BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROMIE A. RHODES,
Petitioner,

vs.

CITY OF TALENT,
Respondent.

LUBA No. 2005-031

FINAL OPINION
AND ORDER

Appeal from City of Talent.

Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf of petitioner. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich and Aitken, PC.

Kurt H. Knudsen, Ashland, filed the response brief and argued on behalf of respondent.

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

REMANDED 10/26/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city ordinance that amends the city's transportation system plan, which is an element of the city's comprehensive plan.

FACTS

In *Rhodes v. City of Talent*, 47 Or LUBA 574 (2004) (*Rhodes I*), we remanded a city resolution that authorized the mayor and city council president to sign a cooperative improvement agreement (the Agreement) with the Oregon Department of Transportation (ODOT) to make improvements to a portion of State Highway 99 (OR 99) within the City of Talent. ODOT appealed our decision in *Rhodes I* to the Court of Appeals. The Court of Appeals affirmed our decision. *Rhodes v. City of Talent*, 197 Or App 169, 104 P3d 1180 (2005) (*Rhodes II*). The city decision that is before us in this appeal was adopted to respond to errors that we identified in *Rhodes I*.

We described the road improvements that are at the center of the dispute between the parties in *Rhodes I*:

> "OR 99 generally runs north and south through the City of Talent. West Valley View Road intersects OR 99 near the middle of the project area. That intersection is one of the intersections that is to be improved by the project. It appears from the record, and from petitioner's arguments, that petitioner owns property at the southwest corner of that intersection. Petitioner currently has direct, two-way access onto both West Valley View Road and OR 99 so that traffic traveling north or south on OR 99 and traffic traveling east or west on West Valley View Road [has] direct access to and egress from petitioner's property using the existing accesses onto those roads. The disputed project will take a portion of petitioner's property for intersection widening. Although petitioner will retain two-way access and egress on West Valley View Road, that access/egress will be relocated some distance west, away from the intersection. Petitioner[']s current access onto OR 99 will be relocated slightly, reduced in size and limited to a right in/right out access so that traffic traveling northbound on OR 99 will no longer have direct access to petitioner's property and traffic leaving petitioner's property will not be able to turn left to travel north on OR 99. Channelization of traffic along OR 99 at the West Valley View Road intersection will be accomplished in part by constructing a raised median along the center of the OR 99 approaches to the intersection. This raised

median would preclude northbound traffic from turning west to enter petitioner's property from OR 99." 47 Or LUBA at 576-77 (record citation omitted).

The city decision that was before us in *Rhodes I* actually authorized approval of two closely related documents. The first document is the Agreement between the city and ODOT to construct the above-described project. Attached to the Agreement is an access management plan (AMP). One of the city's obligations under the Agreement stated that the "[c]ity approves the [AMP] which is marked Exhibit B, attached hereto and by this reference made part hereof." *Rhodes I* Record 37.[1]

The city and ODOT moved to dismiss the appeal in *Rhodes I*.[2] In rejecting the motion to dismiss, we relied on OAR 734-051-0155. We set out the key language from OAR 734-051-0155(4) below:

> "Access Management Plans and Access Management Plans for Interchanges comply with all of the following:
>
> "* * * * *
>
> "(d) *Are consistent with any applicable adopted Transportation System Plan, Local Comprehensive Plan, * * *.*
>
> "* * * * *
>
> "(k) Are approved by the Department through an intergovernmental agreement *and adopted by the local government, and adopted into a Transportation System Plan* * * *." (Emphases added.)

Our reasoning in rejecting the motion to dismiss in *Rhodes I* is set out below:

> "The city has adopted a transportation system plan (TSP) as part of the Talent Comprehensive Plan (TCP). Respondents contend the TSP authorizes the proposed improvements. However, OAR 734-051-0155(4)(d) expressly requires

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[1] The city's decision on remand is a continuation of the proceedings in *Rhodes I* and the Record in *Rhodes I* is part of the record in this appeal, which we cite as "*Rhodes III* Record," to distinguish it from the record that was submitted in the original appeal.

[2] Although ODOT intervened on the side of respondent in *Rhodes I*, it has not moved to intervene in this appeal of the city's decision on remand.

> that the improvements described in the AMP must be consistent with the city TSP, and it is undisputed that the city adopted no findings explaining why it believes that the AMP is consistent with the TSP. Neither did the city adopt the AMP into its TSP, as OAR 734-051-0155(4)(k) requires. Respondents suggest that the city could still adopt the AMP as part of the TSP at some unspecified time in the future. If the challenged decision made it clear that the city did not adopt the AMP until the city's TSP is amended to include the AMP, then we would likely agree that the challenged decision is not the city's land use decision in this matter. But no party cites anything in the Agreement or the AMP that obligates the city to adopt the AMP as part of the TSP or precludes ODOT from proceeding with developing final engineering plans and constructing the improvements described in the AMP in advance of a city decision to amend the TSP to include the AMP. While the city is obligated under ODOT's rules to adopt the AMP into its TSP, it has adopted the AMP without amending its TSP to do so." 47 Or LUBA at 580-81 (footnotes omitted; emphasis added.).

