BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CARLTON WOODARD and MARTIN KILMER,
Petitioners,

vs.

CITY OF COTTAGE GROVE,
Respondent,

and

RUSSELL LEACH and LORI LEACH,
Intervenors-Respondents.

LUBA Nos. 2008-022, 2008-054 and 2008-055

FINAL OPINION
AND ORDER

Appeal from City of Cottage Grove.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was the Goal One Coalition.

Gary R. Ackley, Cottage Grove, filed a response brief and argued on behalf of respondent. With him on the brief was Ackley Melendy & Kelly, LLP.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief was the Law Office of Bill Kloos, PC.

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

HOLSTUN, Board Member, did not participate in the decision.

REMANDED 08/05/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal three ordinances that rezone two properties recently annexed into the city, and adopt mixed use master plan overlay zones for the two properties.

FACTS

The challenged ordinances were re-adopted on remand from this Board. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007). We restate the relevant facts from that decision:

> "The subject property includes the Cottage Grove Speedway, which has been the direct or indirect subject of two previous LUBA appeals, *Leach v. Lane County*, 45 Or LUBA 580 (2003) and *Okray v. City of Cottage Grove*, 47 Or LUBA 297 (2004). The speedway operated for many years outside city limits as a nonconforming use, on a 17-acre parcel adjoining the Willamette River. In 2003, the city annexed the site, and subsequently conducted legislative proceedings to adopt a new Parks & Recreation (PR) Zone intended for the speedway. Under the PR zone, a speedway is allowed subject to approval of a Mixed Use Master Plan (MUMP), which applies as an overlay zone. The ordinances challenged in the present appeals apply the PR zone and adopt MUMPs for the speedway site and an adjoining site that includes the Western Oregon Exposition center. The MUMPs propose that the exposition site be used to provide additional parking for speedway events." *Id.* at 177-78.

We remanded the ordinances for the city to correct a prejudicial procedural error, and therefore did not address the petitioners' substantive challenges to the ordinances. On remand, the city council conducted new proceedings and voted to re-adopt the same ordinances without amendments or additional findings. These appeals followed.

FIRST ASSIGNMENT OF ERROR

The two properties, the Speedway and the Western Oregon Exposition (WOE) center, both carry a city comprehensive plan designation of Public/Quasi-Public. Ordinance 2927 rezones both properties from a county zone Agriculture, Grazing and Timber (AGT-5), to the city zone Parks and Recreation (PR). The PR zone allows public or private racetracks or speedways as conditional uses, subject to a MUMP approval. Under the first assignment of

error, petitioners challenge the city's findings regarding criteria for zone changes, under the Cottage Grove Zoning Ordinance (CGZO).

A. Failure to Address All Criteria and Factors in CGZO 18.58.180(B).

CGZO 18.58.180(B) lists eight "criteria and factors" that must to be considered when rezoning property.[1] Petitioners argue, first, that the city addressed only factors one, two and five, and failed to address the remaining factors listed in CGZO 18.58.180(B).

Intervenors-respondents (intervenors) argue that not all of the factors listed in CGZO 18.58.180(B) will apply to any given rezoning proposal, and that is particularly the case when rezoning recently annexed property that carries a city comprehensive plan designation for which the plan authorizes only one zone. According to intervenors, the table on page 54 of the Cottage Grove Comprehensive Plan (CGCP) indicates that the Public/Quasi-Public plan designation is implemented by only one city zoning district, the PR

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[1] The CGZO has been significantly amended since the challenged ordinances were first adopted, and all code citations and quotes in this opinion are to the former code. CGZO 18.58.180(B) sets out a number of "criteria and factors" that are part of an applicant's burden of proof:

> "The following criteria and factors are deemed relevant and material and shall be considered by the hearings body in reaching its decision on a proposal:
>
> "1. Conformance with the comprehensive plan and zoning code;
>
> "2. The public need for the proposal;
>
> "3. How public need will be best served by changing the zone classification of the proponent's property as compared with other available property;
>
> "4. If other areas have been previously designated for a use of development submitted in the proposal, then the necessity for introducing the proposal into an area not previously contemplated and why the property owners there should bear the burden, if any, of introducing that proposal into their area;
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> "5. Mistake in the original comprehensive plan;
>
> "6. Change in the character of the neighborhood;
>
> "7. Factors listed in [ORS] 227.240 as they apply to the specific proposal;
>
> "8. Such other factors which relate to the public need for helpful, safe and aesthetic surroundings and conditions."

