

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 ELIZABETH A. GRASER-LINDSEY,
5 *Petitioner,*

6
7 and

8
9 KATHERINE KEHOE and CHRISTINE KOSINSKI,
10 *Intervenor-Petitioners,*

11
12 vs.

13
14 CITY OF OREGON CITY,
15 *Respondent,*

16
17 and

18
19 PATTY JACOBSON,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2007-171

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Oregon City.

28
29 Elizabeth Graser-Lindsey, Beavercreek, filed a petition for review and argued on her
30 own behalf.

31
32 Christine Kosinski, Oregon City, filed a petition for review on her own behalf.

33
34 Katherine Kehoe, Oregon City, represented herself.

35
36 Edward J. Sullivan and Carrie Richter, Portland, filed the response brief and Edward
37 J. Sullivan argued on behalf of respondent. With them on the brief was Garvey Schubert
38 Barer.

39
40 Patty Jacobson, Lake Oswego, represented herself.

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42 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
43 participated in the decision.

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45 AFFIRMED

05/07/2008

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

NATURE OF THE DECISION

Petitioners appeal a city resolution that approves a petition to annex 122 acres to the city. The resolution also refers the proposed annexation to city voters.¹ The annexation apparently was approved by city voters in November 2007.

FACTS

The Metropolitan Service District (Metro) included the 122-acre area that is the subject of this appeal within the urban growth boundary (UGB) in 2002. The disputed annexation was initiated by a petition of 100 percent of the owners owning 100 percent of subject area. Record 668-75. At the time the 122 acres were annexed, the area was developed with five single-family residences and an airport and had a total population of nine people.

The 122 acres were included in the UGB by Metro to provide additional urban land for industrial development. At the time the subject property was included in the UGB, it was outside city limits and was designated Low Density Residential by the Clackamas County Comprehensive Plan and was zoned Future Use Zone (FU-10) by the county. The FU-10 zone is a holding zone, which imposes a 10-acre minimum lot size. The city is in the process of developing and adopting the Beaver Creek Road Concept Plan for an area that includes the disputed 122-acre area. That concept plan will provide the basis for new city comprehensive plan and zoning map designations for the annexed area and other areas. Until that concept plan is completed and adopted, the findings that support Resolution 07-24 explain that the county FU-10 zoning will remain in place.

¹ The decision and its supporting findings are scattered in the record in a way that makes it unclear exactly what documents make up the decision on appeal. As far as we can tell, the challenged decision is made up of six documents: (1) Resolution 07-24 (Record 40-42); (2) a legal description of the annexed property (Record 43-44); (3) a map of the annexed property (Record 50); (4) City Commission Findings and Reasons (Record 46-49); (5); a notice of ballot title (Record 45); (6) Findings and Conclusions dated August 15, 2007 (Record 33-39).

1 In approving the disputed annexation, the city found that there are adequate public
2 facilities to serve the now sparsely developed 122 acres and that the existing FU-10 holding
3 zone is sufficient to ensure that any additional development that may occur before the
4 Beavercreek Road Concept Plan is adopted will also be low density development that can be
5 adequately served by existing public facilities. The city found that the Beavercreek Road
6 Concept Plan that is currently being drafted will identify how the 122 acres will be planned
7 and zoned for urban development and how that urban development will be provided the
8 needed additional public facilities and urban infrastructure. The central dispute in this appeal
9 is whether the city erred in annexing the 122 acres before the Beavercreek Road Concept
10 Plan has been adopted. Although that question presents a relatively simple and
11 straightforward legal dispute, the parties have managed to make it a much more complicated
12 dispute.

13 **MOTIONS**

14 Petitioner’s 50-page petition for review was filed on February 6, 2008. The city’s 24-
15 page response brief was filed on February 27, 2008. Petitioner’s reply brief was filed on
16 March 28, 2008. Oral argument in this appeal was held on April 3, 2008. That reply brief
17 claims to be nine pages long, but the 16-page appendix is in reality additional reply brief
18 argument. The reply brief is actually approximately 25 pages long.

19 Under OAR 661-010-0039 a request to file a reply brief and a reply brief are to be
20 filed “as soon as possible after respondent’s brief is filed.”² The reply brief is to be limited
21 “new matters raised in the respondent’s brief.” In addition, the reply brief is not to “exceed

² OAR 661-010-0039 provides:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. A reply brief shall have gray front and back covers.”

1 five pages, exclusive of appendices, unless permission for a longer reply brief is given by the
2 Board.” Petitioner’s reply brief does not comply with any of these requirements.

3 The reply brief was filed 28 days after the respondent’s brief was filed. The reply
4 brief was filed and served by mail late in the day on Friday March 28, 2008, so that it was
5 not received by LUBA or respondent until Monday March 31, 2008, three days before oral
6 argument. Petitioner provides no explanation for the delay in filing the reply brief. Much of
7 the reply brief does not respond to “new matters raised in the respondent’s brief.” Finally,
8 the brief is 25 pages long, and petitioner does not offer any explanation for exceeding the 5
9 page limit by 20 pages. It does not appear to us that petitioner made any effort to keep the
10 reply brief within the five-page limit or as short as possible.

11 Based primarily on petitioner’s failure to timely file the reply brief and its length, at
12 the beginning of oral argument in this appeal we partially granted respondent’s motion to
13 strike the reply brief. We allowed the parts of pages one and two of the reply brief that
14 respond to respondent’s waiver arguments and the six-page Appendix A that continues
15 petitioner’s response to respondent’s waiver arguments. We granted respondent’s motion to
16 strike the remaining parts of the reply brief and the other reply brief appendices.

17 Because respondent had only three days before oral argument to prepare its written
18 response to the 25-page reply brief, we allowed respondent additional time to file an
19 additional written response to the part of petitioner’s reply brief that we allowed. We
20 advised respondent that the additional response should not exceed five pages. On April 10,
21 2008 respondent filed a five-page response to petitioner’s response to the waiver arguments
22 and petitioner’s Appendix A.

23 On April 11, 2008, petitioner filed a motion to strike respondent’s two responses to
24 the reply brief. Alternatively, petitioner moved to allow petitioner’s entire reply brief.
25 Petitioner’s April 11, 2008 motions are denied.

1 **WAIVER**

2 Under ORS 197.763(1) and 197.835(3), unless a petitioner at LUBA raised an issue
3 before the respondent below, the petitioner may not assert that issue as a basis for reversal or
4 remand on appeal to LUBA.³ Respondent argues that petitioner and intervenor-petitioner
5 (petitioners) waived almost all of the issues that are raised in their assignments of error.
6 Petitioners do not argue that ORS 197.763(1) and 197.835(3) do not apply to the appealed
7 decision. But petitioner does argue that all issues that are raised in the petition for review
8 were adequately raised before the city.

