to challenge the proposed standards that the city concluded were not deviations from the BLDC in finding 46 at pages 34-35 of the record. Those standards concern minimum lot size, minimum lot width, building coverage, front and rear setbacks and building height.

1 The city’s theory for why the MPD District does not regulate “lot sizes, lot widths, building
2 coverages, front or rear setbacks or building heights,” is based on the undisputed fact that no such
3 standards actually appear at BLDC Chapter 70. BLDC Chapter 70 lists no uses that are allowed
4 outright or conditionally. Instead, BLDC 70.030 allows “[a]ll uses allowed outright or conditionally
5 in [several specified residential, commercial and industrial zones].” See n 6. The city apparently
6 reads BLDC 70.030 to import to the MPD District *uses* allowed in those named zoning districts
7 without also importing the “lot size, lot width, building coverage, front or rear setback or building
8 height regulations that apply in those zones.”¹³

9 ORS 197.829(1) establishes the standard of review that LUBA is required to apply when
10 reviewing the city council’s interpretation of its own land use legislation.¹⁴ We begin by examining
11 the text of BLDC 70.030 in its BLDC Chapter 70 context. *Church v. Grant County*, 187 Or

¹³ Respondent and Borax offer the following argument in defense of the city’s interpretation:

“[BLDC] 70.020 applies in two situations. It applies to generally applicable regulations such as street standards, that are not zone-specific, and it applies to zone-specific standards when an MPoD is proposed for a site that is in a zone other than the MPD zone. A property owner may apply for an MPoD and zone change to MPD from an existing City zone. When a property owner applies for an MPoD for property that does not have an MPoD zone, whether a proposed standard is a deviation is compared to both generally applicable standards and the standards of the existing non MPD zone. In contrast, if the project is already zoned MPD, there are no underlying zone standards, and the only deviations are deviations from generally applicable (non-zone specific) standards.” Respondents’ Brief 17 n 6.

¹⁴ORS 197.829(1) provides:

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

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

1 App 518, 524-25, 69 P3d 759 (2003). If BLDC 70.030 is viewed in isolation, the city council's
2 interpretation is possible, because BLDC 70.030 only specifically refers to "uses" in the specified
3 zones and does not specifically refer to the "development regulations and standards" in those zones.
4 However, as we have already noted, BLDC Chapter 70 imposes no "development regulations and
5 standards." Under the city's interpretation, the many uses that are allowed in the city's residential,
6 commercial and industrial zones are allowed in the MPD District without any minimum lot size,
7 minimum lot width, limit on building coverage, front or rear setback requirements or building height
8 limitation. Presumably, under the city's interpretation, the only limitations on (1) how small or
9 narrow lots could be, (2) how much of the lot could be covered by buildings, (3) how close
10 buildings could be to front and rear lot lines and (4) building height are the more general criteria in
11 BLDC 70.070(D) that do not address those considerations directly.¹⁵

12 While the city's interpretation might have been affirmable under the extremely deferential
13 standard of review that was required prior to the Court of Appeals' decision in *Church*, it does not
14 succeed under the less deferential standard of review that is required today. The creative defense of
15 the city's interpretation that is offered in respondents' brief admittedly gives some meaning to the
16 alternative development standards provision in BLDC 70.020. *See* n 13. However, it is simply
17 implausible that the city meant its reference to "uses" in BLDC 70.030 to import the many uses
18 allowed in those zones without the minimum lot size, minimum lot width, limit on building coverage,
19 front or rear setback requirements or building height limitations or any other standards or regulations
20 that are applied to those uses in those zones.¹⁶ Read in context with the BLDC 70.020 provisions
21 that permit alternative development standards, BLDC 70.030 allows the uses in the specified
22 residential, commercial and industrial zones with the "development regulations and standards" that

¹⁵ For example BLDC 70.070(D) requires that an applicant for MPoD approval must demonstrate "that the plan respects the physical characteristics of the state." *See* n 8.

¹⁶ Those uses run the gamut from "[s]ingle-family dwellings," BLDC 20.020(A), to "[r]adio and television broadcasting studios and facilities," BLDC 48.020(FF), to "[j]unk yards or wrecking yards," BLDC 68.040(A), to an "abattoir," BLDC 68.040(E).

1 are imposed by those zones, *unless* alternative standards are proposed and approved under BLDC
2 70.020. The city erred in interpreting BLDC Chapter 70 otherwise.

3 The second assignment of error is sustained.

4 **THIRD AND FIFTH ASSIGNMENTS OF ERROR**

5 **A. The TPR Does Not Apply**

6 Under these assignments of error, petitioners allege the city’s findings inadequately address
7 the Land Conservation and Development Commission’s transportation planning rule (TPR) and are
8 not supported by substantial evidence. We conclude below that the TPR does not apply to the
9 decision that is before us in this appeal.

10 The TPR appears at OAR chapter 660 division 12. OAR 660-012-0060(1) requires that
11 where an amendment “to functional plans, acknowledged comprehensive plans and land use
12 regulations” will “significantly affect a transportation facility,” one or more actions specified in the
13 rule must be taken to ensure that the “identified function, capacity, and performance standards” of
14 the facility are preserved.¹⁷ The first question under OAR 660-012-0060(1) is whether the
15 challenged decision is an amendment to a functional plan, a comprehensive plan or a land use

¹⁷ OAR 660-012-0060(1) provides:

“Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:

- “(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
- “(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
- “(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
- “(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.”