district. Intervenors argue that the county zone in place, AGT-5, is a holding zone that is not consistent with the city comprehensive plan designation, and that remains in place only until the city applies an appropriate city zone, which in this case can only be the PR zone. Intervenors argue that several of the factors listed in CGZO 18.58.180(B) appear to apply in circumstances where the applicant requests a change from one city zone to another, or where there are multiple zones that implement a particular plan designation. According to intervenors, not all of the factors will apply when rezoning annexed land from a county holding zone to a city zone, and where only one city zone fits the city comprehensive plan designation, and therefore the city did not err in failing to address those inapplicable criteria and factors.

We tend to agree with intervenors that at least some of the CGZO 18.58.180(B) factors do not apply to the present circumstances, and the city likely committed no error in failing to address them. For one thing, the seventh factor refers to ORS 227.240, which was repealed in 1975. The fourth factor is expressly contingent on whether other areas of the city have previously been designated for the proposed use, a contingency petitioners do not argue is present here. However, we cannot say as a matter of law that all the factors that the city failed to address have no *potential* bearing on the challenged rezoning. The eighth factor in particular is broad enough to at least potentially apply to the challenged rezoning to PR, even if that is the only zone that implements the Public/Quasi-Public plan designation. As petitioners argued below, the code grants the city the option of imposing conditions on a rezoning proposal, and it is possible that if the city had considered "other factors which relate to the public need for helpful, safe and aesthetic surroundings and conditions" it might have chosen some course other than a straightforward nonconditional rezone to PR. In any case, if the city believes some of the criteria and factors listed in CGZO 18.58.180(B) do not apply in the present case, it is incumbent on the city to adopt that explanation in the first instance. This subassignment of error is sustained.

B. Adequacy of Findings Addressing CGZO 18.58.180(B)(1) and (2).

Petitioners argue that "the City's findings with respect to the criteria it does address are brief, conclusory and inadequate." Petition for Review 7. That argument is not accompanied by any explanation, but later in the petition for review petitioners quote and challenge findings 11 and 13, which address factor one, conformance with the comprehensive plan, and factor two, public need. Petition for Review 12, 14. We therefore address those challenges here.

1. Conformance with the CGCP (factor one).

The finding regarding factor one states:

> "The zone change is in compliance with the Comprehensive Plan. The proposal conforms with the City Comprehensive Plan, which includes the parcels in the City UGB and designates them for Public/Quasi-Public use. The implementing zone for the Public/Quasi-Public land use designation is PR Parks & Recreation. Thus lands designated for Public/Quasi-Public uses in the Comprehensive Plan are intended to provide for parks and recreation needs." Record 6-7.

Petitioners argue that this finding is inadequate because it fails to explain what "Quasi-Public" means and why the existing Speedway operation is consistent with the "Public/Quasi-Public" plan designation. Further, petitioners argue that the existing Speedway use is not consistent with a CGCP policy that requires sanitary sewers to be provided at the first possible date subsequent to annexation.

Intervenors reply that the issue under CGZO 18.58.180(B)(1) is whether applying the PR zone to the subject property conforms with the comprehensive plan, not whether a particular existing use or a use allowed under the PR zone is appropriate. We agree with intervenors that in applying CGZO 18.58.180(B)(1) the city is not required to explain why the existing Speedway use is consistent with the Public/Quasi-Public plan designation, or with comprehensive plan policies regarding sanitary sewers. CGZO 18.58.180(B)(2) is more narrowly focused on whether the PR zone should be applied to the subject properties, after consideration of the listed criteria and factors. To the extent petitioners argue that the

Public/Quasi-Public plan designation is inappropriate for the Speedway property, the decision to apply that plan designation to the Speedway property cannot be challenged in these appeals.