9 ORS 197.763(1) and 197.835(3) require “fair notice to adjudicators and opponents,
10 rather than the particularity that inheres in judicial preservation concepts.” *Boldt v.*
11 *Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). A petitioner adequately
12 raises an issue under ORS 197.763(1) and 197.835(3) by citing the relevant legal standard,
13 presenting argument that includes the operative terms of the legal standard, or taking other
14 actions to raise the issue such that the city knows or should know that the issue is one that
15 needs to be addressed in its decision. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690
16 (2001). In reviewing waiver arguments under ORS 197.763(1) and 197.835(3), LUBA relies
17 on the party against whom a waiver defense is asserted to identify where in the record the
18 disputed issue was raised. If the party against whom a waiver defense is asserted fails to cite
19 evidence in the record that establishes that the disputed issue was raised below, LUBA will
20 not consider the issue on appeal. *Cummins v. Washington County*, 22 Or LUBA 129, 137

³ ORS 197.835(3) limits LUBA’s scope of review when considering appeals of quasi-judicial land use decisions to issues that were raised in accordance with ORS 197.763(1). ORS 197.763 sets out statutory requirements of conducting quasi-judicial land use hearings. ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 (1991). Where a party does provide citations to the record in response to arguments that
2 issues were not raised below, we review the cited portions of the record to determine whether
3 the cited portions of the record demonstrate the city knew or should have known that the
4 issue should be addressed in its decision. We address respondent’s waiver arguments, and
5 petitioner’s response to those waiver arguments, under our discussion of the assignments of
6 error and subassignments of error below.

7 **FIRST ASSIGNMENT OF ERROR**

8 The first assignment of error includes several subassignments of error, which we
9 address separately below.

10 **A. Oregon City Municipal Code (OCMC) 14.04.050 Annexation Procedures**

11 OCMC 14.04.050 is entitled “Annexation Procedures.” Petitioner’s first
12 subassignment of error concerns two subsections of OCMC 14.04.050. OCMC 14.04.050(C)
13 states that annexation applicants are “encouraged to meet with the city-recognized
14 neighborhood association or associations within which the property proposed to be annexed
15 is located.” OCMC 14.04.050(E) sets out a long list of things that must be included in an
16 annexation application.

17 Petitioner contends that the city erred by treating the annexation application as
18 complete, without requiring that the applicant comply with OCMC 14.04.050(C) and meet
19 with neighborhood associations. Petitioner also argues the application is missing certain
20 information that OCMC 14.04.050(E) requires to be included in an annexation application.

21 The city argues that petitioner waived the issues presented in this subassignment of
22 error because no party raised any issue below regarding whether the application was
23 deficient based on the applicant’s failures to (1) meet with neighborhood associations or (2)
24 submit an application that includes all of the information listed in OCMC 14.04.050(E).

25 Petitioner cites to testimony that was submitted to the city below questioning the
26 adequacy of public facilities to serve the annexed area. Record 13-14, 158, 243-44 (Reply

1 Brief Appendix A – first unnumbered page). Petitioner recognizes that this testimony does
2 not raise any issue regarding the application requirements under OCMC 14.04.050(C) and
3 (E) but argues that its subassignment of error concerning OCMC 14.04.050(C) and (E) is a
4 permissible elaboration of the broader issue that was raised below concerning the adequacy
5 of public facilities to satisfy annexation approval standards.

6 Petitioner is correct that ORS 197.763(1) and 197.835(3) do not require that
7 petitioner or other parties must have raised before the city “the identical” or “precisely the
8 same” argument that is presented in subassignment of error A. *Hale v. City of Beaverton*, 21
9 Or LUBA 249, 254 (1991); *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff’d* 107 Or
10 App 619, 813 P2d 1078 (1991). While the distinction between “issues” and “arguments” is
11 somewhat imprecise, the *issue* that petitioners raised on the cited pages of the record (the
12 alleged adequacy of public facilities to satisfy annexation approval standards) is not the same
13 issue that is raised in petitioner’s subassignment of error A (adequacy of the application to
14 meet OMC 14.04.050(C) and (E) application requirements).

15 Petitioner did not raise the issue that is presented in the subassignment of error A, and
16 that issue is waived.

17 **B. The City Erred by Failing to Adopt a Concept Plan for the Area Before**
18 **Annexing the Property**

19 In subassignment of error B, petitioner argues that the city must adopt the
20 Beaver Creek Road Concept Plan before it approves the disputed annexation. We understand
21 petitioner to advance three legal theories for why the city must adopt the Beaver Creek Road
22 Concept Plan before it approves the disputed annexation. First, petitioner argues that
23 relevant annexation approval standards and contextual laws require that a concept plan be
24 adopted before annexation. Second, petitioner contends that both the planning commission
25 and city commission were uncomfortable proceeding with the annexation before the concept
26 plan was adopted. Third, petitioner argues the proposed annexation cannot comply with the

1 city's comprehensive plan without a concept plan in place. We address each of petitioner's
2 legal theories in support of subassignment of error B separately below.

3 **1. Waiver**

4 The city first argues the issue that is presented under subassignment of error B was
5 not raised below. In response to the city's waiver argument, petitioner relies principally on
6 the following testimony in the record to establish that the legal issue presented under this
7 subassignment of error was raised below:

8 "I also believe that when Metro regulated that areas within an Urban Growth
9 Boundary could not develop until a Concept Plan was adopted, they did not
10 mean for developers to take the initiative and seek annexation prior to
11 Concept Plans being adopted. Metro Code states that the Commission's
12 decision on this boundary change should be consistent with specific directly
13 applicable standards or criteria for boundary changes contained in
14 Comprehensive Land Use Plans, Public Facility Plans, etc. The Clackamas
15 County Comprehensive Plan implements the Oregon City Comprehensive
16 Plan for lands within the Urban Growth Boundary. The plan designations for
17 these properties on the County's Oregon City Area Land Use Plan (Map IV-5)
18 have not been updated to reflect the UGB expansion and the current
19 designation of these properties are FU-10. If Map IV-5 needs to be updated
20 once the Beavercreek Concept Plan is adopted, then these annexed areas
21 currently do not meet the applicable zoning assignments, which can only be
22 established upon adoption [of the] concept plans." Record 160.

23 Although the person presenting the above-quoted testimony certainly could have been
24 clearer about her underlying legal theory for arguing that adoption of the Beavercreek Road
25 Concept Plan must precede approval of the disputed annexation, we agree with petitioner that
26 the above-quoted testimony is sufficient to raise the issue that is presented under the
27 subassignment of error B, *i.e.*, whether the Beavercreek Road Concept Plan must be adopted
28 before the disputed annexation can be approved.

29 We turn next to petitioner's three legal theories for why she believes the Beavercreek
30 Road Concept Plan must be adopted before the annexation can be approved.

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2. Examples of Metro Code, City Comprehensive Plan Requirements and OCMC Requirements

Petitioner first cites eleven “examples” of Metro Code, Oregon City Comprehensive Plan (OCCP) and OCMC requirements that she contends require that the Beaver Creek Road Concept Plan be adopted prior to annexation. We address them separately below.

a. OCCP Page 118 (Examples 1 and 2)

Petitioner sets out text from the city comprehensive plan that describes what Title 11 of the Metro Code requires of cities when land is included in the UGB. That text also describes a number of things the city could and should do.⁴ We agree with the city that nothing in the cited comprehensive plan text mandates prior approval of the Beaver Creek Road Concept Plan before the disputed annexation could be approved. The closest the cited text comes to lending any support to petitioner’s position is the part that states that one of Metro Code Title 11 purposes is met “by ensuring that concept plans are developed for areas proposed for urbanization or annexation.” See n 4. But the quoted statement in the OCCP that an intent in Metro Code Title 11 is met by ensuring that concept plans are developed for areas proposed for urbanization or annexation imposes no legal requirement, by itself. Metro

⁴ The cited text is as follows:

“Title 11 requires cities to include the land within their Urban Growth Boundaries in their Comprehensive Plans prior to urbanizing that land. Title 11 intends to promote the integration of land added to the Urban Growth Boundary with existing communities by ensuring that concept plans are developed for areas proposed for urbanization or annexation. * * * Metro requires Oregon City to adopt concept plans for areas added to the Urban Growth Boundary.