1 regulation. If the answer to the first question is yes, then the second question is whether the
2 amendment will “significantly affect a transportation facility.”¹⁸

3 The challenged decision approves an MPoD, it does not amend a functional plan, a
4 comprehensive plan or a land use regulation. The city contemporaneously adopted a separate
5 decision that approved a comprehensive plan amendment to adopt the approved MPoD as part of
6 the city’s comprehensive plan. However, petitioners did not appeal that decision. Although that
7 plan amendment might obligate the city to apply the TPR if the amendment would “significantly
8 affect a transportation facility,” within the meaning of OAR 660-012-0060(1), that decision is not
9 before us in this appeal.¹⁹ Petitioners have not demonstrated how the only decision that is before us
10 was required to apply the TPR.

11 **FOURTH ASSIGNMENT OF ERROR**

12 One of the approval criteria for MPoD approval is BLDC 70.070(C), which provides:

13 “The proposed MPoD will demonstrate that adequate utilities and infrastructure are
14 available or can reasonably be made available at each phase. The proposed MPoD
15 will further demonstrate that existing utility services and water supplies for adjacent
16 properties will not be negatively affected at each phase.”

¹⁸ The term “significantly affect a transportation facility” is a defined term. 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;
- “(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.”

¹⁹ We review some of the city’s TPR findings later in this decision, in considering petitioners’ challenge under a city standard that requires assessment of transportation system impacts. Based on that review, the contemporaneous plan amendment that has not been appealed to us apparently either does not significantly affect transportation facilities or, where it does, the city appears to have adopted the kind of mitigation measures that are required by OAR 660-012-0060(1).

1 Under the fourth assignment of error petitioners argue that the approved MPoD fails to make the
2 demonstration required by BLDC 70.070(C) for several necessary utility services.

3 **A. Water**

4 The MPoD lists three options for providing water to the property. Option 1 calls for a
5 private onsite system separate from the city's water system. Option 2 calls for extension of the city
6 water system to serve the site. Option 3 calls for a private onsite water system to serve the initial
7 phases of development with that system to become part of the city's water system during later
8 phases. The MPoD proposed option 3, with onsite wells providing the initial water source. Under
9 option 3, when the onsite water distribution system is connected to the city's water system, those
10 onsite wells would provide a backup groundwater source of water for the city's system. As
11 approved by the city in the decision challenged in this appeal, the development's water system will
12 be connected to the city's water system from the beginning and there will be no on-site wells (option
13 2).

14 Petitioners first contend that the MPoD that was adopted as part of the city's
15 comprehensive plan is the original MPoD which proposes Option 3, whereas the MPoD approved
16 in this decision is predicated on option 2. Petitioners contend the challenged decision should be
17 remanded to resolve the inconsistency.

18 As we have already noted, petitioners did not appeal the city decision that amended the
19 city's comprehensive plan to include the MPoD. Therefore, even if it was error not to require that
20 the MPoD be amended to reflect the ultimate choice concerning the water system before it was
21 adoped as part of the comprehensive plan, that decision is not before us.²⁰

²⁰ Respondents also note that the only difference between option 2 and option 3 is the timing regarding the connection of the water system to the city system. Because it was always anticipated that the water system would connect to and become part of the city's water system, respondents contend it is unnecessary to amend the MPoD to reflect the later decision to connect to the city system from the beginning. With the understanding that the option to delay connection to the city water system that is authorized by the plan amendment is no longer available to Borax by virtue of the challenged decision that approves the MPoD, we agree with respondents that any error the city may have adopted in its plan amendment is harmless.

1 Petitioners next point to evidence that was submitted below that raises questions about
2 whether there is a sufficient source of water available to the city water system to supply the
3 proposed development and notes that the city’s water right to remove water from the Chetco River
4 is currently under protest. Record 200-201, 304. Respondents cite, among other things, a
5 memorandum from Otak engineering and testimony that was submitted by the planning director.
6 Record 116-17; Respondents’ Brief App-11. Otak and the planning director both explain why
7 they believe there is sufficient capacity to serve the subject property from existing city water supplies
8 and note that onsite wells could be developed to supplement that water supply if necessary.
9 Respondents contend that evidence is more than sufficient to support the city’s finding that there is
10 adequate water available to serve the subject property. We agree with respondents.

11 Petitioners also contend that the city’s decision does not adequately explain how the
12 property can be developed without adversely affecting the water supply of the neighboring Rainbow
13 Condominiums and or how funding and cost sharing for the needed water system improvements will
14 be accomplished.

15 Respondents point out that the city found that Rainbow Rock Condominiums will be able to
16 connect to the city water system when it is extended, and that finding is unchallenged. We agree
17 that unchallenged finding is sufficient to dispose of any concerns about impacts on Rainbow Rock
18 Condominiums.

19 With regard to financing the water system, respondents note that the Lone Ranch Technical
20 Appendix includes the ‘Lone Ranch Master Plan Utilities Report’ (Utilities Report). *See* n 1. The
21 Utilities Report explains that Borax will pay the costs of all onsite improvements and will share in the
22 costs of off-site improvements. Utilities Report 23. A variety of other funding sources are
23 discussed for the remaining funding required for off-site improvements. Respondents contend, and
24 we agree, the Utilities Report is sufficient to show it is financially feasible to fund the needed water
25 system improvement.