Petitioners also argue that the proposed rezoning is inconsistent with two sets of comprehensive plan policies. We address these arguments in turn.

a. Urban Design Objectives

The CGCP Urban Design chapter includes objectives to "[d]iscourage those development proposals which lack sensitivity to natural features and/or neighborhood character," and to "[e]ncourage the use of the planned development technique to create developments which contain a mixture of dwelling unit types, open space and recreation areas and neighborhood and professional commercial services." Petitioners argue that the proposed Speedway use on the banks of the Willamette River "lacks sensitivity" to that natural feature and is not the kind of mixed use development that the comprehensive plan encourages.

Intervenors respond, and we agree, that petitioners' arguments under the Urban Design chapter do not provide a basis for reversal or remand. As discussed, the question under factor one is whether *the proposed rezoning* conforms with the comprehensive plan, not whether the existing or proposed Speedway use does. Both Urban Design objectives are focused on development proposals, not rezoning proposals. Further, both objectives are framed in hortatory, nonmandatory terms. Petitioners have not established that applying the PR zone to the Speedway property fails to conform with the Urban Design objectives.

b. Public Facilities Goal and Annexation and Utility Service Policy 6.

The CGCP Public Facilities Goal is to "require timely, orderly and efficient arrangement of public facilities and services by types and levels appropriate to the needs of the land areas and uses to be served." Petitioners argue that the existing Speedway use is

inconsistent with the Public Facilities Goal, because it lacks an adequate sewage waste disposal system and an adequate on-site storm water detention facility. Similarly, petitioners argue that the Speedway is inconsistent with Annexation and Utility Service Policy 6, which requires that "[s]anitary sewers will be provided on an assessment basis at the first possible date subsequent to annexation." Petitioners contend that the city has failed to require that the Speedway property be connected to the city public sewage system "at the first possible date subsequent to annexation."

Intervenors argue, and we agree, that petitioners fail to explain why the either the Public Facilities Goal or Policy 6 is applicable to the rezoning decision, for purposes of CGZO 18.58.180(B)(1). The rezoning decision does not authorize the Speedway use or annex the Speedway property. Absent a more focused argument as to why the city must consider the goal and policy under factor one in deciding whether to rezone the Speedway property to PR, petitioners' arguments do not provide a basis for reversal or remand. These subassignments of error are denied.

2. Public Need (factor two).

The city's finding under factor two, public need, states:

> "Public need is established for these recreational facilities in the Water to Woods: 2003 Cottage Grove Parks Plan. This request will place 26.04 acres of land in the PR Parks & Recreation District and allow for the future development of these parcels as privately provided recreational facilities so long as they remain consistent with the requirements of the PR district and other sections of the [CGZO]. The existing uses on these properties, a fairgrounds and a private racetrack, are listed in the PR code as uses permitted subject to a Mixed Use Master Plan." Record 7.

Petitioners argue that the city's reliance on the Water to Woods park plan, a refinement plan, to demonstrate "public need for the proposal" is puzzling, because the plan mentions the speedway only twice, and then only as a private recreational facility and as a potential source of pollution with respect to the adjacent regional park. According to petitioners, allowing the Speedway use to continue at its present location is in fact contrary

to the protection of important natural and cultural resources, which is one of the purposes of the Water to Woods park plan.

Intervenors respond that the focus of factor two is on the public need for the *rezoning* proposal, not the existing speedway use. We understand intervenors to argue that the city did not find that there is a public need for the speedway, and the city did not rely on the references to the speedway in the Water to Woods park plan to find a public need for the rezoning. Intervenors argue that petitioners do not identify any policy or language in the Water to Woods park plan that is inconsistent with the proposed rezoning.

As discussed, we agree with intervenors that the focus of CGZO 18.58.180(B)(2) is on the proposed rezoning, not the existing speedway use itself. Nonetheless, petitioners are correct that the above quoted finding that "public need" for the rezoning is "established" by the Water to Woods plan is inadequate. Neither the findings nor respondents identify anything in the Water to Woods plan that purports to establish a public need for the proposed rezoning. While rezoning 26 acres to PR would seem, on its face, to be *consistent* with the city parks plan, that is not the question posed by factor two, which is whether there is a "public need" for the proposed rezoning. Remand is necessary for the city to adopt a more adequate explanation for why there is a public need for the proposed rezoning, for purposes of factor two. This subassignment of error is sustained.