We went on to reject the respondents' argument that the city decision at issue in *Rhodes I* was excluded from the statutory definition of "land use decision" by ORS 197.015(10)(b)(D).[3]

> "* * * It may be that, once the city has adopted the AMP as part of its TSP, future city or ODOT actions to implement the project described in the AMP will qualify as the type of actions that are exempted from LUBA's review jurisdiction by ORS 197.015(10)(b)(D) because those actions are the kinds of actions described in ORS 197.015(10)(b)(D) and they are 'authorized by and consistent with' the city's TSP. But the city has not yet established that the project described in the AMP is 'authorized by and consistent with' the city's TSP." 47 Or LUBA at 581-82.

Based on the above reasoning, we sustained petitioner's seventh assignment of error and remanded the city's decision so that it could adopt the AMP as part of its TSP, following appropriate post-acknowledgment amendment procedures. Although we rejected petitioner's eighth assignment of error in which he argued the challenged decision was quasi-judicial, we nevertheless agreed with petitioner that the city would be required on remand to adopt findings to

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[3]ORS 197.015(10)(b)(D) excludes the following type of decision from the ORS 197.015(10)(a) definition of land use decision:

> "[A decision w]hich determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

demonstrate that "the project envisioned in the AMP is consistent with the TSP." 47 Or LUBA at 585.

The Court of Appeals' decision in *Rhodes II* concerned a hypothetical issue that is not presented in this appeal so we simply note that issue here and do not address it further. ODOT believes that the roadway improvements that are envisioned by the Agreement in this case are authorized by the city's TSP. In that circumstance, ODOT argued to the Court of Appeals, if it were not for OAR 734-051-0155(4)(d) and the city's decision in this case to adopt the AMP as part of the Agreement, the city's decision to adopt the cooperative improvement agreement would not constitute a land use decision. There is language in LUBA's decision in *Rhodes I* that can be read to reject that argument.[4] In *Rhodes II*, the Court of Appeals held that that issue was not decided by LUBA and that the issue was not presented in *Rhodes II*:

> "[W]e make no determination regarding the parties' apparent shared interest in whether, as a legal matter, the authorization, by itself, to enter into a cooperative improvement between a local jurisdiction and ODOT regarding an improvement project falls within the statutory definition of a land use decision. Here, the city's resolution adopted an AMP as well as provided authorization for the city to enter into a cooperative improvement agreement. In light of the content of the city's resolution, this case does not present the issue of whether an authorization to enter into a cooperative improvement agreement by itself constitutes a land use decision." 197 Or App at 176-77 (internal citations omitted).

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[4] Our decision in *Rhodes I* includes the following discussion:

> "Before turning to petitioner's assignment of error, we note that we would almost certainly conclude that the challenged decision is a land use decision, even if OAR 734-051-0155(4)(k) did not expressly require that the AMP be adopted as part of the city's TSP. At the very least, the challenged decision is both a contract and a city decision to authorize construction of transportation facility improvements. It may well be that those improvements are already envisioned by and consistent with the TSP, as respondents argue. However, the TSP is more general and does not provide the kind of detail that the AMP does in describing the project. Neither the Agreement nor the AMP make any attempt to establish that the project envisioned by the Agreement and AMP is consistent with the TSP. Without expressing any position on the merits of petitioner's arguments, we are unable to agree with respondents that the consistency of the proposed project with the TSP can be determined without a decision by the city, with supporting findings that explain why the project is consistent with the TSP. Such a decision will be required to apply the TSP and will be a land use decision even if it were not required by OAR 734-051-0155(4)(k) to be adopted as an amendment to the TSP." 47 Or LUBA at 582.

In summary, the city's obligation following *Rhodes I* and *Rhodes II* is dictated by OAR 734-051-0155(4)(d) and the manner in which the city proceeded in this matter. On remand, the city was required to amend its TSP to adopt the AMP as part of its TSP. In doing so, the city was also obligated to adopt findings to demonstrate that the AMP complies with any legal requirements for AMPs and that the roadway improvements that are envisioned in the AMP are consistent with the city's TSP and any other applicable legal requirements.

FIRST ASSIGNMENT OF ERROR

The city's April 21, 2004 resolution that was appealed to LUBA in *Rhodes I* authorized the mayor and council president to sign the Agreement. In approving the Agreement in 2004, the city also approved the AMP, although the city did not at that time amend its TSP to include the AMP. LUBA's decision remanding the April 21, 2004 resolution is dated September 27, 2004. The Court of Appeals' decision in *Rhodes II* was issued on January 26, 2005, and the appellate judgment was issued on March 16, 2005.

The city's decision in response to *Rhodes I* and *Rhodes II* was issued on January 19, 2005—seven days *before* the Court of Appeals issued its decision in *Rhodes II* and almost two months *before* the appellate judgment issued. Citing *Rose v City of Corvallis*, ___ Or LUBA ___ (LUBA Nos. 2004-221 and 2004-222, April 15, 2005), petitioner contends the city's decision should be reversed because the city lacked jurisdiction to adopt the comprehensive plan and TSP amendment that is challenged in this appeal while the Court of Appeals had jurisdiction over this matter.

In *Rose*, we followed our decision in *Standard Insurance Co. v. Washington County (Standard IV)*, 17 Or LUBA 647, 660, *rev'd on other grounds* 97 Or App 687, 776 P2d 1315 (1989), in which we held:

> "Where jurisdiction is conferred upon an appellate review body, once appeal/judicial review is perfected, the lower decision making body loses its jurisdiction over the challenged decision unless the statute specifically provides otherwise. In this case, the statutes do not authorize the county to take further action on its decision while that decision is being reviewed by LUBA or the Court

> of Appeals. Therefore, the county was without jurisdiction to adopt the challenged decision." (Footnote omitted.)