1 For the reasons explained above, we conclude that petitioners' arguments under the fourth
2 assignment of error concerning the proposed water system provide no basis for reversal or remand.

3 **B. Sewer**

4 Petitioners cite testimony below that questions whether there is sufficient capacity in the
5 city's sewer system to serve the proposed development. Record 197-98. Petitioners question
6 whether needed facility expansions will be available when the anticipated phases of the proposed
7 development are constructed. Petitioners also contend that City of Brookings Comprehensive Plan
8 (BCP) Goal 14 Urbanization Policy 9(d) strictly limits use of interim on-site sewage disposal
9 systems to those that support rural levels of development and requires a master plan for the sanitary
10 sewer system. Petitioners contend that the MPoD anticipates that the proposed community college
11 may be constructed before the city sanitary sewer system is available and in that event would utilize
12 an on-site sewage disposal system until the city sewer is available. Petitioners also contend that the
13 applicant has not prepared the master sanitary sewer system plan that is mandated by BCP Goal 14
14 Urbanization Policy 9(d).

15 Respondents' response to petitioners' inadequate capacity arguments is as follows:

16 "The * * * Utilities Report describes the on-site sewer system as well as the line
17 needed to connect to the City's existing sewer system. In response to arguments
18 that the Lone Ranch development would use all surplus capacity of the existing
19 sewage treatment system, Otak provided evidence that the MPoD proposes
20 development that results in a substantially smaller population projection for the
21 property than was used in the City's Water and Wastewater facilities Plan
22 (WWFP). Rec. 116. Because the Lone Ranch site was included in the original
23 projections as only part of the anticipated growth and the population increase on the
24 property will be smaller than projected, there will be less demand than estimated in
25 the WWFP. Rather than using all the surplus, the evidence is that Lone Ranch will
26 use less of the surplus than anticipated in the WWFP.

27 "Petitioners rely on statements in the Public Facilities Plan (PFP) that it will not be
28 able to treat all wastewater * * * but ignore the evidence in the record that the
29 wastewater treatment plant's capacity has been increased over that assumed in the
30 PFP and that the improved plant has adequate capacity to serve existing
31 development and anticipated growth, including Lone Ranch. Planning Director John
32 Bischoff testified:

1 ““The other issue was the public facilities and services plan, which
2 was written in 1999, stated that the City did not have capacity at
3 the time for sewage treatment of the Urban Growth Boundary.
4 However, that was just prior to the city’s commencement of the
5 second expansion of the treatment plant. That expansion was done
6 with the same population numbers that were used for the projection
7 of the Urban Growth Boundary in the same period of time. So the
8 expansion is large enough to handle the projected population of the
9 Urban Growth Boundary in 2015.” Respondents’ Brief 31.

10 Respondents contend that the above-described testimony is substantial evidence that there will be
11 adequate sewer system capacity to serve the proposed development. We agree with respondents.

12 With regard to BCP Goal 14 Urbanization Policy 9(d), respondents contend that there is no
13 such BCP policy.²¹ Respondents suggest that petitioners probably meant to cite one of the BCP
14 Goal 14 Urbanization “Findings” which describe provisions of the “Urban Growth Boundary Joint
15 Management Agreement.” BCP Goal 14 Urbanization Finding G states:

16 “All new development shall be required to obtain sanitary sewer service from either
17 the City of Brookings or Harbor Sanitary District depending upon agreed service
18 areas. If wastewater treatment capacity is not available, or not legally or physically
19 available, at the time of development, an interim onsite sewage disposal system that
20 meets all state and local requirements may be approved. Use of an interim on-site
21 sewage disposal system is limited to a rural level of development or is specifically
22 allowed by the Public Facilities Plan. This interim development approval shall be
23 conditioned to require connection to a public system when capacity becomes legally
24 and physically available.”

25 Respondents contend that provisions of the city/county urban services agreement are not standards
26 that must be applied in this decision approving an MPOD. Even if it does apply in that way,
27 respondents contend that the community college is property viewed as a rural level of development.

28 Petitioners’ argument is predicated on an assumption that the limitation on interim onsite
29 sewer systems is a BCP “Policy.” It is not. Assuming petitioners are relying on the above-quoted

²¹ BCP Goal 14 Urbanization Policy 9 provides:

“City shall work closely with the Port District to insure orderly, economic development and appropriate utilization of the Chetco River Estuary resources.”

1 BCP “finding,” the meaning and status of that finding is not clear to us.²² It is not clear to us whether
2 the BCP Goal 14 Urbanization Findings are merely *descriptions of* provisions of the Urban Growth
3 Boundary Joint Management Agreement or whether the findings set out the actual text from that
4 document. Given the lack of clarity in the petition for review concerning the authority the petitioners
5 are relying on to argue that it was error for the city to approve an MPoD that provides that the
6 community college may be developed with a interim onsite sewer system, we reject the argument
7 without further consideration.²³

8 Petitioners’ argument that BCP Goal 14 Urbanization Policy 9(d) mandates preparation of a
9 master plan for the proposed sewer system as part of MPoD approval suffers the same fate. In
10 addition, respondents contend that nothing in the BCP Goal 14 Urbanization Findings imposes such
11 a requirement. The relevant MPoD application graphic requirement, BLDC 70.040(A)(3)(g),
12 merely requires that the MPoD include “plans and other graphics” that show “sanitary sewer, storm
13 sewer, drainageways, and water.” Respondents contend that such graphics are included in the
14 MPoD.