C. PR Zone Development Standards

CGZO 18.17 sets out a number of standards for uses permitted in the PR zone, such as maximum height, lot size, setbacks, off-street parking, and traffic impacts. Petitioners argue that the city failed to address these standards in rezoning the property to PR and that the existing speedway use does not comply with many of those standards. For example, CGZO 18.17.060(A) limits the "maximum or structural height for any building or accessory use" to 30 feet. However, petitioners argue that the existing lighting system for the racetrack is mounted on towers that are 80 feet tall.

Intervenors respond again that for purposes of CGZO 18.58.180(B), factor one, the relevant question is whether the proposed rezone conforms with the zoning code, not whether existing uses or structures on the property conform to the development standards in the new zone. Under petitioners' apparent view, intervenors argue, the city could never rezone property unless all of the existing uses and structures on the property already complied with all applicable development standards in the new zone.

We agree with intervenors that petitioners have not established that, for purposes of the rezoning criteria and factors under CGZO 18.58.180(B), the city is required to evaluate and find that the *existing* uses and structures of the property comply with the standards of the new zone. Nothing cited to us in CGZO 18.58.180(B) or elsewhere suggests that whether property should be rezoned to PR depends in part on whether existing uses or structures on the property conform to height and other standards that apply to uses allowed in the PR zone.

That said, it is not clear to us what is the legal status of existing uses or structures on the speedway property that are allegedly inconsistent with PR standards. We do not understand the city or intervenors to rely on any city or county determination that existing uses or structures are lawful nonconforming uses and structures.[2] If we understand correctly, the city and intervenors rely upon the MUMP approval process to authorize all uses or structures on the Speedway property, including those that may be inconsistent with applicable PR standards. Petitioners challenge the Speedway MUMP approval decision under the fifth assignment of error, and we therefore address petitioners' arguments that the Speedway use and structures violate CGZO 18.17 standards under that assignment of error. This subassignment of error is denied.

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[2] In *Leach v. Lane County*, 45 Or LUBA 580 (2003), we remanded a county hearings officer's decision that determined the scope and nature of lawful nonconforming uses and structures on the property. We affirmed many of those determinations, but sustained challenges to a number of other determinations. Due to the city's intervening annexation of the property, as far as we know the county took no further proceedings on remand and the city has apparently not made any nonconforming use determinations with respect to the Speedway property.

D. Failure to Impose Conditions of Approval

CGZO 18.58.110 provides for a process whereby the city adopts a "Resolution of Intent to Rezone" instead of a straightforward rezoning, subject to fulfillment of specified conditions. Similarly, CGCP Annexation and Utility Service Policy 3 states that "at the time property is rezoned, conditions may be imposed to make the property compatible with future urban development." Petitioners argue that the city should have availed itself of the CGZO 18.58.110 procedure and imposed conditions under Policy 3 in order to ensure that the Speedway operation will comply with applicable law.

Intervenors respond, and we agree, that petitioners have not established that anything in the city's code or comprehensive plan compels the city to proceed under CGZO 18.58.110 or to impose conditions when rezoning. As far as we can tell, whether to process a rezoning application under CGZO 18.58.110 or as a simple, non-conditional rezoning is left to the city's discretion. Similarly, Policy 3 uses the permissive "may," and does not require the city to impose conditions on a rezone. This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that the city failed to address whether the zone change from AGT-5 to PR complied with Statewide Planning Goal 12 (Transportation) and the Transportation Planning Rule (TPR), at OAR 660-012-0060, and instead impermissibly and inadequately addressed compliance with Goal 12 and the rule as part of the MUMP overlay decision. In addition, petitioners argue that the city failed to adequately address Statewide Planning Goal 15 (Willamette Greenway) and improperly deferred analysis under Goal 15 to the MUMP process.