If the decision before us in this appeal was a city decision that readopted the April 15, 2005 resolution or reauthorized or readopted the Agreement, we would agree with petitioner that the city exceeded its jurisdiction in acting before the Court of Appeals issued its appellate judgment in *Rhodes II*. However, as petitioner points out in subassignment of error 6(E), although the April 15, 2005 resolution was ultimately remanded to the city following *Rhodes I* and *Rhodes II*, the city has not readopted the resolution or the Agreement. What the city has done in the decision that is before us in this appeal is amend its comprehensive plan and TSP to include the AMP, an action that the city should have taken at the same time it adopted the April 15, 2005 resolution, but did not. The decision before us in this appeal is therefore a different, albeit related, decision to the city decision that was before LUBA in *Rhodes I* and indirectly before the Court of Appeals in *Rhodes II*. The city did not lack jurisdiction to adopt the disputed comprehensive plan and TSP amendment.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In *Rhodes I*, we concluded that although adoption of the AMP is properly viewed as a legislative decision, the city was nevertheless required to adopt findings to explain why the AMP is consistent with the TSP and other relevant requirements. Petitioner argues under the second assignment of error that the city erred because it did not adopt findings in support of its decision, as LUBA directed in its remand in *Rhodes I*.

Page 3 of the record in *Rhodes III* is a transcript of the city council's motion to adopt the ordinance that is at issue in this appeal. In that motion, the city council explains that its action to adopt the disputed ordinance is "based on staff's findings and the recommendation of the Planning Commission * * *."[5] We conclude that the city's motion was sufficient to adopt the referenced

[5] The referenced staff findings appear at pages 6-16 of the record in *Rhodes III* and the planning commission recommendation appears at pages 4-5 of the record in *Rhodes III*.

findings. We will consider the separate question of whether those findings are adequate to explain why the challenged decision complies with relevant legal standards in addressing petitioner's remaining assignments of error.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under the Transportation Planning Rule (TPR), local TSPs must be consistent with regional TSPs. OAR 660-012-0015(3).[6] Petitioner points out that the AMP expressly recognizes that it must be consistent with the Rogue Valley Regional Transportation Plan (RV RTP). Record 123. Petitioner contends that the city has failed to demonstrate that the AMP is consistent with several RV RTP Policies.

Before turning to the specific policies that petitioner identifies we note two general arguments presented by the city. First, the city points out that the city was not subject to the RV RTP until May 27, 2003, and the city appears to suggest that because the disputed OR 99 improvements were programmed by ODOT before that date, the RV RTP does not apply. We reject that argument. The disputed comprehensive plan and TSP amendment was adopted on January 19, 2005. There is no dispute that the city was subject to the RV RTP on that date.

The city's second general argument is that under the TPR, transportation planning is "divided into two phases: transportation system planning and transportation project development." OAR 660-012-0010(1). We understand the city to argue that the transportation system planning for the disputed improvements occurred in the past when the city's TSP was amended to approve the OR 99 improvements and that the challenged decision represents project development rather than transportation system planning. We agree with the city's second general argument. Although this second general argument has no obvious bearing on petitioner's arguments under the third assignment of error, it does have some bearing on petitioner's fifth assignment of error. As

[6] OAR 660-012-0015(3) provides that when local governments "prepare, adopt and amend local TSPs" the "[l]ocal TSPs * * * shall be consistent with regional TSPs and adopted elements of the state TSP."

previously noted, petitioner contends the city failed to demonstrate the AMP complies with several specific RV RTP Policies. We turn to those policies.

A. Policy 10-4

As relevant, Policy 10-4 provides:

> "Local governments shall require or provide sidewalks/pedestrian pathways along all streets within the urban growth boundary."

Petitioner's argument under this policy is as follows:

> "The AMP states that it provides for sidewalks only on the west side of OR 99. However, the statement cannot be verified because the AMP and the evidence are illegible. Even if sidewalks were present on the west side, there is no planning to install sidewalks along the east side of OR 99, now or in the future." Petition for Review 7.

The AMP includes the following discussion of sidewalks:

> "It is recommended that sidewalks be installed at the locations illustrated in Appendix C. As illustrated in the Appendix, it is recommended that sidewalks be installed on the west side of OR 99 throughout the project area.
>
> "There are currently a number of vacant properties on the east side of OR 99. Because of this, it is recommended that asphalt sidewalks be installed on the east side of OR 99 where needed to connect the developed parcels to the nearest signalized intersections (where pedestrians can cross the highway and travel on the continuous west sidewalk). It is anticipated that in the future, concrete sidewalks would be installed on the east side with development of the vacant properties." Record 134.

Petitioner is correct that the drawings in the record showing the proposed improvements are difficult to read. Part of the problem is the scale of the drawings, and part of the problem is the lack of a legend and readable descriptions of the features displayed on those drawings. However, the text of the AMP makes it clear that continuous concrete sidewalks are to be installed initially on the west side of OR 99 along with some asphalt sidewalks on the east side, as needed to allow pedestrians to cross OR 99 to the continuous concrete sidewalks on the west side.[7] Contrary to

[7] We agree with respondent that nothing in the text of Policy 10-4 supports petitioner's apparent reading of that policy to mandate that the proposed improvements include continuous sidewalks on both sides of OR 99.

petitioner's assertion, we understand the AMP to anticipate that there will be continuous concrete sidewalks on the east side of OR 99 at some point in the future. We reject petitioner's arguments under Policy 10-4.