15 For the reasons explained above, we conclude that petitioners’ arguments under the fourth
16 assignment of error concerning the proposed sewer system provide no basis for reversal or remand.

17 **C. Stormwater**

18 Petitioners contend there is not substantial evidence that an adequate stormwater system will
19 be made available or that it can be financed. Petitioners note that the Public Facilities Plan calls for

²² Although petitioners do not cite it, we note that one of the MPoD approval standards, BLDC 70.070(G), requires that the MPoD must “meet the applicable requirements of the Urban Growth Boundary Joint Management Agreement.” *See* n 8.

²³ If we were to consider petitioners’ argument further we would first have to find the relevant provision in the Urban Growth Boundary Joint Management Agreement that petitioners presumably meant to cite and confirm that it includes the same general prohibition on onsite sewer systems and the same limitation to rural levels of development. If we determined that such a conditional prohibition exists, we would then have to again confront the difficult question of whether the community college should be viewed as a “rural” or “urban” use. Drawing a line between development that is “urban” and development that is “rural” is a particularly excruciating and subjective exercise.

1 a new culvert under Highway 101 in this area to carry increased runoff. Petitioners again cite BCP
2 Goal 14 Urbanization Policy 9(d), apparently for the proposition that a detailed stormwater system
3 for the property must be designed at the time of MPoD approval.

4 The MPoD includes a conceptual stormwater drainage system. The BLDC requires that
5 the DDP include a “[u]tilities plan indicating how sanitary sewer, storm sewer, drainage, and water
6 systems will function and how negative impacts to existing sanitary sewers, storm sewers, drainage
7 and water systems of adjacent properties will be avoided.” Respondents cite testimony by a
8 professional engineer that the storm drainage system can be installed so that the system will not
9 increase runoff discharges to the culvert so that it need not be replaced. Respondents contend that
10 is substantial evidence that the larger culvert need not be required now. Respondents also point out
11 that the MPoD explains how utilities are to be financed, and petitioners do not make any attempt to
12 show why that discussion is not sufficient to show financing is feasible. For the same reason we
13 rejected petitioners arguments regarding BCP Goal 14 Urbanization Policy 9(d) above, we reject
14 them here.

15 For the reasons explained above, we conclude that petitioners’ arguments under the fourth
16 assignment of error concerning the proposed storm drainage system provide no basis for reversal or
17 remand.

18 The fourth assignment of error is denied.

19 **SIXTH ASSIGNMENT OF ERROR**

20 BLDC 70.070(F) requires that the “* * * MPoD will demonstrate that adequate
21 transportation facilities are available, and the plan promotes the most economic, safe and efficient
22 movement of traffic.” Petitioners contend that the city’s findings that adequate transportation
23 facilities are available are not supported by substantial evidence.

24 Petitioners first contend that because BLDC 70.070(F) is worded differently from the
25 BLDC 70.070(C) standard requiring that utilities be available “or can reasonably be made
26 available,” BLCD 70.070(C) mandates that all facilities that may be needed to serve the entire

1 development must already be in place at the time of MPoD approval. Petitioners contend that the
2 traffic impact study (TIS) that supports the application does not propose mitigation for all
3 intersections that are failing and does not assure that any needed improvements will be in place
4 before the phases that will generate the need for those improvements are constructed. Petitioners
5 argue that the development will depend entirely on Highway 101 for access, when an access that
6 would not use Highway 101 is possible at the southern end of the site. Petitioners also criticize the
7 lack of connectivity between some parts of the development. Based on these alleged flaws in the
8 TIS, petitioners contend the city’s finding that the proposal complies with BLDC 70.070(F) is not
9 supported by substantial evidence.

10 With regard to petitioners’ argument that BLDC 70.070(F) requires that all transportation
11 facilities that will be needed to serve the development proposed in an MPoD must be in place at the
12 time of MPoD approval, respondents offer the following response:

13 “While [petitioners’ interpretation is] perhaps a linguistically possible interpretation
14 of this provision, the interpretation is a practical impossibility. Any master plan
15 includes a significant amount of new transportation facilities. The streets within the
16 master plan area are never going to be in place before the master plan is approved.
17 Similarly, the access points are rarely if ever, going to be in place. The only
18 reasonable way to interpret this provision is the way the Council obviously
19 interpreted it, to require that adequate transportation facilities are available when
20 needed to meet the traffic generated by the development.” Respondents’ Brief 36-
21 37.

22 We agree with respondents.

23 Respondents contend that the city’s lengthy findings concerning the adequacy of the existing
24 and planned transportation system are adequate to respond to petitioners’ remaining concerns. We
25 set out respondents’ arguments below:

26 “* * * The council found that three transportation facilities are significantly affected
27 by the decision, based on existing facilities. As petitioners acknowledge, after
28 determining whether existing facilities are adequate the next step in the TPR analysis
29 is to determine whether the additional transportation facilities included in the TSP
30 (when added to the existing system) are sufficient to resolve any deficiencies.