A. Goal 12 (Transportation)

The county's Goal 12 finding states, in its entirety, that "[a]ny proposed development of these parcels will require traffic impact analysis which may identify impacts that will be

required to be addressed at MUMP approval stage." Record 9. As part of the MUMP application, the city required intervenors to submit a traffic impact study (TIS), and the city found based on the TIS that the proposed Speedway use will comply with the city's Transportation System Plan (TSP). Record 54.

Petitioners argue that the city erred in deferring analysis of whether the proposed rezoning is consistent with Goal 12 and OAR 660-012-0060 to the MUMP approval process.[3] Further, petitioners contend that the city's MUMP decision does not in fact address compliance with Goal 12 and the Goal 12 rule and, to the extent it purports to do so, the TIS is deficient in several respects and fails to provide an adequate basis to conclude that the rezoning complies with the goal and the rule.

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[3] OAR 660-012-0060(1) provides:

> "Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:
>
> "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
>
> "(b) Change standards implementing a functional classification system; or
>
> "(c) As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
>
> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."

Intervenors respond, initially, that Goal 12 and OAR 660-012-0060 do not apply to the rezoning decision, because a site-specific zone change is not a comprehensive plan amendment or land use regulation amendment subject to the goals. We disagree. A zone change is a "land use regulation amendment" and therefore potentially subject to the goals and their implementing regulations. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 677 (1995). That is particularly appropriate with respect to OAR 660-012-0060, because zone changes are the primary instrument through which new uses of land are authorized, including new uses that generate more traffic impacts than previously allowed uses, which is a fundamental concern of the rule.

On the merits, intervenors contend that petitioners have failed to establish any basis to believe that rezoning the Speedway and WOE properties from AGT-5 to PR "significantly affects" any transportation facility under any of the three triggers set out in OAR 660-012-0060(1)(a), (b) or (c). We disagree. While petitioners do not specifically discuss OAR 660-012-0060(1)(a), (b) or (c), petitioners argue that the TIS the city relied upon evaluates only impacts on the current transportation system, and fails to evaluate "traffic impacts out to the planning horizon as required by the TPR." Petition for Review 16. We understand petitioners to argue that the TIS and the city failed to evaluate under OAR 660-012-0060(1)(c)(A) through (C) whether the traffic allowed by the rezoning would exceed the thresholds in (A) through (C) "[a]s measured at the end of the planning period identified in the adopted transportation system plan[.]" Intervenors offer no response to that argument, and we agree with petitioners that for purposes of OAR 660-012-0060(1), the city erred to the extent it relied upon a TIS that fails to evaluate traffic impacts of uses allowed in the PR zone through the end of the planning period identified in the city's TSP.[4]

[4] We say "to the extent" because, although no party points it out, the TIS appears to have evaluated background conditions and traffic generated by the Speedway through the year 2015. Record 1778 (LUBA No. 2006-056). The city asserts, and it appears to be the case, that the TSP's planning period runs through 2015.

More fundamentally, however, we agree with petitioners that the city's findings regarding Goal 12 and the TPR are inadequate and the city erred in relying on the traffic impact analysis that is part of the MUMP approval process to determine that the proposed rezoning is consistent with the goal. We note, first, that there are no findings addressing the TPR, either as part of the ordinance rezoning the Speedway, or the ordinance adopting the MUMP overlay zone. It is not the case, then, that the city deferred findings under the TPR to the MUMP review process; the city failed to address the TPR at all. The findings addressing Goal 12 consist of the single sentence quoted above, which fails to explain why an evaluation of traffic impacts under the MUMP approval process is sufficient to ensure compliance with Goal 12 or the TPR.

