

NATURE OF THE DECISION

Petitioner appeals a city decision amending its transportation system plan and amending its comprehensive plan and development code to implement the amended transportation system plan.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file brief a reply brief. There is no opposition to the motion and it is granted.

FACTS

The City of Newberg transportation system plan (TSP) was originally adopted in 1994. In 2001, the city began the process of updating the TSP to reflect changes since its original adoption, and the city adopted the challenged decision in 2005. The updated TSP authorizes many road construction projects, but the only one at issue in this appeal involves the Wilsonville/Springbrook/219 project (project) involving the intersection of Wilsonville Road and Highway 219. The project would close the street connections of Wilsonville Road and Springbrook Street at Highway 219 and re-route Wilsonville Road to Springbrook Street to reconnect with Highway 219 at a different intersection via a new connecting road. The new connecting road would be built through petitioner’s property.

Petitioner’s property is a 2.41-acre parcel planned Industrial and zoned M-2 (Light Industrial), and petitioner apparently has plans to construct an industrial complex. Under the amended TSP, the Oregon Department of Transportation (ODOT) would acquire the property as a right-of-way, although the property would remain planned and zoned for industrial use. The proposed connecting road would run through the center of petitioner’s property and render it useless for anything other than transportation. There is a projected shortfall of industrial land in the city. Petitioner challenged the proposed TSP amendments below, but the city adopted the amendments over his objections. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the proposed use of the property for transportation will “obliterate” it
3 for industrial use and that the city is therefore required to demonstrate that the remaining supply of
4 industrial land is adequate to comply with Statewide Planning Goal 9 (Economic Development).
5 According to petitioner, the city has not made this demonstration and cannot make such a
6 demonstration based on the record.¹

7 Goal 9 requires that local governments provide “an adequate supply of sites of suitable size,
8 types, locations, and service levels for a variety of industrial and commercial uses.” *Home Depot*
9 *USA v. City of Portland*, 169 Or App 599, 601, 10 P3d 316 (2000). We have repeatedly held
10 that in the context of post-acknowledgement plan amendments, local governments are “required by
11 Goal 9 to consider the adequacy of their inventory of lands that would remain available for industrial
12 or commercial uses in the aftermath of decisions that would actually redesignate or divert existing
13 industrially or commercially zoned lands from *all* industrial and commercial use.” *Id.* at 602
14 (emphasis in original), *citing Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670
15 (1995) and *Volny v. City of Bend*, 37 Or LUBA 493, *aff’d* 168 Or App 516, 4 P3d 768 (2000).
16 According to petitioner, because the city has redesignated and diverted industrial lands, Goal 9 is
17 implicated.

18 When a local government changes the comprehensive plan designation or the zoning of a
19 property Goal 9 can certainly be implicated. In *Hummel v. City of Brookings*, 16 Or LUBA 1

¹ The city’s findings regarding Goal 9 state:

“The TSP update will provide for the continued orderly development of the City’s street network which is vital to economic activity. Testimony has been given regarding the Wilsonville/Springbrook/219 reconfiguration project as it relates to Goal 9. While this project does involve the use of vacant industrial land, it also provides significant benefits to the overall state and local transportation system, including safe and efficient movement of freight and goods. Most importantly, this project will eliminate a significant safety problem enhancing the efficiency of the transportation system which connects the industrial areas to the south of Newberg to Highway 99W and on the Portland market area. Written and oral testimony addresses these benefits, and shows that the plan does comply with Goal 9.” Record 10.

1 (1987), the adequacy of the city’s industrial lands base was challenged when the city rezoned 43
2 acres of industrial lands to residential use. We held that when a city changes the plan and zone
3 designations of industrial lands it must comply with Goal 9. *Id.* at 5. In *Opus Development*
4 *Corporation v. City of Eugene*, 141 Or App 249, 918 P2d 116 (1996), the city adopted a
5 refinement plan that redesignated the land base in the area. The court affirmed that redesignation of
6 land triggers a need for Goal 9 review. *Id.* at 252.