“Once inside the Urban Growth Boundary, areas can be proposed for annexation. * * * The City should consider its ability to adequately provide public facilities and services to an area * * *.

“Rather than asking voters to approve property owners’ requests to annex one at a time, the City should implement an annexation plan. The City could then annex large blocks of properties, with voter approval, rather than in a piecemeal fashion. Annexation would be tied more directly to the City’s ability to provide services efficiently * * *. The zoning of the property should be considered when the Planning Commission and City Commission review the annexation request.” OCCP 118.

1 Code Title 11 may impose such a requirement, but the quoted OCCP *description* of that
2 requirement does not impose that requirement.

3 **b. Metro Code 3.07.1120 (Example 3)**

4 Petitioner next relies on Metro Code 3.07.1120.⁵ Metro Code 3.07.1120 requires the
5 city adopt comprehensive plan provisions for land that is included in the UGB and requires
6 that the city comprehensive plan include a requirement that such land be annexed before it is
7 allowed to urbanize. A Metro Ordinance that was adopted on December 5, 2002 gave cities
8 four years to do so, but the city has not yet done so.

9 Metro Code 3.07.1120 is concerned with ensuring that annexation precedes
10 urbanization. Like the city, we do not see that Metro Code 3.07.1120 says anything about
11 whether the city may annex property before it adopts the required concept plan for such
12 property.

13 **c. OCMC 14.04.060(2) (Example 4)**

14 OCMC 14.04.060 sets out seven “factors” the city must “consider” when deciding
15 whether to approve an annexation request. *See* n 13. Factor OCMC 14.04.060(A)(2) is as
16 follows:

17 “Conformity of the proposal with the city’s comprehensive plan[.]”

⁵ Metro Code 3.07.1120 provides, in part:

All territory added to the UGB as either a major amendment or a legislative amendment pursuant to Metro Code Chapter 3.01 shall be subject to adopted comprehensive plan provisions consistent with the requirements of all applicable titles of the Metro Urban Growth Management Functional Plan * * *. The comprehensive plan provisions shall be fully coordinated with all other applicable plans. * * * *Comprehensive plan amendments shall include:*

“* * * * *

“B. *Provision for annexation to the district and to a city or any necessary service districts prior to urbanization of the territory[.]*” (Emphasis added).

1 In addressing OCMC 14.04.060(A)(2), the city found that “the City’s Comprehensive Plan is
2 satisfied or will be satisfied with the adoption of the Beaver Creek Road Concept Plan * * *.”
3 Record 64.

4 Whatever the adequacy of the city’s finding concerning annexation factor OCMC
5 14.04.060(A)(2), neither that finding nor OCMC 14.04.060(A)(2) itself operate to create a
6 legal requirement that the Beaver Creek Road Concept Plan be adopted before the disputed
7 annexation is approved.

8 **d. OCCP Policies 11.1.1 and 14.4.2 (Example 5)**

9 OCCP Policy 11.1.1 is as follows:

10 “Ensure adequate public funding for the following public facilities and
11 services, if feasible[.]

12 OCCP Policy 14.4.2 is as follows:

13 “Include an assessment of the fiscal impacts of providing public services to
14 unincorporated areas upon annexation, including the costs and benefits to the
15 city as a whole as a requirement for concept plans.”⁶

16 The city’s findings concerning OCCP Policy 11.1.1 took the position that the
17 Beaver Creek Road Concept Plan would address the public facility impacts of urban
18 development of the annexed property. Record 58.

19 That finding may or may not be adequate to establish that the disputed annexation is
20 consistent with OCCP Policy 11.1.1. But that is not the question presented under
21 subassignment of error B. Neither Policy 11.1.1 nor Policy 14.4.2 impose a legal

⁶ The quoted text of Policy 14.4.2 is taken from the copy of the City Comprehensive Plan that is available on the city’s webpage. The text of Policy 14.4.2 set out at Record 63 is worded slightly differently and is set out below:

“Concept Plans * * * for unincorporated areas within the Urban Growth Boundary shall include an assessment of the fiscal impacts of providing public services to the area upon annexation, including the costs and benefits to the city as a whole.” Record 63.

1 requirement that the Beaver Creek Road Concept Plan be adopted before the disputed
2 annexation.

3 **e. OCCP Policy 2.6.8 (Example 6)**

4 OCCP Policy 2.6.8 is as follows:

5 “Require lands east of Clackamas Community College that are designated as
6 Future Urban Holding to be the subject of concept plans, which if approved as
7 an amendment to the Comprehensive Plan, would guide zoning designations.
8 The majority of these lands should be designated in a manner that encourages
9 family-wage jobs in order to generate new jobs and move towards meeting the
10 city’s employment goals.”

11 The subject property falls within the area described in the first clause of OCCP Policy
12 2.6.8. Petitioner argues that OCCP Policy 2.6.8 anticipates that the Beaver Creek Road
13 Concept Plan would be in place before annexation.

14 The city responds that although OCCP Policy 2.6.8 anticipates that the Beaver Creek
15 Road Concept Plan will be in place to guide *zoning* of the subject property that policy does
16 not anticipate or require that the Beaver Creek Road Concept Plan necessarily will be in place
17 before the disputed area is *annexed*. Based on the text of OCCP Policy 2.6.8, we agree with
18 the city.

19 **f. OCMC 14.04.050(E) (Example 7)**

20 OCMC 14.04.050(E) sets out the required contents of an annexation application. In
21 several places OCMC 14.04.050(E) refers to the “anticipated development” and “proposed
22 development.” Petitioner argues the applicant proposes urban development in the annexed
23 area and expresses concern that such development could occur before the Beaver Creek Road
24 Concept Plan is adopted.

25 The city responds that the FU-10 zone, which remains in place after the annexation,
26 would not permit urban development of the annexed property. New comprehensive plan and
27 zoning map designations will have to be adopted before the annexed property could be
28 developed for urban uses. The city concedes that the Metro Code and the OCCP require that

1 the Beaver Creek Road Concept Plan must be adopted before the annexed territory can be
2 planned and zoned in a manner that would allow the annexed property to be developed with
3 urban uses. However, we understand the city to argue that the requirement that the
4 Beaver Creek Road Concept Plan must be adopted before the subject property can be
5 developed with urban uses has no bearing on whether the Beaver Creek Road Concept Plan
6 must be adopted before the subject property is *annexed*. We agree with the city.