1 “One of those intersections is the intersection of Highway 101 and Fifth Street. The
2 Council found that the TSP identifies improvements to that intersection. The City is
3 entitled to rely on its own TSP to determine whether additional facilities are planned.
4 The evidence in the traffic impact study as well as the TSP are sufficient to support
5 the finding that, with planned improvements in the TSP, this intersection will function
6 at an acceptable level.

7 “While opponents of the project raised issues relating to the adequacy of the
8 improvements listed in the TSP as to Highway 101/Carpenterville intersection, the
9 record does not indicate any challenge to the adequacy or timing of the Highway
10 101/Fifth Street intersection improvements identified in the TSP. Because no issue
11 was raised as to this intersection, no error was preserved as to this intersection and
12 petitioners may not raise any issue as to this intersection, including the evidentiary
13 challenge.

14 “The second of the intersections is Highway 101/Carpenterville Road. A condition
15 of approval has been imposed relating to Highway 101/Carpenterville Road that
16 provides:

17 ““To assure that the mobility standards are met at the intersection of
18 Highway 101/Carpenterville Road, no DDP should be approved
19 that would exceed the acceptable ODOT mobility standards for
20 Highway 101/Carpenterville Road intersection until the City of
21 Brookings TSP is amended to identify recommend[ed]
22 improvements or a change to standards and the Lone Ranch
23 development pays a proportionate share [of] these improvements.
24 Analysis at Highway 101/Carpenterville Road should be conducted
25 to determine the level of impact for each DDP until the Brookings
26 TSP is amended to include the necessary improvements.’

27 “This condition assures consistency with the TPR. It requires ongoing studies to
28 assure that no development will be approved if that development would exceed the
29 accepted standards for the intersection. Given the City’s plans to amend the TSP
30 to include improvements for that intersection, compliance with the condition is
31 feasible.

32 “The third intersection is the main access to the site from Highway 101. The TIS
33 identified improvements to the access needed to maintain ODOT standards for the
34 access. U.S. Borax’s traffic consultant provided evidence that the ‘improvements
35 at the main access point necessary to allow the intersection to meet ODOT mobility
36 standards will be implemented.’ A condition was imposed requiring those
37 improvements to be provided. Given the imposition of the condition, the evidence is
38 sufficient to support the Council’s findings as to compliance with the TPR.

1 “Petitioners argue that the TSP requires that traffic impact studies for Lone Ranch
2 include an analysis of 20 year traffic impacts. The Council found that the provision
3 relating to the length of the study (20 years) was a recommendation, not a
4 requirement. The transportation impact study was developed with a 15 year study
5 period, extending beyond the TSP planning horizon.

6 “Petitioners argue that the section of Highway 101 north of Carpenterville Road
7 would operate at below acceptable performance standards. The TIS, however,
8 concluded that the intersection would operate at acceptable levels. The TIS,
9 prepared by qualified professionals, is sufficient evidence to support the Council’s
10 conclusion that this section of highway would not be substantially affected by the
11 development. The TIS was prepared more recently than the TSP and was based
12 on the MPoD, unlike the TSP that was not able to consider the MPoD in estimating
13 trips from the site. The TSP therefore does not discredit the evidence provided by
14 the TIS.” Respondents’ Brief 34-36.

15 With one possible exception, the above seems to demonstrate that the city’s conclusion that
16 the existing and planned transportation system is adequate to serve the proposed development.
17 That one possible exception concerns the timing of facility improvements that will be necessary to
18 accommodate the increased traffic that will be generated by the phased development that is
19 envisioned under the MPoD. Under the Court of Appeals’ recent decision in *Jaqua v. City of*
20 *Springfield*, 193 Or App 573, 593, 91 P3d 817 (2004), it is not sufficient under the TPR to ensure
21 that the TSP is amended to plan for the new or improved transportation facilities that will be needed
22 to keep the approved development from resulting in transportation facility failures. The construction
23 of those facilities must be timed or the development must be conditioned to avoid temporary
24 performance measure failures in the future that would not otherwise occur without the development
25 authorized by the plan or land use regulation amendment. Petitioners suggest that this might be the
26 case here, although they provide no specific examples of why that is the case.

27 We do not believe petitioners have alleged a cognizable *Jaqua* timing issue. The city argues
28 petitioners have waived any timing issue regarding the Highway 101/Carpenterville intersection.
29 Petitioners have not responded to that waiver argument. The other two significantly affected
30 intersections identified above are intersection improvements that will be needed to access the

1 property. Petitioners offer no reason to suspect that those intersections will not be constructed
2 before or at the time of development.

3 Finally, we noted above petitioners' argument that a connection to a road other than
4 Highway 101 is possible at the south end of the property and their complaints about internal
5 connectivity and the relationship of internal roads to Highway 101. Respondents note that the
6 layout of the internal road system is to a large extent dictated by serious topographic constraints.
7 BLDC 70.070(F) requires "adequate transportation facilities;" it does not require any particular
8 level of internal or external connectivity.