The city's MUMP approval does include findings addressing CGZO 18.33.060(B), which requires a finding that "the traffic generated by the development does not reduce the level of service below a fair standard as established in the Cottage Grove Transportation Plan," a standard that echoes OAR 660-012-0060(1)(c)(B). Record 50. The city relied upon the TIS to conclude that five nearby city intersections would continue to function above the "fair" standard in the city's TSP including the traffic generated by the proposed Speedway. However, it is not clear that findings of compliance with CGZO 18.33.060(B) are sufficient to establish compliance with OAR 660-012-0060(1). As noted, it is not clear that the TIS evaluated traffic impacts of the Speedway use as allowed under the PR zone to the end of the planning period identified in the city's TSP. Further, as petitioners point out, half of the traffic generated by the Speedway is projected to travel via a railroad underpass to access Highway 99E, a state highway subject to a different, state-mandated, level of service standard than the city standard. Further, petitioners argue that the railroad underpass is illegal and the access to Highway 99 is substandard, and the city erred in assuming that the Speedway may continue to use the underpass and access to Highway 99.

The city and intervenors offer no focused response to these arguments. We agree with petitioners that the city erred to the extent it relied entirely upon findings addressing CGZO 18.33.060(B) to establish compliance with Goal 12 and the TPR. Intervenors do not contend that the TIS evaluated impacts to Highway 99E under the applicable state standard, or any standard for that matter, or explain why no such evaluation was necessary under the TPR. The city's findings concede that the railroad underpass access is not a legal public crossing and that the state is considering closing it, but simply state that should the crossing be closed the applicants will be required to submit a revised TIS. Record 28. Because closure of the underpass would send half of the significant levels of traffic generated by the Speedway onto other streets, we believe that the requirement to submit a revised TIS in the event that the crossing is closed is insufficient to ensure compliance with the TPR. Remand is necessary to adopt findings addressing the TPR and, if necessary, require a revised TIS that is sufficient to establish conformance with the rule.

B. Goal 15 (Willamette Greenway)

Petitioners argue that the city's findings addressing whether application of the PR zone is consistent with Goal 15 are inadequate, and the city erred in deferring analysis of compliance with Goal 15 to the MUMP approval process. Petitioners also cite to ORS 390.318, a statute that requires local governments to prepare a plan for development and management of the Willamette River Greenway consistent with the purposes set out in ORS 390.314, which include limiting the intensity of land uses so that they remain compatible with preservation of the natural, scenic, historical and recreational qualities of the Greenway.

The city found with respect to Goal 15:

> "Willamette River Greenway: Both properties are entirely within the Willamette River Greenway. The existing uses, a private speedway and fairgrounds, are permitted uses in the PR/Greenway zone contingent upon [MUMP] approval. The [MUMP] application process consolidates review of multiple land use applications, including greenway conditional use permit

> review. Hence compliance with the zoning code and MUMP application submittal/approval will ensure compliance with the requirements for Willamette River Greenway protection as established in the Comprehensive Plan and Zoning Code." Record 9.

Intervenors argue that ORS 390.318 is a planning statute, that does not impose any regulatory standards on local governments in approving proposed development within the Greenway. According to intervenors, the city has fully complied with ORS 390.318 and 390.314 by adopting comprehensive plan and zoning code regulations, including the MUMP process, which incorporates the Greenway conditional use permit standards. Intervenors argue that there are no substantive requirements either under Goal 15 or the statute that the city is required to evaluate, and therefore the city did not error in relying on the MUMP approval process to ensure compliance with Goal 15.

Petitioners identify no substantive provisions of Goal 15 or ORS 390.318 that apply to the proposed rezoning to PR. Accordingly, we agree with intervenors that petitioners have failed to establish that the city's findings regarding Goal 15 are inadequate, or that the city erred in relying on the MUMP approval process to ensure compliance with the goal.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Ordinances 2928 and 2929 amend the city zoning map to add the MUMP overlay on the Speedway and WOE properties. Under the third assignment of error, petitioners argue that the city failed to apply the eight "criteria and factors" listed in CGZO 18.58.180(B) in making that rezoning decision.