7 **g. OCCP Policy 14.4.3 (Examples 8 and 9)**

8 OCCP page 118 explains that Metro Code Title 11 directs the city to adopt a Concept
9 Plan to guide annexations. That page of the comprehensive plan also says the city “should”
10 adopt an annexation plan. OCCP Policy 14.4.3 sets out certain considerations that may be
11 relied upon to require that a proposed annexation be enlarged to include other properties.⁷
12 Petitioner argues that without the Beaver Creek Road Concept Plan the city cannot adopt and
13 implement an annexation plan, and without the Beaver Creek Road Concept Plan the city
14 cannot require that adjacent parcels be included in the annexation.

15 As in other arguments petitioner presents under this subassignment of error and
16 elsewhere in the petition for review, petitioner identifies OCCP and OCMC language that is
17 consistent with having the Beaver Creek Road Concept Plan in place before approving the
18 disputed annexation. But that is not the same thing as citing language that *requires that* the
19 Beaver Creek Road Concept Plan be adopted before the disputed annexation. Nothing on

⁷ OCCP Policy 14.4.3 provides:

“Evaluate and in some instances require that parcels adjacent to proposed annexations be included to:

- “• avoid creating unincorporated islands within the city;
- “• enable public services to be efficiently and cost-effectively extended to the entire area; or
- “• implement a concept plan or sub-area master plan that has been approved by the Planning and City Commissions.”

1 page 118 of the OCCP and nothing in the language of Policy 14.4.3 imposes a legal
2 requirement that the Beavercreek Road Concept Plan must be adopted before any land that
3 may be subject to the concept plan can be annexed.

4 **h. OCMC 17.06.050 (Example 10)**

5 OCMC 17.06.050 governs zoning of land that is annexed by the city and requires that
6 the city apply a final zoning classification within 60 days after the property is annexed.⁸

7 Petitioner’s entire argument regarding this example is set out below:

8 “The city is to designate the final zoning within 60 days of annexation. This
9 can’t happen without the Concept Plan being adopted.” Petition for Review
10 12 (citations omitted).

11 The city responds that the county’s FU-10 zoning is “final zoning,” within the
12 meaning of OCMC 17.06.050. The city contends that although the decision anticipates that
13 zoning will change at the conclusion of the Beavercreek Road Concept Plan, that does not
14 mean that the FU-10 zoning cannot constitute the “final zoning” that is required by OCMC
15 17.06.050.

16 We need not and do not decide here whether the city’s plan to leave the county FU-10
17 zoning in place is consistent with OCMC 17.06.050.⁹ The only question we must resolve
18 under this subassignment of error is whether OCMC 17.06.050 establishes a legal

⁸ OCMC 17.06.050 provides:

“All lands within the urban growth boundary of Oregon City have been classified according to the appropriate city land use designation as noted on the comprehensive plan map (as per the city/county urban growth management area agreement). The planning department shall complete a review of the final zoning classification within sixty days after annexation. The zoning classification shall reflect the city land use classification as illustrated in Table 17.06.050.”

The referenced Table 17.06.050 shows the city zoning districts that correspond to various city comprehensive plan designations.

⁹ If we were required to reach that question, the city’s position that the *county* zoning that was applied to the property before it was annexed and continues to apply to the property qualifies as the “final zoning classification” that is required by OCMC 17.06.050 seems highly suspect. OCMC 17.06.050 seems clearly to envision application of the appropriate “city” zoning, not the “county” zoning that applied before annexation.

1 requirement that the Beavercreek Road Concept Plan be adopted before the disputed
2 annexation. OCMC 17.06.050 clearly does not impose that requirement. OCMC 17.06.050
3 specifies action that the county must take *after* property is annexed; it says nothing about
4 what a city must do *before* property is annexed or at the time property is annexed.

5 **i. Bad Faith (Example 11)**

6 We quote petitioner’s eleventh example below:

7 “When the application for annexation [precedes] adoption of the draft
8 Concept Plan, which is already so close to adoption that the Planning and City
9 Commissions are expecting it imminently, the applicant and City are placed in
10 the position of racing the Concept Plan to adoption and of acting in bad faith
11 as the term is understood in common law, which is fatal to the application.
12 * * *” Petition for Review 12.

13 Petitioner’s eleventh example provides no basis for concluding that prior adoption of
14 the Beavercreek Road Concept Plan is legally required before the subject property can be
15 annexed.

16 **j. Conclusion**

17 Some of petitioner’s eleven examples of Metro Code, OCCP and OCMC
18 requirements establish criteria that may be difficult or impossible to comply with because the
19 Beavercreek Road Concept Plan was not adopted and in place before the disputed annexation
20 was approved. But even if that is the case, that would simply mean that the annexation
21 would have to be remanded if petitioner assigns error to the city’s failure to demonstrate that
22 the annexation complies with one or more applicable annexation approval criteria. Under
23 this subassignment of error, petitioner makes a very different argument. That argument is
24 that the examples establish the existence of a legal requirement that the city must adopt the
25 Beavercreek Road Concept Plan before taking action to annex land that will be subject to the
26 Concept Plan. Whether those examples are viewed separately or collectively, they simply do
27 not impose that legal requirement.

1 **3. City Commission and Planning Commission Discomfort with**
2 **Approving the Annexation First**

3 The second of petitioner’s three legal theories for why she believes the Beavercreek
4 Road Concept Plan must be adopted before the annexation can be approved is that the
5 planning commission and city commission were uncomfortable with proceeding with the
6 annexation before the Beavercreek Road Concept Plan was adopted.

7 That theory is without merit, and we reject it.

8 **4. Other OCCP Goals and Policies**

9 The third and final theory petitioner advances in support of subassignment of error B
10 is not clear. That legal theory appears to be that additional OCCP Goals and Policies legally
11 require the city to adopt the Beavercreek Road Concept Plan before the area that will be
12 subject to that plan can be annexed. Some of the OCCP Goals and Policies that petitioner
13 cites this final legal theory were previously cited under petitioner’s first legal theory.

14 Setting out the text of all the OCCP Goals and Policies that petitioner cites here
15 would needlessly lengthen and further complicate this opinion. None of the cited OCCP
16 Goals and Policies supports petitioner’s argument under subassignment of error B that the
17 Beavercreek Road Concept Plan must be adopted before the city can annex the disputed 122
18 acres. Only three of the cited OCCP Goals and Policies, Goal 14.4 and Policies 14.4.2 and
19 14.4.3, specifically address annexation.¹⁰ OCCP Goal 14.4 requires the city to consider the

¹⁰ Those OCCP provisions are set out below:

“Goal 14.4 Annexation of Lands to the City

“Annex lands to the city through a process that considers the effects on public services and the benefits to the city as a whole and ensures that development within the annexed area is consistent with the Oregon City Comprehensive Plan, City ordinances, and the City Charter.”

“Policy 14.4.2

“Include an assessment of the fiscal impacts of providing public services to unincorporated areas upon annexation, including the costs and benefits to the city as a whole as a requirement for concept plans.

1 impacts of providing public services to the annexed area and to ensure that development of
2 annexed areas is consistent with the OCCP. OCCP Policy 14.4.2 requires that concept plans
3 assess the fiscal impacts of providing public services to unincorporated areas upon
4 annexation. OCCP Policy 14.4.3 authorizes the city to enlarge areas proposed for annexation
5 in certain circumstances. One of those circumstances is the additional territory is needed to
6 “implement a concept plan or sub-area master plan that has been approved by the Planning
7 and City Commissions.”