9 The sixth assignment of error is denied.

10 **SEVENTH ASSIGNMENT OF ERROR**

11 BLDC 70.070(D) requires that "[t]he proposed MPoD will demonstrate that the plan
12 respects the physical characteristics of the site." Petitioners point out that BLDC 70.070(A) also
13 requires that the MPoD must be "consistent with the purposes identified in [BLDC] 70.010 and the
14 intent of the MPD [District]." BLDC 70.010 is set out at n 4 and states that one of the MPD
15 District purposes is to [p]reserve to the greatest extent possible existing landscape features and
16 amenities, and utilize such features in a harmonious fashion." Petitioners also cite BCP Goal 5 which
17 is "[t]o conserve open space and protect natural, scenic resources, cultural, and historic areas while
18 providing for the orderly growth and development of the City." Petitioners further cite BCP Goal 6
19 which is "[t]o maintain and improve the quality of the air (including the control of noise pollution),
20 water and land resources of the Brookings area."

21 **A. Scope of the Seventh Assignment of Error**

22 Respondents' initial response calls into question the scope of the seventh assignment of
23 error. The seventh assignment of error itself states "Respondent Fails to Support Its Finding that the
24 MPoD Will Respect the Physical Characteristics of [the] Site." Petition for Review 35. However,
25 as we note above, the arguments that immediately follow that assignment of error cite to the MPD
26 District purposes, which BLDC 70.070(A) make approval considerations, and BLDC 70.010

1 specifically provides that “[c]ompliance with applicable plan goals and policies is deferred until the
2 MPoD review.” To the extent respondents argue the seventh assignment of error should be limited
3 to the text of the assignment of error, *i.e.* that the approved MPoD does not respect the physical
4 characteristics of the site, we reject the argument. Petitioners’ arguments are much broader, and
5 respondents do not argue that the cited BCP provisions do not apply to MPoD approval.
6 Nevertheless we agree with respondents that the approach petitioners follow under this assignment
7 of error of stating a fairly limited and discrete assignment of error that is followed by much broader
8 and frequently undeveloped references to other BCP and BLDC provisions is at times difficult to
9 follow and understand. We take that into consideration in reviewing this assignment of error.

10 It is somewhat unclear to us precisely how much protection the city is obligated to provide
11 for the natural and other resources on the site. All parties appear to agree that ultimately all feasible
12 efforts must be made to avoid destruction of the endangered western lily that occupies some of the
13 wetlands on the site. However, beyond that general agreement, the obligations the city and the
14 applicant face under the cited BLDC and BCP provisions are less clear. Because the parties do not
15 really address the question in any explicit way, we will assume that the cited BLDC and BCP
16 provisions require reasonable efforts to identify and protect resources on the site and a sufficient
17 explanation for why resources will not be protected, where they will not be protected.

18 Petitioners argue under the seventh assignment of error that the record does not support the
19 city’s decision that adequate measures are in place in the MPoD to protect (1) wetlands, (2) water
20 quality, (3) habitat for endangered plant and animal species, (4) scenic resources, and (5) cultural
21 and historic resources.

22 **B. Wetlands**

23 The wetland assessment (WA) prepared by Borax’s consultant identified 43 separate
24 wetlands on the site, which occupy a total of 28 acres. Those 43 wetland sites are arranged into 35
25 wetland complexes, because some of the wetlands are hydrologically connected. The WA includes
26 a number of figures that show the existing wetlands, wetland buffers, the location of proposed

1 development and the wetlands and wetland buffers that will be directly impacted by that
2 development. WA figures 5a – 5f. Those figures also show the locations where western lilies have
3 been observed and the number of lilies observed.

4 Of the 28 acres of wetlands, a total of one-half acre of wetlands will be filled, in most cases
5 to accommodate road crossings. The loss of these wetlands will be mitigated. According to
6 testimony submitted by one of Borax’s experts, the development does not directly impact any
7 known lily location on the property. Record 91-95. In addressing BLDC 70.070(D) the planning
8 commission found:

9 “The development has been designed to minimize the impact on the existing
10 wetlands and buffer areas and avoids impacts to the existing lilies. More than 2/3 of
11 the site has been left in open space in direct response to the slopes, existing
12 vegetation and wetlands and existing access points. The MPoD provides for 15
13 separate neighborhoods as a means of respecting the physical characteristics of the
14 site, rather than a single neighborhood that would ignore existing physical
15 characteristics.” Record 34.

16 During the proceedings before the planning commission, issues were raised by the United
17 States Fish and Wildlife Service (USFWS) and others about potential damage to the wetlands and
18 the endangered western lilies that occupy some of those wetlands. USFWS first noted that the WA
19 concedes that “detailed surveys for the lily on the property” have not been conducted. Record 183.
20 The USFWS goes on to express concern that while large areas are designated for open space it
21 cannot be assumed that the areas reserved for the western lily will be adequate to maintain the
22 species. *Id.* USFWS goes on to point out that “[t]he Borax population appears to be essential to
23 recovery of the species” and notes that unless concerns about impacts on the western lily can be
24 adequately addressed, the federal permits that will be necessary for the proposal may either be
25 conditioned in ways that will require changes to the approved MPoD or denied altogether. Record
26 184.