B. Policy 10-5

Policy 10-5 provides:

> "The location and design of all sidewalks shall comply with the requirements of the Americans with Disabilities Act [(ADA)]."

Petitioner's entire argument under this subassignment of error is as follows:

> "There is no evidence that the city considered ADA, nor that the sidewalk placement or dimensions comply with ADA. Also, the only evidence and plan provisions on sidewalk dimensions are illegible." Petition for Review 7.

As already noted, petitioner is correct that the drawings of the proposed improvements are difficult to read. However, it is reasonably clear that the city and ODOT do not intend these drawing to represent a final decision concerning the design of the sidewalks. More detailed engineering drawings will be required to do that. We do not understand the AMP or the drawings that are included in the AMP to represent a current decision to construct sidewalks that do not comply with the ADA. To the contrary, with one possible exception noted later in this opinion, we see nothing in the AMP to suggest that the city and ODOT plan to construct sidewalks that do not comply with all legal requirements, including the ADA.

This subassignment of error is denied.

C. Policies 11-7 and 18-3

Policy 11-7 requires that the city cooperate with the Rogue Valley Transit District (RVTD) to maximize features that are "beneficial to transit riders and transit operations." Policy 18-3 requires that local governments "coordinate transportation planning and construction efforts with those of the [Rogue Valley Metropolitan Planning Organization]." The Rogue Valley Metropolitan Planning Organization (RVMPO) is the Rogue Valley Council of Governments. Petitioner argues that the city did not provide notice to either the RVTD or the RVMPO and there is no evidence in

the record that would show that the city conferred or coordinated with either body in adopting the AMP as part of the TSP.

The response to petitioner's arguments concerning Policies 11-7 and 18-3 in the city's response brief is set out below:

> "Petitioner states that the City failed to comply with Policies 11-7 and 18-3 requiring cooperation and coordination among agencies concerning the AMP. However, Petitioner fails to point out that City was not responsible for preparing the AMP and that Petitioner had ample opportunity to participate, and voice any concerns, during the public hearings and other proceedings while the AMP was being developed." Response Brief 8.

The obligation to cooperate with RVTD under Policy 11-7 and to coordinate with RVMPO under 18-3 is the city's, even though ODOT may have prepared the AMP. It may be that ODOT cooperated with RVTD and coordinated with RVMPO when the AMP was being prepared and that the city can rely on those cooperation and coordination efforts to establish that the city has complied with those policies. However, the city makes no effort to identify any evidence in the record that the cooperation and coordination required under those policies was accomplished by ODOT when it prepared the AMP. The city's argument that *petitioner* may have had an opportunity to participate and voice any concerns he may have had does not mean that RVTD and RVMPO had that opportunity.

This subassignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

OAR 660-012-0015(5) provides:

> "The preparation of TSPs shall be coordinated with affected state and federal agencies, local governments, special districts, and private providers of transportation services."

The RVTD is a special district. According to petitioner, there are three taxi services that are "private providers of transportation services." Petitioner argues:

> "There is no evidence that the city in any way conferred with RVTD or the three taxi services in developing the AMP, which limits their use of OR 99 through access

management. The city has not provided notice of the land use proceeding to any of these transportation providers as required by the [TPR]." Petition for Review 9.

The city again argues that petitioner's arguments come too late, because the city is merely adopting an AMP that ODOT prepared. Once again, it may well be that ODOT performed the required cooperation and coordination with RVTD and the private taxi services. If so, it may be that the city can rely on that cooperation and coordination to meet its obligation under OAR 660-012-0015(5) to coordinate with those entities when it amends its TSP. However, the city offers no reason to assume that ODOT provided that required coordination.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner contends under the fifth assignment of error that the city amended its TSP to include the AMP without conducting the evaluation of system alternatives that is required by OAR 660-012-0035(1) or applying the standards set out in OAR 660-012-0035(3) in conducting that evaluation of alternatives.[8] OAR 660-012-0035(4) also imposes requirements that TSPs must be

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[8] As relevant, OAR 660-012-0035 provides:

"(1) The TSP shall be based upon evaluation of potential impacts of system alternatives that can reasonably be expected to meet the identified transportation needs in a safe manner and at a reasonable cost with available technology. The following shall be evaluated as components of system alternatives:

"(a) Improvements to existing facilities or services;

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

"(c) Transportation system management measures;

"(d) Demand management measures; and

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

"* * * * *

"(3) The following standards shall be used to evaluate and select alternatives:

designed to reduce vehicle miles traveled (VMT) per capita. Petitioner contends that the city did not consider the impact the AMP would have on VMT.

The city responds as follows:

> "OAR 660-012-0035 does not apply to the challenged decision. The city was not drafting a TSP when it made the challenged decision; it was instead merely implementing a project that was already described in the TSP. The TSP had already evaluated and adopted the project alternative (modernization and improvement of Highway 99). The challenged decision simply allowed the system alternative to be put into effect. * * *" Response Brief 9 (emphasis in original).