Intervenors respond that no issue was raised below that adding the MUMP overlay zone to the city zoning map required application of the CGZO 18.58.180(B) rezoning criteria and factors. Petitioners have not responded or identified any place in the record where this issue was raised below. Accordingly, the issue is waived. ORS 197.763(1).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

CGZO 18.33.020 provides in relevant part that a MUMP district may be established on land that is "suitable for and of sufficient size for planning and development in a manner consistent with the purposes and objectives of this chapter."[5] Petitioners argue that the Speedway site is not suitable or of sufficient size for the proposed use, *i.e.*, continuation of the existing Speedway operation. In particular, petitioners contend that (1) an area at the north end of the property marked on the site plan for parking will instead likely be used for "pit" activities by participants, and (2) there is insufficient parking on the site or within the required distance of the site for the 6,000 spectators that the applicants propose to accommodate.[6]

Intervenors respond that the city adopted extensive findings regarding parking that petitioners do not challenge. Record 17-20. With respect to on-site parking, intervenors argue that there is no basis to speculate that intervenors will ignore the approved site plan and allow the area marked for parking to be used for pit activities instead of parking. With respect to the required number of parking spaces, intervenors argue that petitioners fail to note that the city limited attendance at the Speedway to 300 participants and 1500 spectators, except for special events and then only if the city grants permission on a case by case basis to use additional off-site parking spaces. Record 19. Intervenors argue that there is sufficient on-site and adjacent off-site parking to accommodate 300 participants and up to 1500

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[5] CGZO 18.33.020 is entitled "Application" and provides, as relevant:

> "A mixed use master plan combining district may be established in any residential professional, parks & recreation, or community commercial district on a parcel or parcels of land under one ownership which are suitable for and of sufficient size for planning and development in a manner consistent with the purposes and objectives of this chapter. * * *"

[6] Petitioners also argue that the Speedway site is unsuitable because it is located within the Willamette Greenway and the city has failed to grant a Willamette Greenway conditional use permit or address the applicable Greenway standards. We address this argument under the sixth assignment of error, below. Further, petitioners raise additional issues regarding parking under the fifth assignment of error, and we address those arguments therein.

spectators, and that petitioners have not demonstrated any basis to conclude that the proposed use is inconsistent with CGZO 18.33.020. We agree with intervenors.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend that the existing Speedway use and structures are inconsistent with certain other development standards under CGZO 18.17 (the PR District) and CGZO 18.33 (the MUMP Combining District).

A. Height and Maximum Lot Coverage

CGZO 18.17.060(A) sets a 30-foot maximum height limit for any building or accessory use in the PR zone. CGZO 18.17.080 provides that the maximum lot coverage by structures shall not exceed 40 percent of the lot area. Petitioners argue that the city erred in concluding that the Speedway use complies with these development standards. According to petitioners, the city failed to recognize that the tallest structures on the property are 80-foot high lighting towers, and the city failed to take into account the racetrack surface and parking areas in determining that the lot coverage for "structures" does not exceed 40 percent of the lot area.

Intervenors respond, initially, that petitioners waived these issues by failing to raise them below and failing to state the issues in their appeal to the city council. Petitioners do not respond to intervenors' waiver challenge, or cite to any place in the record where these issues were raised. These subassignments of error are denied.

B. Use of Parking Spaces as Open Space

In addressing the Greenway conditional use permit standard at CGZO 18.46.170(C)(2)(g), which requires a finding that the proposed development "will provide the maximum landscaped area, open space, or vegetation that is feasible between the activity and the river," the city adopted a finding that notes in relevant part that certain on-site parking areas within the floodplain would "remain unpaved to allow for the retention of

as much open space as possible." Record 46. Petitioners argue however that CGZO 18.33.040(C), a MUMP approval standard, states that "[p]arking spaces shall not be considered open space."[7] Petitioners also cite to language in the CGCP parks, recreation and open space element, at page 25, stating that steep hillsides and flood plain areas "should be preserved as permanent open space."

Petitioners' point is not entirely clear, but we understand petitioners to argue that CGZO 18.33.040 precludes the city from allowing unpaved parking spaces to be used as "open space" for any purpose, including that of compliance with the Greenway standard at CGZO 18.46.170(C)(2)(g). However, we note that CGZO 18.33.040(C) is concerned with parking, not open space requirements. CGZO 18.33.40(A) is directly concerned with open space, and requires that 10 percent of the subject property be preserved as open space, in this case approximately 1.73 acres. The city accepted intervenors' proposal to use 3.5 acres of the 17.25-acre Speedway property west of the river as dedicated open space, on the opposite shore from the Speedway facility and parking areas. Record 17. In other words, it is clear that the unpaved parking area does not serve as "open space" for purposes of CGZO 18.33.040(A) and (C). That the city listed the unpaved nature of the parking spaces as one reason for compliance with the Greenway standard at CGZO 18.46.170(C)(2)(g) does not conflict with CGZO 18.33.040(C). As to the CGCP language petitioners cite, it is not framed in mandatory language and petitioners do not explain what significance that language has for purposes of either CGZO 18.33.040(C) or CGZO 18.46.170(C)(2)(g).