27 One of Borax’s consultants submitted a letter rebutting the USFWS’s comments and the
28 comments of others. Record 91-95. With regard to the USFWS’s concerns that letter states:

1 “The USFWS letter of September 20, 2004 clearly states that they cannot take a
2 position regarding the proposed Master Plan for the Lone Ranch site. The USFWS
3 also states that they look forward to working with the project proponents in
4 developing site specific plans to ensure the continued existence of the western lily on
5 the project site. The USFWS continues to express a desire to see detailed
6 hydrologic analysis of a development plan. This analysis can be conducted only
7 after a site specific development plan has been prepared.” Record 94.

8 In its decision the planning commission imposed condition 28, which provides as follows:

9 “A hydrologic study shall be provided with each DDP, and any such study must be
10 provided to federal and state agencies responsible for wetlands and endangered
11 species protection. The City will review the hydrology study to determine
12 compliance with applicable standards relating to storm drainage.” Record 105.

13 Before turning to the adequacy of the city’s decision and the above condition to address the
14 evidentiary concerns that were raised below, we note, as we have on many occasions, that our role
15 is not to reweigh the evidence or to duplicate or second guess the local decision maker on
16 evidentiary questions. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 586-88,
17 842 P2d 441 (1992); *Douglas v. Multnomah County*, 18 Or LUBA 607, 617-18 (1990). In
18 reviewing the city’s decision we ask whether, looking at all of the evidence in the record, the city’s
19 decision is supported by substantial evidence, *i.e.* evidence a reasonable person would rely on to
20 decide as the city did. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

21 While the question is a close one, it appears that a detailed hydrologic assessment will be
22 needed to determine whether the 1000 units proposed in the MPoD can be approved consistent
23 with the above-cited BLDC and BCP provisions, without damaging the wetlands and western lily.
24 Stated differently, given the uncertainty in the record concerning the direct and indirect impacts the
25 development may have on the site’s wetlands, we believe a reasonable person would conclude that
26 the hydrologic assessment is necessary to determine whether the proposed 1000 dwelling units can
27 be built without damaging the wetlands and jeopardizing the western lily. The hydrologic
28 assessment appears to be particularly necessary where proposed development will encroach into
29 wetlands or their buffer areas or will be located in sufficient proximity to those wetlands and buffer
30 areas to affect the surface and subsurface flow of water necessary to allow those wetlands to

1 survive. It presumably will also be necessary to determine whether the wetlands where the western
2 lilies are located will be hydrologically impacted so that they will not continue to support recovery of
3 the western lily.

4 As we explained earlier in this opinion, when a local government finds itself in this position it
5 must either deny the application or defer its finding to a later stage where the information will be
6 made available and impose any condition that may be necessary to defer its finding regarding
7 whether the proposal complies with the relevant standard or standards. The above-noted condition
8 28 comes reasonably close to providing a solution to this issue, but it falls short. First, by its terms,
9 it only provides that *storm drainage standards* will be considered during DDP approval based on
10 the hydrologic survey. The issue here is wetlands, and the likelihood that the endangered western
11 lilies that occupy some of those wetlands will survive after the property is developed in accordance
12 with the MPoD. If the city is correct and a hydrologic survey is not possible without the additional
13 details concerning development that will be provided by the DDPs, the city appears to be in the
14 third situation we described earlier in our discussion of our decision in *Rhyne* (“if the local
15 government determines that there is insufficient evidence to determine the feasibility of compliance
16 with the standard, instead of finding the standard is not met, it may defer a determination concerning
17 compliance with the standard to the second stage”). We see no reason why the city could not
18 amend condition 28 to provide that the city will revisit the BLDC and BCP provisions that
19 petitioners cite when it considers DDPs and the hydrologic study is available to determine at that
20 time that the MPoD adequately protects the wetlands and the western lily. In that way the city will
21 confirm respondents’ current view that the MPoD adequately protects those resources based on
22 substantial evidence, or the city can require that any needed change in the MPoD be made that is
23 necessary to protect the wetlands and western lily.

24 We make two final points before moving to petitioners’ arguments concerning water quality.
25 Petitioners appear to argue that a complete hydrologic survey of the entire site is necessary to
26 assess the proposal’s impact on the wetland. We have no doubt that having that information might

1 make the job of assessing potential impacts on the wetlands and western lily easier or more
2 certain.²⁴ However, we do not agree with petitioners that there is anything in the record that
3 demonstrates that a hydrologic survey for the site cannot be prepared in phases. We understand
4 condition 28 to call for hydrologic studies for each DDP as they are separately prepared.
5 Presumably the hydrologic study for the second DDP will have the benefit of the hydrologic study
6 that is done for the first DDP, and the hydrologic study for the third DDP will have the benefit of the
7 first two, and so on. Petitioners have not demonstrated that such an approach is unworkable. Also,
8 the USFWS contends that the survey that the applicant's expert has done to locate western lilies on
9 the property is inadequate. We understand Borax's experts to dispute that contention. While it
10 may be that this dispute will ultimately be resolved in the USFWS's favor in future federal
11 permitting, we believe this dispute presents a case of conflicting expert testimony at this MPoD
12 stage, and we defer to the city's resolution of the evidentiary question in this proceeding.