8 OCCP Goal 14.4 is the provision that seems most consistent with and most
9 supportive of petitioner’s view. That policy specifically applies to annexation decisions and
10 requires that the city “[a]nnex lands to the City *through a process* that considers the effects
11 on public services and the benefits to the city as a whole.” (Emphasis added.) The city
12 certainly could interpret that reference to be a reference to the “annexation process.” Other
13 OCCP language and polices, including OCCP Policies 14.4.2 and 14.4.3, which are
14 discussed above, are consistent with such an interpretation.

15 The city assumes in its decision that the planning and zoning that will be required to
16 urbanize the subject 122 acres will be determined in the yet-to-be completed Beaver creek
17 Road Concept Plan planning process. Until the city knows how the annexed area will
18 urbanize, *i.e.* until the Beaver creek Road Concept Plan is completed, it is not possible
19 consider “the effects on public services and the benefits to the city as a whole” in any

“*Policy 14.4.3*

“Evaluate and in some instances require that parcels adjacent to proposed annexations be included to:

- “• avoid creating unincorporated islands within the city;
- “• enable public services to be efficiently and cost-effectively extended to the entire area; or
- “• implement a concept plan or sub-area master plan that has been approved by the Planning and City Commissions.”

1 meaningful way. That is why the city has effectively deferred that consideration to the
2 Beavercreek Road Concept Plan process.¹¹ If the “process” that is referenced in OCCP Goal
3 14.4 must be limited to the annexation process, such a deferral is improper and OCCP Goal
4 14.4 likely would have the legal effect of forcing the city to wait until the Beavercreek Road
5 Concept Plan is adopted before it proceeds with annexation with the Beavercreek Road
6 Concept Plan area.

7 However, it is clear from the findings that the city adopted to address OCCP Goal
8 14.4 and related provisions that it does not interpret OCCP Goal 14.4 in that manner.
9 Therefore, the question we must answer is whether the text of OCCP Goal 14.4, viewed in
10 context, requires that the adequacy of public facilities to serve annexed territory once it is
11 fully urbanized must be demonstrated in the “annexation process,” making the city’s reliance
12 on a post-annexation *planning* process inconsistent with OCCP Goal 14.4. While the
13 question is a reasonably close one, we do not believe the city’s contrary interpretation is
14 reversibly wrong under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524,
15 69 P3d 759 (2003).¹² The nature, scope and extent of the “process” envisioned by OCCP

¹¹ The city’s findings addressing OCCP 14.4 are set out below:

“The city annexation process is set out in Chapter 14 of the [OCMC]. By requiring compliance with that code, the Metro Code, and the statewide Planning Rules, the city is identifying the effects of the full build-out of these annexed properties will have on public services and any benefit to the city as a whole. As part of the Beavercreek Road Concept Plan adoption, appropriate Master Plans, such as the Transportation System Plan, Water and Sewer Master Plans for example, will be updated to address the anticipated impacts.” Record 63.

¹² ORS 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;

1 Goal 14.4 is not expressly limited to the annexation process. Therefore, the city’s
2 interpretation that the process can include a required post-annexation planning process is not
3 inconsistent with the text of OCCP Goal 14.4.

4 The underlying purpose of OCCP Goal 14.4 and related city and Metro provisions
5 appears to be to ensure that (1) a concept plan will precede actual urbanization of the
6 annexed areas, (2) concept plans will provide the basis for planning and zoning of annexed
7 areas for urban development, and (3) adequate and sufficient public facilities are extended to
8 annexed areas as they urbanize in a way that does not financially burden or adversely affect
9 public facilities and services in other parts of the city. As we have explained elsewhere in
10 this opinion, the city took steps to ensure that urbanization cannot occur until the
11 Beaver Creek Road Concept Plan has been completed. The Beaver Creek Road Concept Plan
12 planning process must address public facility impacts of urbanization. While a number of
13 contextual OCCP provisions seem to envision that planning and zoning for urbanization will
14 precede annexation, those contextual provisions are not unworkable if annexation is the first
15 step. Stated differently, as far as the apparent underlying purpose is concerned, it does not
16 appear to matter whether planning and zoning comes before or after annexation, so long as
17 such planning and zoning is completed before the annexed property is allowed to urbanize.
18 While it is a reasonably close question, we conclude that OCCP Goal 14.4 and related OCCP
19 and OCMC provisions not require that the Beaver Creek Road Concept Plan must be in place
20 before the city can annex any property within the Beaver Creek Road Concept Plan planning
21 area.

22 For the reasons explained above, subassignment of error B is denied.

“(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 **C. The City Failed to Analyze the Annexation Based on Potential**
2 **Development of the Annexed Area**

3 Subassignment of error C concerns OCMC 14.04.060(A). OCMC 14.04.060(A) sets
4 out “factors” that the city must “consider” in reviewing an annexation proposal. Among the
5 factors that the city must consider are whether the proposal conforms to the city’s
6 comprehensive plan and whether the city has adequate and available public services and
7 facilities to serve the potential development.¹³ In addressing OCMC 14.04.060(A) the city
8 adopted a two-part view of potential development: (1) the potential development under the
9 FU-10 zone (which the city found to be insignificant and adequately served by existing
10 public facilities) and (2) the potential development when that existing holding zone is
11 replaced by new city zoning for urban development (which will be identified in the not-yet-
12 completed Beavercreek Road Concept Plan, a plan that will also address and resolve public
13 facility impacts):

14 “[T]he Facilities and Services discussion of the staff report indicate that there
15 are adequate services to support the annexation at the zoning designation of
16 FU-10. To the extent additional development will occur, the property will
17 have to be re-zoned, which will not occur until the Concept Plan has been
18 approved. The Concept Plan will have to demonstrate that public facilities
19 and services for potential development will be accounted for once the
20 Beavercreek Road Concept Plan is adopted. The concept plan will identify

¹³ OCMC 14.04.060(A) provides, in part:

“When reviewing a proposed annexation, the commission shall consider the following factors, as relevant:

“* * * * *

“2. Conformity of the proposal with the city’s comprehensive plan;

“3. Adequacy and availability of public facilities and services to service potential development;

“* * * * *

“7. Lack of any significant adverse effects on the economic, social and physical environment of the community by the overall impact of the annexation.”

1 the impacts to the public facilities and services and the remedies necessary to
2 accommodate the potential development on the annexed properties.” Record
3 37.

4 We understand petitioner to raise two related but separate issues under this
5 subassignment of error. Under OCMC 14.04.060(A)(2) and (3), the city was required to
6 consider the “proposal” and “potential development.” We understand petitioner to argue first
7 that it was error for the city to ignore the development that is actually proposed in the
8 disputed annexation application and instead defer comprehensive plan conformance
9 questions and public facilities and services adequacy questions that may be posed by future
10 urbanization of the annexed territory to the not-yet-completed Beaver Creek Road Concept
11 Plan.”¹⁴ Second, we understand petitioner to argue that even if the city’s two-step approach
12 is permissible, the record shows the city cannot even provide adequate public facilities for
13 existing development on the 122 acres and the minimal additional development that is
14 possible under FU-10 zoning.