The transportation system planning phase and the transportation project phase discussed in OAR 660-012-0010(1) may not always break neatly into separate and distinct phases with no overlap. However, petitioner makes no attempt to explain why notwithstanding the decisions that are already included in the TSP for the disputed improvements, the city should nevertheless be required to apply the systems alternatives analysis required by ORS 660-012-0035(1). Without a more developed argument from petitioner, we do not agree that the city was obligated to conduct the systems alternatives analysis required by ORS 660-012-0035(1) in adopting an AMP for an improvement project that has already been included in the TSP.

> "(a) The transportation system shall support urban and rural development by providing types and levels of transportation facilities and services appropriate to serve the land uses identified in the acknowledged comprehensive plan;
>
> "(b) The transportation system shall be consistent with state and federal standards for protection of air, land and water quality including the State Implementation Plan under the Federal Clean Air Act and the State Water Quality Management Plan;
>
> "(c) The transportation system shall minimize adverse economic, social, environmental and energy consequences;
>
> "(d) The transportation system shall minimize conflicts and facilitate connections between modes of transportation;
>
> "(e) The transportation system shall avoid principal reliance on any one mode of transportation and shall reduce principal reliance on the automobile. In MPO areas this shall be accomplished by selecting transportation alternatives which meet the requirements in section (4) of this rule."

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The ODOT rule that sets out the requirements for AMPs is OAR 734-051-0285(7), which provides as follows:

> "Access Management Plans comply with all of the following:
>
> "(a) Must include sufficient area to address highway operation and safety issues and the development of adjoining properties including local access and circulation.
>
> "(b) Must improve access management conditions to the extent reasonable within the limitation and scope of the project and be consistent with design parameters and available funds.
>
> "(c) Describe the roadway network, right-of-way, access control, and land parcels in the analysis area.
>
> "* * * * *
>
> "(e) Are consistent with any applicable adopted Transportation System Plan, corridor plan, or Special Transportation Area or Urban Business Area designation, or amendments to the Transportation System Plan unless the jurisdiction is exempt from transportation system planning requirements under OAR 660-012-0055.
>
> "* * * * *
>
> "(l) Are approved by the Department through an intergovernmental agreement and adopted by the local government, and adopted into a Transportation System Plan unless the jurisdiction is exempt from transportation system planning requirements under OAR 660-012-0055."

Under the sixth assignment of error, petitioner contends that the challenged decision fails to demonstrate that the AMP complies with the above requirements.

A. Area of Analysis - OAR 734-051-0285(7)(a).

OAR 734-051-0285(7)(a) requires that the AMP include a "sufficient area to address highway operation and safety issues and the development of adjoining properties * * *." Petitioner makes two separate arguments. First, petitioner argues the AMP looks only at the "immediate

vicinity of OR 99," and fails to show a "study area" or "parcel boundaries." Petition for Review 12. Second, petitioner contends the AMP "simply addresses OR 99 access, without analyzing or weighing the development needs of adjoining properties." *Id.*

Regarding petitioner's first argument, we agree with respondent that the "sufficient area" requirement in OAR 734-051-0285(7)(a) is subjective and does not expressly impose the kind of detailed boundary designation requirement that petitioner suggests is required. Petitioner has not established that the area covered by the AMP is inadequate under OAR 734-051-0285(7)(a). Petitioner's second argument reads in a requirement that is not expressed in OAR 734-051-0285(7)(a). OAR 734-051-0285(7)(a) is an area delineation requirement, not a study methodology or content requirement. Those requirements are imposed in later subsections of OAR 734-051-0285(7)(a).

This subassignment of error is denied.

B. Consistency with Design Parameters - OAR 734-051-0285(7)(b).

Among other things, OAR 734-051-0285(7)(b) requires that the proposed improvements must be "consistent with design parameters." According to petitioner, the TSP imposes design parameters on major arterial streets, which are the equivalent of ODOT's "principal arterial" classification. TSP 7-5. No one disputes that OR 99 is designated as a major arterial under the TSP and a principal arterial by ODOT. The TSP provides the following design parameters for a major arterial:

> "A two-way major arterial shall be a 74-foot wide roadway, curb face-to-curb face, which provides two 12-foot travel lanes and one 6-foot bike lane in each direction, plus a 14-foot center left-turn lane. The right-of-way width shall be 100 feet. * * *" TSP 7.5.

The TSP also requires that sidewalks be at least 8 feet wide in commercial areas. *Id*. Petitioner complains that the drawings at Record 212-16 "are illegible." Petitioner contends that from the drawings it is not possible to tell if the proposed improvements comply with TSP design parameters. Petitioner goes on to argue:

> "However, the AMP does state the width of the bicycle lane as 5.9 feet, which does not comply with the 6.0 foot standard. Also, petitioner's building juts out into the sidewalk along West Valley View Road, which means that the sidewalk will not comply with the 8 foot standard." Petition for Review 13.

Except for his specific challenge to the proposed bicycle lane and sidewalk widths, petitioner simply assumes from the lack of clarity in the drawings at Record 212-16 that the proposed improvements will be or could be built in ways that are inconsistent with TSP design standards. However, we assume the opposite. In other words, absent some reason to reach a contrary conclusion, we assume the improvements depicted on the sketches will be refined in the more detailed construction drawings to produce construction drawings that in turn result in roadway improvements that are consistent with applicable design standards.