13 **C. Water Quality**

14 Petitioners' arguments concerning water quality impacts are divided between alleged
15 impacts resulting from increased withdrawal of water from the Chetco River to provide water to the
16 proposed development and water quality impacts resulting from possible impacts to wetlands.
17 Petitioners' substantial evidence argument under this assignment of error is not well developed. We
18 agree with respondents that it is insufficient to provide an additional basis for remand.

19 **D. Impacts on Habitat for Endangered Plant and Animal Species**

20 As respondents correctly note, petitioners make no attempt to challenge the adequacy of
21 the city's findings concerning endangered species. Petitioners' substantial evidence challenge is
22 directed at the alleged lack of substantial evidence regarding impacts on the western lily and the
23 potential for marbled murrelet habitat on the site. To the extent petitioners state a cognizable and
24 meritorious substantial evidence challenge here regarding the western lily, it adds nothing to our

²⁴ If the city is correct that DDPs must be available to prepare hydrologic surveys, that would mean that all of the DDPs for the entire site would have to be prepared before the hydrologic survey could be completed.

1 resolution of their wetland arguments above. Turning to the marbled murrelet, as respondents point
2 out, a habitat survey for the “2004 nesting and breeding seasons [has been completed and] no
3 evidence of use of the property by spotted owls or marbled murrelets has been detected.” A
4 survey is planned for the 2005 season as well. Petitioners make no attempt to explain why this
5 evidence is not substantial evidence that the MPoD adequately responds to any concerns regarding
6 marbled murrelets.

7 **E. Scenic Resources**

8 The city adopted the following finding concerning scenic resources:

9 “The [Kalmiopsis Audubon Society (KAS)] argues that the MPoD does not
10 comply with Comprehensive Plan Goal 5, policy 1, which requires protection of
11 natural and scenic resources. The MPoD preserves a large portion of the total site
12 in its natural state. The goal policy of protecting natural and scenic resources does
13 not prohibit all development. The policy must be read in conjunction with other
14 policies, which encourage housing and economic development. * * *

15 “* * * * *

16 “The KAS argues for limits on the location of homes to reduce impacts on scenic
17 values. The MPoD provides an appropriate balance of the rights of property
18 owners and future homeowners with the rights of others.” Record 55.

19 Petitioners make no attempt to challenge these findings, and we agree with respondents that
20 petitioners’ substantial evidence challenge regarding scenic impacts of the proposal is nothing more
21 than a disagreement regarding the scenic merits of the proposal. That disagreement does not
22 provide a basis for reversal or remand.

23 **F. Cultural and Historic Resources**

24 Petitioners’ substantial evidence challenge under this assignment of error suffers because
25 petitioners do not clearly articulate the legal standard that they believe the city must apply
26 concerning cultural and historic resources. BLDC 70.070(D) simply requires that the city find that
27 the MPoD “respects the physical characteristics of the site.” In their arguments petitioners simply
28 cite the BCP Goal 5 direction “[t]o conserve * * * historic areas while providing for the orderly
29 growth and development of the City.” In response to petitioners’ substantial evidence challenge,

1 respondents cite the following excerpt from a letter that was submitted by the lead archeologist for
2 the Parks and Recreation Department Heritage Conservation Division:

3 “* * * I met with representatives from US Borax and Western Advocates Inc. to
4 discuss the current Lone Ranch Master Plan proposal being considered by your
5 office. This meeting came about as a result of my recent letter to your office that
6 attempted to inform your council of the general results of an archaeological survey
7 that had been conducted by Archaeological Frontiers for the above property. In
8 discussing the Master Plan, I want to be clear in stating that our office has no
9 problem with the proposed development. We find that cultural resource issues have
10 been considered during the early planning stages of the development and that
11 flexibility exists to address any concerns that might arise later when a detailed
12 development plan is designed and an actual study of potential effects can be made.

13 “Our recent meeting provided me with the first opportunity to review the proposed
14 Lone Ranch development plan and to understand its history and design schedule.
15 Having reviewed the Lone Ranch’s Master Plan of Development * * * and the
16 Condition of Approval that had been previously approved by the City of Brookings
17 Planning Commission, our office finds that we are in agreement with US Borax that
18 cultural resource concerns are assured adequate protection during the project’s
19 early development process.

20 “* * * * *

21 “The current discussion regarding the Master Plan for the Lone Ranch development
22 does not involve any site-specific planning areas that would be in conflict with any
23 cultural resources that exist on the property. Flexibility in design and sufficient land
24 in which to allow modification of later structural placement in cases of future
25 conflicts appear to have been foreseen and built into the existing ordinance and plan.
26 Potential conflicts with cultural resources located within the Lone Ranch property,
27 and steps needed to avoid or mitigate any adverse effects that may occur during
28 future stages of development will not be known until US Borax drafts a [DDP] for
29 review. This next stage in the development plan calls for such a discussion, which is
30 currently proposed for 2005. At that time the archaeological survey report will
31 have been completed and its results able to be taken into consideration.” Record
32 380-81 (underline emphasis in original).

33 Respondents contend that this letter constitutes substantial evidence supporting the city’s decision
34 regarding cultural and historic resources. We agree.

35 For the reasons explained above in our discussion of wetlands, the seventh assignment of
36 error is sustained in part. In all other respects, the seventh assignment of error is denied.

1 The city's decision is remanded.