15 **1. Waiver**

16 The city argues petitioner waived both of the issues presented under subassignment of
17 error C. We agree with the city that the record citations provided by petitioner do not
18 demonstrate that the second issue was raised below. Petitioner’s stated concerns below with
19 regard to the adequacy of public facilities were with the alleged inadequacy of those facilities
20 to serve the more intense urban development that the annexation will make possible, not the
21 sparse existing development or the additional sparse development that may be possible under
22 FU-10 zoning. However, we do not agree with the city that petitioner failed to raise the first
23 issue. The alleged impermissibility of relying on the not-yet-adopted Beaver Creek Road
24 Concept Plan was a constant theme in the testimony of petitioner and other annexation
25 opponents.

¹⁴ The application proposes approximately 2 million square feet of commercial development and approximately 1,500 units of residential development. Record 680.

1 **2. The City’s Reliance on the Beaver Creek Road Concept Plan**

2 At its core, the remaining issue is not that complicated. The parties simply interpret
3 the legal requirement that is imposed by OCMC 14.04.060(A) differently. See n 13.
4 Petitioner apparently reads OCMC 14.04.060(A) to require that the city *consider* the
5 annexation “proposal” and any “potential development” under that proposal and *establish*
6 that such potential urban development presently conforms to the city’s comprehensive plan
7 and that adequate public facilities and services are now available or already planned to serve
8 that potential urban development before approving the annexation. If that is what OCMC
9 14.04.060(A) requires, the city’s decision must be remanded. At the time the city adopted
10 the challenged decision, the city did not know for sure what urban development will be
11 proposed under the Beaver Creek Road Concept Plan. Whether the “proposal” or the
12 “potential development” that is referred to in OCMC 14.04.060(A) is the development
13 proposed in the application or the development that will be allowed under the Beaver Creek
14 Road Concept Plan the city did not know how or whether adequate public facilities will be
15 available for that urban development at the time the city approved the disputed annexation.

16 Although the city adopted no express interpretation of OCMC 14.04.060(A), it is
17 quite clear that the city does not interpret OCMC 14.04.060(A) in the same way petitioner
18 does.¹⁵ The city apparently interprets OCMC 14.04.060(A) not to require, at the time of
19 annexation, that the comprehensive plan authorize the ultimate urban development that is
20 anticipated following annexation. The city also interprets OCMC 14.04.060(A) not to
21 require that public facilities exist or that plans for public facilities to support the ultimate
22 urban development that will be allowed under future plan and zoning amendments be in

¹⁵ The closest the city comes to rejecting petitioner’s interpretation and explaining its own express interpretation is as follows:

“The City’s Code contains provisions on annexation processing. Section 6 of Chapter 14 [which appears to be a reference to OCMC 14.04.060(A)] requires the City Commission ‘to consider the following factors, as relevant’[.]” Record 64.

1 place at the time of annexation. Rather, the city interprets OCMC 14.04.060(A) to require
2 that the city “consider” the ultimate comprehensive planning for the annexed area and to
3 “consider” the adequacy and availability of public services and facilities to serve that urban
4 development as “relevant factors.” We understand the city to argue that since (1) annexation,
5 in and of itself, authorizes no additional urban development of the annexed property, (2) no
6 urban development of the 122 annexed acres is allowed or will be allowed under the existing
7 FU-10 zoning, (3) no urban development will be possible before the Beaver Creek Road
8 Concept Plan is adopted and necessary comprehensive plan and zoning amendments are
9 adopted to allow urbanization of the annexed area, and (4) the Beaver Creek Road Concept
10 Plan will be required to address the public facilities and services that will be needed for
11 urbanization of the plan area, the city’s findings that recognize and point out these facts are
12 sufficient to “consider” the “relevant factors” set out in OCMC 14.04.060(A).

13 We conclude that the decision includes the above-described implied interpretation of
14 OCMC 14.04.060(A). We also agree with the city that the city’s interpretation and
15 application of OCMC 14.04.060(A) is not reversible under ORS 197.829(1) and *Church v.*
16 *Grant County*. See *Alliance for Responsible Land Use v. Deschutes Cty*, 149 Or App 259,
17 265-67, 942 P2d 836 (1997) (LUBA may not substitute its interpretation for express or
18 implied interpretations of a local governing body).

19 **D. Bad Faith**

20 Under subassignment of error D, petitioner makes a “bad faith” argument. Petitioner
21 appears to be concerned that the city’s approval of the disputed annexation before the
22 Beaver Creek Road Concept Plan is complete may allow the applicant to qualify for a vested
23 right to develop in ways that would be inconsistent with the Beaver Creek Road Concept Plan
24 when it is ultimately adopted. Petitioner never explains how this vesting of rights might
25 come to pass and seems to recognize that because the annexation applicant has knowledge of
26 the pending adoption of the Beaver Creek Road Concept Plan it is highly unlikely that a

1 vested rights theory under *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973)
2 would allow the applicant to assert a vested right to develop in ways that are inconsistent
3 with the Beaver Creek Road Concept Plan.

4 The city argues that petitioner waived this argument by failing to raise the issue
5 below. The city also contends the bad faith argument is without merit. We agree with the
6 city on both points.

7 **E. OCMC 17.06.050**

8 As we noted in discussing Example 10 under subassignment of error B above, OCMC
9 17.06.050 establishes a 60-day deadline for applying city zoning to annexed property. Under
10 subassignment of error E, petitioner argues the city erred by annexing the subject property
11 when it knew it would not be able to comply with OCMC 17.06.050 because the Beaver Creek
12 Road Concept Plan would not be completed in time to meet that deadline.

13 The city argues that the decision that is before LUBA is the annexation decision. The
14 city contends that acts or failures to act that occur after that decision cannot provide a basis
15 for reversing or remanding the annexation decision. We agree with the city.

16 Subassignment of error E is denied.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 **A. Legal Background**

20 Petitioner's second assignment of error begins with a section that is entitled "Legal
21 Background." Many of the cited OCCP and OCMC provisions that petitioner cites in the
22 "Legal Background" discussion under the second assignment of error were cited in the first
23 assignment of error. The Legal Background section is followed by five subassignments of
24 error, some of which have several sub-subassignments of error. As we explain below,
25 petitioner and the city simply disagree about the nature of the legal obligation that those

1 OCCP and OCMC provisions impose on the city, at the time of annexation. We set out
2 petitioner’s Legal Background discussion before turning to her subassignments of error.