7 In the present case, however, the city did not redesignate petitioner’s property. To the
8 contrary, the property remains planned and zoned for industrial use, and ODOT intends to use
9 petitioner’s property for a transportation use that is apparently permitted in the industrial plan
10 designation and zone.²

11 Petitioner argues that even if the comprehensive plan and zoning map designation for his
12 property has not been changed, it has been “diverted” from all industrial use. According to
13 petitioner, his property does not have to be replanned or rezoned to trigger Goal 9. If the property
14 is diverted from all industrial uses, that is enough to trigger Goal 9. Petitioner is correct that we have
15 required compliance with Goal 9 in situations where the underlying plan or zone designation was not
16 changed. In *Volny*, the city enacted a regulation that reclassified a street from minor arterial to a
17 major arterial. The minimum right-of-way requirements for a major arterial required more right-of-
18 way than the minimum right-of-way for a minor arterial. We held that the increase in minimum right-
19 of-way could reduce the amount of buildable land and commercial sites, thereby implicating Goal 9.
20 37 Or LUBA at 510-11. In *Homebuilders Association of Lane County v. City of Eugene*, 41
21 Or LUBA 370 (2002), the city enacted ordinances that gave more protection to significant trees
22 and prohibited construction around those trees. A single significant tree could impact 450 square

² We understand respondent to argue that transportation facilities were previously allowed in industrial zones prior to the challenged decision, notwithstanding that transportation facilities were not listed among the uses permitted outright or conditionally in those zones. ODOT also points out that the challenged decision amends the city’s code to make transportation facilities permitted uses in a number of zones, including industrial zones. Petitioner does not challenge that amendment.

1 feet, and the city contained over 200,000 significant trees. We held that the regulation triggered an
2 obligation on the part of the city to address compliance with Goal 9. *Id.* at 447.

3 As *Volny* and *Homebuilders* demonstrate, a city may be required to address Goal 9 in the
4 absence of a plan and zone change when an amendment or regulation has the effect of depleting the
5 industrial lands inventory. In the present case, the city’s authorization of the project does not
6 establish new regulations or standards that, as applied to future development applications, could
7 reduce the available supply of industrial lands. All the decision does is authorize construction of a
8 use or infrastructure on industrial land that is permitted on industrially zoned property and that is
9 intended, at least in part, to serve industrially zoned property in the area. There was no argument in
10 *Volny* that the arterial authorized by the TSP amendments in that case was a permitted use on
11 industrial lands, and no indication the arterial was intended to serve industrial uses. In the present
12 case, the decision authorizes use of a small parcel for infrastructure that is permitted in the industrial
13 zone and that serves industrial uses, even if that is not the use petitioner would prefer. A
14 comprehensive plan amendment that simply authorizes on a 2.41-acre parcel a use that (1) is
15 permitted in an industrial zone and (2) serves industrial uses is consistent with Goal 9,
16 notwithstanding any current or longterm shortage in the city’s industrial lands inventory.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioner argues that the city failed to comply with OAR 660-009-0010(4) which provides
20 in pertinent part:

21 “* * * a jurisdiction which changes its plan designations of lands in excess of two
22 acres to or from commercial or industrial use, pursuant to OAR 660 – Division 18
23 (a post acknowledgement plan amendment), must address all applicable planning
24 requirements; and

25 “(a) Demonstrate that the proposed amendment is consistent with the parts of its
26 acknowledged comprehensive plan which address the requirements of this
27 division; or

1 “(b) Amend its comprehensive plan to explain the proposed amendment,
2 pursuant to OAR 660-009-0015 through 660-009-0025; or

3 “(c) Adopt a combination of the above, consistent with the requirements of this
4 division.”

5 The city responds that neither the plan designation nor the zoning for the property is being changed.
6 According to the city, because it is not “chang[ing] its plan designation” OAR 660-009-0010(4)
7 does not apply.

8 Petitioner argues that the meaning of “changes its plan designations” in the rule is broader
9 than plan or zoning map designation changes. According to petitioner, because the amended TSP
10 “points out” the property for transportation use, it is no longer “designated” for industrial use within
11 the meaning of OAR 660-009-0010(4). However, even if petitioner is correct that the rule governs
12 more than actual changes of plan designation and zoning to or from industrial and commercial use,
13 we disagree with petitioner that the rule governs plan amendments that simply authorize a use that is
14 permitted in an industrial zone. The city’s decision does not change the designation of the property
15 within the meaning of OAR 660-009-0010(4). Therefore, OAR 660-009-0010(4) is not
16 applicable and the city did not err by not complying with the rule.

17 The second assignment of error is denied.

18 The city’s decision is affirmed.