Turning to the bike lane and sidewalk, the AMP for some reason calls for bike lanes that deviate slightly from design standards, and petitioner suggests that it will not be possible to construct the required 8-foot wide sidewalks in the vicinity of his building. In its brief, the city simply dismisses these deviations as *de minimus* and suggest that these deviations should be overlooked. Response Brief 11. It is not clear to us why the AMP calls for bike lanes that are one inch too narrow. It is also unclear whether there is something in the AMP or elsewhere that allows *de minimus* deviations. Similarly it is not clear to us whether the city in fact is proposing sidewalks of less than 8 feet in width near petitioner's property or, if so, whether there is some basis in the AMP or elsewhere for allowing such deviations from the 8-foot design standard. Because the city does not really dispute that the proposed bike lane and sidewalk may deviate slightly from design standards as petitioner alleges, we assume without deciding that they do.

As we indicated in *Rhodes I*, it is the city's obligation to adopt findings that explain why the AMP is consistent with applicable legal standards. The city has failed to do so. On remand, the city must either explain why the proposal does not deviate from design standards in the way petitioner alleges, or explain why its decision to deviate slightly from bike lane and sidewalk design standards is permissible under OAR 734-051-0285(7). However, with these two exceptions, we

reject petitioner's speculation that the city's choice to include drawings in the AMP that leave the precise dimensions of the proposed roadway improvements unknowable at this point necessarily means that the city intends to build a facility that does not meet applicable design standards.

C. Description - OAR 734-051-0285(7)(c).

Petitioner argues:

> "The AMP does not comply with OAR 734-051-0285(7)(c), which requires a description of the roadway network, right of way, access control, and land parcels in the analysis area. Such topics do not appear in the AMP, except arguably in the illegible portion of the project plans." Petition for Review 13.

The city responds:

> "OAR 734-051-0285(7)[(c)] does not articulate the detail of the 'description" required for the roadway network, right-of-way, access control, and land parcels in the analysis area. The plan does describe the area * * *. There is no requirement to have a 'study area boundary' or parcel boundaries for larger properties. Each parcel with an approach is sufficiently described. The rule simply does not require greater detail." Response Brief 11-12.

We agree with the city. This subassignment of error is denied.

D. Consistency with City TSP - OAR 734-051-0285(7)(e).

Under this subassignment of error, petitioner alleges that the AMP does not comply with the OAR 734-051-0285(7)(e) requirement that the AMP must be consistent with the TSP. In support of that argument, petitioner incorporates his arguments under the ninth assignment of error below that the AMP is inconsistent with the TSP. We sustain the ninth assignment of error in part. For the same reasons we sustain this subassignment of error. On remand, the city must either explain why the AMP is consistent with the TSP or amend the AMP or the TSP or both to make them consistent.

This subassignment of error is sustained.

E. Approved Through Intergovernmental Agreement - OAR 734-051-0285(7)(l).

We set out below petitioner's entire argument under this subassignment of error, followed by the city's entire response:

> "The AMP does not comply with OAR 734-051-0285(7)(l), because it was not approved thorough an intergovernmental agreement with ODOT. * * * The city has not approved such an agreement on remand." Petition for Review 13.

> "OAR 734-051-0285(7)(l) is not an issue as the [Agreement] is still in [e]ffect. The LUBA decision [in *Rhodes I*] did not change the effect of the [Agreement]; it simply required the AMP to be adopted as part of the TSP. That was also a requirement of the [Agreement] itself." Response Brief 12.

Because the resolution that authorized the mayor and city council president to execute the agreement was remanded in *Rhodes I* and because that resolution presumably was necessary to authorize the city to enter into the Agreement, we tend to agree with petitioner that the prudent course would have been for the city to readopt that resolution and re-execute the Agreement at the same time it amended the TSP to respond to our decision in *Rhodes I*. However, OAR 734-051-0285(7)(l) clearly envisions that a city may adopt multiple decisions to enter into cooperative agreements with ODOT that involve AMPs. The city's error in *Rhodes I* was in entering into the Agreement and adopting the AMP without at the same time amending its TSP to include the AMP or making it clear that a separate land use decision would be adopted at a later date to amend the TSP to include the AMP. However, the only decision that is before us in this appeal is the city's decision to amend the TSP to include the AMP. Whether the Agreement remains in force or whether it requires additional action by the city by virtue of our decision in *Rhodes I* is not a question that is before us in this appeal. Even if it does not remain in force, the amendment of the TSP accomplishes the part of the city's decision making in this matter that constitutes a land use decision and petitioner provides no reason why the Agreement could not be reauthorized and re-executed separately at a later date. For all that we know, the city may have already done so.

This subassignment of error is denied.

The sixth assignment of error is sustained in part.

SEVENTH ASSIGNMENT OF ERROR

OR 99 crosses Wagner Creek. Petitioner contends the proposed improvements will enlarge the highway's footprint in the floodway. We cannot tell if that contention is factual, but the city does not dispute it. Talent's Flood Damage Prevention Ordinance includes the following provision:

> "5.3.2 Other encroachments are also prohibited, including fill, water-related facilities and roads, unless certification by a registered professional civil engineer is provided demonstrating that such encroachment will not result in any increase in flood levels during the occurrence of the base flood discharge." Petition for Review App I-13.