3 “Like State law, Metro ordinances, and County ordinances which require
4 ensuring public facilities and services can be provided, there are many parts of
5 the City’s Comprehensive Plan and Code which concern measures of the
6 ability of the City to provide public facilities and services to the newly
7 annexed land: a) the City is required to ensure the ‘adequacy and availability
8 of public facilities and services’;^[16] b) ‘public facilities and services [are to
9 be] provided in a timely, orderly and efficient manner’;^[17] c) [w]ith
10 annexation of large blocks according to the plan, ‘Annexation would be tied
11 more directly to the City’s ability to provide services efficiently’;^[18] d) ‘The
12 City should consider its ability to adequately provide public facilities and
13 services’;^[19] e) ‘* * * ensure adequate public funding for the following urban
14 facilities and services, if feasible’;^[20] f) the City is to ‘ensure the cost of
15 providing new public services * * * are born by the entity responsible for the
16 new development to the maximum extent allowed under state law’;²¹ g) the
17 City is to ‘ensure’ the provision of services doesn’t ‘diminish the delivery of
18 those same services to existing areas and residents’;^[22] h) ‘[Annex lands to
19 the City through a process that considers] the effects on public services and
20 the benefits to the city as a whole’;^[23] and i) the City is to consider a ‘lack of

¹⁶ The quoted language is from OCMC 14.04.060(A)(3) which, which is one of the “factors” the city must “consider” when reviewing an application for annexation. That text was set out earlier at n 13.

¹⁷ The quoted language appears on page 79 of the OCCP, which addresses public facilities.

¹⁸ The quoted language appears at page 118 of the OCCP, which addresses Urbanization. That language was quoted earlier at n 4.

¹⁹ The quoted language appears at page 118 of the OCCP, which addresses Urbanization. That language was quoted earlier at n 4.

²⁰ The quoted language is from OCCP Plan Policy 11.1.1, which was quoted earlier in our discussion of Example 5.

²¹ The quoted language is from Policy 14.3.4 which appears in the Urbanization Section of the OCCP. *See* n 26.

²² The quoted language is from Policy 14.3.2 which appears in the Urbanization Section of the OCCP.

²³ The quoted language is from Goal 14.4, which appears in the Urbanization Section of the OCCP and addresses annexation. Goal 14.4 is set out at n 10.

1 any significant adverse effects on the economic, social and physical
2 environment of the community’^[24][.]” Petition for Review 25-26.

3 Petitioner then offers the following “summary” of the above listed OCCP and OCMC
4 provisions:

5 “In summary, at annexation the City is obligated to determine if it can provide
6 public facilities and services to the potential new development through the
7 developer’s funding and its own funding without diminishing services to the
8 existing City residents or causing economic, social and physical adversities,
9 since the City will be responsible to provide services once the annexation is
10 approved.”

11 **B. Subassignments of Error B, C and D**

12 Just as petitioner argued the above described OCCP and OCMC provisions mandate
13 that the Beaver creek Road Concept Plan and implementing comprehensive planning and
14 zoning must precede annexation, petitioner argues at length under these assignments of error
15 that the detailed public facility and service planning that will be required to urbanize the
16 annexed 122 acres must precede annexation.

17 An erroneous assumption on petitioner’s part, which permeates the petition for
18 review, is that once the disputed 122 acres are annexed, the city will be immediately
19 obligated to provide public facilities and services to the property to allow urbanization to go
20 forward immediately. The city may be legally obligated to provide public facilities and
21 services to those 122 acres at some point following annexation, but petitioner cites nothing
22 that requires that the city immediately do so. Specifically, petitioner cites nothing that would
23 legally require that the city extend public facilities and services before the Beaver creek Road
24 Concept Plan planning process that will establish the nature of that urbanization and how the
25 necessary public facilities will be provided and paid for is complete. Until those 122 acres

²⁴ The quoted language is from OCMC 14.04.060(A)(7) which is one of the “factors” the city must “consider” when reviewing an application for annexation. That text was set out earlier at n 13.

1 are planned and zoned in a way that allows them to be urbanized, the public facilities and
2 public services needed by the subject 122 acres will remain essentially unchanged.

3 In rejecting petitioner’s third legal theory under subassignment of error B of her first
4 assignment of error, we addressed OCCP Goal 14.4, which requires that the city “[a]nnex
5 lands to the city through a process that considers the effects on public services and the
6 benefits to the city as a whole and ensures that development within the annexed area is
7 consistent with the Oregon City Comprehensive Plan, City ordinances, and the City Charter.”
8 *See* n 10. In rejecting petitioner’s subassignment of error C under her first assignment of
9 error, we considered OCMC 14.04.060(A), which requires that the city consider a number of
10 factors when considering an annexation proposal. *See* n 13. Among those factors are
11 whether the annexation conforms to the comprehensive plan, and whether the public
12 facilities that will be needed for the potential urban development that will be made possible
13 by the annexation are adequate and available. We ultimately concluded in rejecting
14 subassignments of error B and C under the first assignment of error that the city did not
15 violate its obligations under those OCCP and OCMC requirements because it has ensured
16 that the 122 acres will not urbanize until the required land use and public facilities planning
17 is completed under the Beaver Creek Road Concept Plan. The additional legal requirements
18 that petitioner cites in her discussion of the “Legal Background” above and addresses in her
19 arguments under subassignments of error B, C and D under her second assignment of error
20 do not materially add to the legal obligations the city has under OCCP Goal 14.4 and OCMC
21 14.04.060(A)(2)(3). The conclusions that we reached there in addressing the city’s
22 interpretation and application of OCCP Goal 14.4 and OCMC 14.04.060(A)(2) and (3)
23 require that we deny petitioner’s subassignments of error B, C and D under the second
24 assignment of error.

25 Subassignments of error B, C and D are denied.

1 **C. Subassignment of Error E**

2 Under subassignment of error E, petitioner argues the ballot title that the challenged
3 resolution adopted and placed before the voters on November 6, 2007 is not supported by
4 adequate findings or substantial evidence. According to petitioner, the city has not
5 adequately explained how the annexed property can be adequately served with necessary
6 public facilities and petitioner contends that the record does not demonstrate that the
7 facilities and services needed for urbanization can be provided to the 122 acres.

8 Subassignment of error E relies on petitioner’s view that public facility planning and
9 land use planning and zoning must precede both urbanization and annexation under the
10 OCCP and OCMC. We have rejected that view. Because we reject that view, subassignment
11 of error E provides no basis for reversal or remand.²⁵

12 Subassignment of error E is denied.

13 **D. Subassignment of Error F**

14 Under subassignment of error F, petitioner argues the disputed annexation violates
15 OCCP 14.3.4.²⁶ We understand petitioner to argue the city should have ensured in its
16 annexation decision that the public services that will be needed at the time the annexed
17 property is urbanized are paid for by system development charges, to the maximum extent
18 allowed by law.

19 As we have already explained, the city has not yet determined how the subject
20 property will be urbanized, what public facilities and services will be required when the

²⁵ It also seems unlikely that LUBA has jurisdiction to review an election ballot title that was voted on in a November 2007 election, for a number of reasons.

²⁶ OCCP Policy 14.3.4 provides:

“Ensure the cost of providing new public services and improvements to existing public services resulting from new development are borne by the entity responsible for the new development to the maximum extent allowed under state law for Systems Development Charges.”

1 annexed area does urbanize, and how those needed public facilities and services will be paid
2 for when the subject property does urbanize. Those determinations will be made in the
3 Beavercreek Road Concept Plan planning process. When those determinations are made
4 during the Beavercreek Road Concept Plan planning process, it may be that OCCP 14.3.4
5 will have some bearing on that planning process. But since the city’s annexation decision
6 does not decide how the annexed territory will be urbanized or how any needed public
7 services will be provided and paid for, and the Beavercreek Road Concept Plan will make
8 these decisions, it follows that the annexation decision does not violate OCCP 14.3.4.