Petitioner contends the city makes no attempt to show that the proposed OR 99 improvements comply with the above provision, other than to suggest in its brief that the roadway improvements might not qualify as an "other encroachment" within the meaning of Section 5.3.2.

The city responds in its brief that if the road improvements will encroach in the floodway, "the certification could conceivably be provided at any time prior to project completion." Response Brief 12. In fact, although it is not part of the city's record, we understand the city to argue that it has received the engineer's certification that is required by the above Flood Damage Prevention Ordinance provision.

Because the city's decision must be remanded in any event, we sustain this assignment of error. On remand the city must either demonstrate that the proposed improvements do not implicate Section 5.3.2 of the Talent Flood Damage Prevention Ordinance or, if they do, that the required certification has been obtained. If the city has not obtained an engineer's certification and plans to defer any required certification under Section 5.3.2 to a future date, the city must explain how that certification will be obtained.

The seventh assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR

Under his eighth assignment of error, petitioner alleges that the improvements envisioned in the AMP will damage protected city historic resources. The city adopted no findings addressing historic resources and simply concluded that Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) is "[n]ot applicable." Record 8.

Petitioner contends that the "Mary J. Carpenter House is a Talent Landmark." Petition for Review 15. Petitioner also appears to suggest that some buildings in the Old Town District of Talent will be altered or demolished, but does not identify any such buildings. If we understand petitioner correctly, he even seems to suggest that removal of existing pavement and sidewalk in making planned improvements along OR 99 where it adjoins the Old Town District of Talent will require design review and application of the Old Town Talent Design Review Standards. Petition for Review Appendix H1-15. Petitioner appears to go so far as to suggest that under those design standards the city is required to "recycle, reuse, or adapt the existing highway [99] surface, subsurface, or improvements." The city disputes petitioner's contention that the Mary J. Carpenter House is a designated landmark and disputes petitioner's arguments that the criteria governing alteration, relocation or demolition of resources located within 150 feet of a Talent landmark are implicated.

We have a great deal of trouble understanding petitioner's arguments and the city's response to those arguments. However, some of those arguments raise issues that seem to at least merit more of a response than is provided in the city's brief. For example, it is not obvious to us why the Mary J. Carpenter House should not be viewed as a Talent Landmark. On the other hand it is hard to take seriously petitioner's suggestion that the city's historic regulations require that the city recycle and reuse any concrete that must be removed from the existing OR 99 to make the desired improvements. The city is more familiar with how its regulations concerning historic resources work and whether the improvements envisioned in the AMP will implicate those resources in a way that requires design review, as petitioner suggests is the case. With that better

understanding of how its regulations work and whether the improvements envisioned by the AMP will impact historic resources in a way that will require review under those regulations, the city is also in a better position to adopt findings that explain why petitioner's arguments are without merit or to respond to any arguments that do have merit.

Because the city adopted no findings addressing possible impacts on historic resources, we sustain the eighth assignment of error.

NINTH ASSIGNMENT OF ERROR

Under his ninth assignment of error, petitioner contends the AMP is inconsistent with the city's TSP.

A. Design Parameters

Petitioner's arguments under this subassignment of error are the same as his arguments under subassignment of error 6(B). For the same reasons we sustain that subassignment of error in part and deny it in part, we sustain this subassignment of error in part and deny it in part.

B. Coincidence with Community Needs

The TSP includes General Transportation Policy 2, which provides in part:

> "The construction of transportation facilities shall be timed to coincide with community needs, and shall be implemented in a way that minimizes impacts on existing development." TSP 2-1.

The TSP includes a Traffic Operations Analysis and petitioner cites to discussion under that analysis that concludes that the current level of service (LOS) of the intersection of Valley View Road and OR 99 is "LOS 'B' with a volume to capacity ratio of .55 during the PM peak hour." TSP 4-5. The TSP goes on to conclude that "the intersection is operating very well and a considerable increase in traffic can be accommodated without exceeding accepted standards." TSP 6-2. Petitioner also cites additional discussion in the TSP Traffic Operations Analysis that "there do not appear to be significant deficiencies related to the capacity of the roads in Talent." *Id*. Petitioner cites discussion under the Future Traffic Capacity Deficiencies portion of the TSP that concludes that the "existing [Or 99/West Valley View Road] intersection configuration could

accommodate traffic increases of up to 70 percent without exceeding level-of-service standards * * *." TSP 6-3. Petitioner also cites discussion in the AMP that seems to support his contention that the proposed improvements are not warranted based on safety concerns. Record *Rhodes III* 132-33. Based on these argument, petitioner contends that the city has not demonstrated that the proposed OR 99 improvements have been "timed to coincide with community needs," within the meaning of General Transportation Policy 2.