9 Subassignment of error F is denied

10 The second assignment of error is denied.

11 **THIRD ASSIGNMENT OF ERROR**

12 Under her third assignment of error, petitioner argues the UGB amendment that
13 included the subject property inside the UGB was justified based on a need for industrial
14 land. We understand petitioner to contend that there is still a need for industrial land.
15 Petitioner points out that Metro requires that land that is included in the UGB to meet
16 industrial land needs must be planned and zoned for industrial use and protected for such
17 industrial use. The OCCP similarly requires that the city provide an adequate supply of land
18 for industrial use and protect such lands from inappropriate development. Petitioner
19 contends that because the annexation applicant’s proposal and the draft Beavercreek Road
20 Concept Plan both call for commercial and residential development within the subject 122
21 acres, the annexation violates Metro and OCCP requirements that industrial land be protected
22 for industrial use. One of those OCCP requirements is OCCP Goal 2.6, which provides:

23 “Industrial Land Development: Ensure an adequate supply of land for major
24 industrial employers with family-wage jobs.”

25 The challenged decision includes the following findings addressing OCCP Goal 2.6:

26 “The Beavercreek Road Concept Plan is being completed and will create a
27 community that provides for industrial, employment, office and residential

1 uses arranged in a manner that maximizes the available services and provides
2 for a mix of supporting uses. The proposed lands for annexation will receive
3 the zoning as identified within the concept plan once approved. The
4 preliminary concept plan identifies a small area of industrial lands within the
5 proposed annexation area that will add to the industrial lands within the city.”
6 Record 57.

7 Once again, petitioner’s assignment of error is based on erroneous assumptions about
8 what the disputed annexation does and what the disputed annexation must do under the cited
9 Metro and OCCP provisions that require an adequate supply of industrial land. Petitioner’s
10 arguments under the third assignment of error all appear to be directed at the Beaver Creek
11 Road Concept Plan, which will determine how much of the annexed area will be developed
12 industrially. The city’s annexation decision does not determine how many of the annexed
13 122 acres will be developed industrially. Petitioner’s arguments under the third assignment
14 of error therefore provide no basis for reversal or remand.

15 The third assignment of error is denied.

16 **FOURTH ASSIGNMENT OF ERROR**

17 **A. Late Notice under Metro Code 3.09.030(E) and ORS 197.615(2)**

18 Metro Code 3.09.030(E) requires that within 30 days after a final decision on a
19 boundary change application, the reviewing entity must give written notice to “Metro and all
20 necessary parties.” Under ORS 197.615(2) a local government is required to give notice of a
21 post acknowledgment plan amendment to persons who have requested such notice.
22 Petitioner argues the city did not give notice until 44 days after its annexation decision was
23 rendered. Petitioner also asserts an undeveloped argument that the city’s action deprived
24 unspecified members of the public their right to equal protection of the law.

25 The city argues petitioners failed to raise any notice issue concerning Metro Code
26 3.09.030(E) or ORS 197.615(3). The city also argues that petitioner makes no attempt to

1 show how any procedural error the city may have committed under Metro Code 3.09.030(E)
2 or ORS 197.615(3) prejudiced petitioner’s substantial rights.²⁷

3 Petitioner does not respond to the city’s waiver defense, and makes no attempt to
4 show how the alleged delay in giving notice of the annexation decision prejudiced
5 *petitioner’s* substantial rights.

6 Subassignment of error A is denied.²⁸

7 **B. Resident Voters Who do not Own Property**

8 We understand petitioner to assign error to the city’s failure to protect the right of
9 voters who do not own property to participate in the annexation petition.

10 The city contends petitioner did not raise this issue below. Petitioner does not
11 respond to the city’s waiver defense. We therefore do not consider this subassignment of
12 error further.

13 Subassignment of error B is denied.

14 **C. Posted Notice Was Inadequate**

15 OCMC 17.50.100(B) requires that notice of certain city land use hearings must be
16 posted on the property in advance of the hearing. Such posted notice is to be “posted within
17 ten feet of the street and shall be visible to pedestrians and motorists.” Petitioner argues that
18 the notice posted by the applicant was inadequate for a number of reasons.

19 Petitioner speculates that the substantial rights of other persons who are not parties to
20 this appeal may have been prejudiced by the allegedly defective notice. However, petitioner
21 does not argue that her substantial rights were prejudiced. Without a demonstration that the

²⁷ Under ORS 197.835(9)(a)(B), LUBA may reverse or remand a land use decision if a local government “[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner.”

²⁸ Although we need not and do not reach the question, it also seems doubtful that the city’s annexation decision is accurately described as a post-acknowledgment plan amendment. If not, ORS 197.615(2) would not apply.

1 alleged notice defect under OCMC 17.50.100(B) prejudiced petitioner’s substantial rights
2 that alleged notice defect does not provide a basis for reversal or remand.

3 Subassignment of error C is denied.

4 **D. City Violated its Own Timeline**

5 We quote petitioner’s final subassignment of error below:

6 “The City failed to use its own time line for the November 2007 election App.
7 F.”

8 Subassignment of error D appears on page 50 of the petition for review. It is not
9 accompanied by any argument. The cited appendix F is a table. If we consider that table to
10 be petitioner’s argument in support of subassignment of error, petitioner’s petition for review
11 exceeds the 50-page limit specified by OAR 661-010-0030(2)(b).

12 One column on the appendix F table is labeled “City Timeline Date Requirement.”
13 The adjoining column is labeled “Actual Date.” The table indicates that four events occurred
14 after the listed “City Timeline Date Requirement.” The “Actual Date” column list a question
15 mark for two events. The table indicates the Election was held on the date specified in the
16 “City Timeline Date Requirement.”

17 Because considering appendix F to be part of the petition for review would make the
18 petition for review exceed the 50-page limit specified in our rules and because appendix F
19 makes no attempt to explain the source of the alleged timeline requirement or whether that
20 source specifies a legal consequence for failing to meet the timeline, appendix F is not a
21 sufficiently developed argument to provide a basis for reversal or remand. For both reasons
22 we reject subassignment of error D.

23 The fourth assignment of error is denied.

24 **INTERVENOR-PETITIONER KOSINSKI’S ASSIGNMENTS OF ERROR**

25 Intervenor-petitioner’s first assignment of error is denied for the same reasons we
26 rejected petitioner’s subassignment of error F under petitioner’s second assignment of error.

1 Intervenor-petitioner’s second assignment of error appears to allege that the
2 procedures the city has followed in adopting the Beaver Creek Road Concept Plan and a
3 neighboring concept plan violate OCCP Goals and Policies that encourage citizen
4 participation. Because these arguments are directed at the concept plans rather than the
5 annexation decision that is before us in this appeal, they provide no basis for reversal or
6 remand. Intervenor-petitioner’s second assignment of error is denied.

7 Intervenor-petitioner’s third assignment of error overlaps petitioner’s first assignment
8 of error and is denied for the same reasons we denied petitioner’s first assignment of error.

9 The city’s decision is affirmed.