The city offers the following response to petitioner's arguments under this subassignment of error:

> "Petitioner's observations regarding the timing of and need for construction of the Highway 99 modernization project reflect Petitioner's personal opinions, bolstered by hand-selected quotations from the AMP taken out of context. The city clearly has the discretion to draw its own conclusions regarding traffic data, impacts and safety, and proceed with the project at this time.
>
> "The AMP was adopted by the City with the finding that the AMP 'amplifies the princip[les] of access management contained in the city's [TSP]' and that 'this adoption incorporates the finer level of detail contained in the Access Management Plan.' LUBA does not overturn a local decision if the decision is based on substantial evidence in the record. The local government is entitled to deference when interpreting its ordinances and plans. 'We agree with ODOT that the city's key interpretations * * * are not reversible under the discretionary standard of review we must apply to a governing body's interpretations of its comprehensive plan, pursuant to ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).' *Comrie vs.* [*City of*] *Pendleton*, 47 Or LUBA 38 (2004).
>
> "Petitioner's statements ignore the many * * * references of the priority need for the Highway 99 project contained in the TSP and quote apparently outdated traffic data as a reason to negate the need for the project. The need for the project was originally determined in the TSP and when the project was submitted to the RVACT and ODOT several years ago. Petitioner has cited no made [sic] to the inclusion of this project in the previously adopted [State Transportation Improvement Projects]." Response Brief 15.

The requirement in TSP General Transportation Policy 2 that "construction of transportation facilities shall be timed to coincide with community needs" seems to impose a fairly simple and straightforward obligation. While that language does not expressly command that "transportation

facilities" and "community needs" must proceed in lock step, as petitioner suggests, it does suggest a city concern that community needs should not be allowed to outstrip the capacity of transportation facilities and that transportation facilities should not unnecessarily predate the community's need for those facilities. The difficulty presented in this case is that we have no city interpretation or express application of General Transportation Policy 2 by the city council to review.

The absence of city council findings concerning General Transportation Policy 2 or a reviewable interpretation of that policy to defer to makes many of the city's arguments set out above irrelevant. The city's claim that petitioner's quotations from the TSP are "hand selected" and "out of context" may well be true. But the city provides no citations to the TSP of its own to provide the claimed missing context. Just as importantly, the city provides no citations to countervailing considerations in the TSP or the AMP or elsewhere that might justify a conclusion that proceeding to construct the disputed improvements at this time "coincide[s] with community needs," as General Transportation Policy 2 requires. On remand the city must adopt findings that provide that explanation.

C. The Nine Access Management Techniques

Petitioner contends that the TSP addresses access management techniques and lists nine techniques.[9] Petitioner argues that "[n]arrowing and relocating driveways like petitioner's are not

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[9] The TSP provides:

"The number of access points to an arterial can be restricted through the following techniques:

"• Restricting spacing between access points based on the type of development and the speed along the arterial.

"• Sharing of access points between adjacent properties.

"• Providing access via collector or local streets where possible.

"• Constructing frontage roads to separate local traffic from through traffic.

"• Providing service drives to prevent spill-over of vehicle queues onto the adjoining roadways.

listed techniques." Petition for Review 21. Citing language in the TSP, petitioner contends that even these nine techniques are to "be applied as new development occurs," and "are not intended to eliminate existing intersections or driveways." *See* n 9.

The city first responds that the TSP language cited by petitioner does not expressly state that the nine listed techniques are exclusive. The city cites to other TSP language that makes it clear that driveway relocation is a legitimate access management technique under the TSP. In addition, the city cites the following TSP language that is specific to the proposed OR 99 improvements:

> "Improvement of Highway 99 through Talent has been suggested during development of the Transportation System Plan. The proposal to upgrade the highway would include the addition of a center turn lane where it does not exist, widening the pavement to include bike lanes, adding sidewalks, and consolidating access. * * *Access adjustments typically include *narrowing extra-width driveways, eliminating second and third driveways serving individual parcels, and by combining access with that provided for adjacent parcels*. * * *" TSP 5-4.

We agree with the city that petitioner misreads the TSP to limit access management techniques to the nine listed examples. We also agree with the city that the protection of existing driveways from access management techniques does not apply when "new development" is being proposed. The proposed improvements to OR 99 are new development and the TSP not only

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> "Traffic and facility improvements for access management include:
>
> "• Providing acceleration, deceleration, and right turn only lanes.
>
> "• Offsetting driveways to produce T-intersections to minimize the number of conflict points between traffic using the driveways and through traffic.
>
> "• Installing median barriers to control conflicts associated with left turn movements.
>
> "• Installing side barriers to the property along the arterial to restrict access width to a minimum.
>
> *These access management restrictions are not intended to eliminate existing intersections or driveways. Rather, they shall be applied as new development occurs.* Over time, as land is developed and redeveloped, the access to roadways will meet these guidelines." TSP 7-13 (emphasis added.)

does not bar the city from imposing access management requirements, it expressly anticipates that such access management techniques will be employed as part of those improvements.

This subassignment of error is denied.

The ninth assignment of error is sustained in part.

TENTH ASSIGNMENT OF ERROR

The AMP includes a series of drawings. Record *Rhodes III* 212-216. The text of the AMP indicates that those maps show the location of sidewalks, bike lanes, and modified travel lanes and rights of way. Petitioner contends that the maps are "illegible or indecipherable." Petition for Review 22. As we have already noted the scale of those maps and the lack of a legend or explanatory notes makes it difficult or impossible to tell from those drawings precisely what is being proposed and the dimensions of proposed features. However, as we explained in our discussion of subassignment of error B under the sixth assignment of error, petitioner assumes that the lack of clarity in these drawings means the city intends to construct roadway improvements that do not comply with legal standards. With the exceptions previously noted, we assume to the contrary that as construction drawings are prepared they will result in improvements that meet applicable design standards or, if they deviate from those standards, such deviations will be pursuant to applicable law that permits such deviations.

The tenth assignment of error is denied.

The city's decision is remanded.