[7] CGZO 18.33.040(C) provides:

> "Parking. Parking space requirements for buildings and uses shall be determined by the Community Development Director during the pre-application phase of the MUM application and applied to the MUM plan application. Parking areas shall not be considered open space."

C. On-Site Parking

The city's code generally requires one parking space for every four seats in places of public assembly. As noted, CGZO 18.33.040(C) provides that the community development director shall determine the number of parking spaces required as part of a MUMP application. *See* n 7. CGZO 18.33.040(G) allows the city to deviate from otherwise applicable development standards, in approving a MUMP application. The city adopted three pages of findings explaining how it determined the number of required spaces. Record 17-19. The city limited attendance to 300 participants and 1500 spectators, and required 183 on-site participant parking spaces and approximately 32 on-site spectator parking spaces.

Petitioners first question the city's conclusion that roughly one parking space per two participants is sufficient, citing to photographs showing that trucks used to transport race cars can occupy up to four parking spaces. Intervenors respond, and we agree, that petitioners have not demonstrated that the city failed to provide adequate participant parking. After a careful analysis of the number of participants and parking needs, the city chose to require more than twice the number of participant parking spaces than would otherwise be required under the parking code. Based on the photographs petitioners cite, the city might have chosen to require additional participant parking spaces. However, given the discretion the city has under CGZO 18.33.040(C) and (G), we cannot say that the city's choice is not supported by substantial evidence.

Petitioners next challenge 48 parking spaces identified on the site plan between the river bank and a fire lane. The city imposed a condition requiring intervenors to install a fence along a 15-foot riparian setback along the riverbank, which would bisect almost all of the riverside parking spaces proposed on the site plan. Consequently, the city required intervenors to move the parking spaces eastward, outside of the riparian setback. However, petitioners question whether that is possible without infringing on the fire lane shown on the

site plan, and if those 48 parking spaces are unavailable there will not be enough on-site parking.

Intervenors respond that the city's decision contemplates that the fire lane will also be moved slightly to the east, if necessary, and that there is more than enough room on the site to do so. While the city's findings are not explicit on this point, the city clearly authorized the 48 parking spaces along the river, but required that those spaces be moved out of the riparian setback. Nothing cited to us in the decision or record suggests that it is problematic to shift the fire lane an equal distance to the east, if necessary, to accommodate the required parking spaces. Petitioners have not demonstrated that the 48 riverside parking spaces are unavailable.

D. Off-Site Parking

Intervenors proposed, and the city accepted, using 350 parking spaces on the adjoining WOE site for off-site spectator parking. CGZO 18.42.060(B)(1) allows joint use of parking facilities if "there is no substantial conflict in operating hours of the building or use[.]" The city found that the WOE and Speedway schedules are coordinated during the racing season to ensure no overlap, and that where events do occur on the same calendar day, WOE events will occur during the day, while the Speedway events will be held at night.

Petitioners challenge that finding, arguing that even if WOE and Speedway events do not overlap, attendees may leave after the events are over or arrive early, potentially causing conflicts. Intervenors respond, and we agree, that petitioners' speculation on this point does not demonstrate reversible error.

Finally, the decision permits the Speedway to exceed the maximum attendance limitations on special occasions, if intervenors obtain the city's approval for additional off-site parking, provide a shuttle and take other measures. Petitioners challenge that condition, arguing that CGZO 18.42.060(B)(2) permits joint parking only within 400 feet of the use

required to have parking and speculating that some off-site parking areas may be more than 400 feet from the Speedway property.

We understand intervenors to respond that the city reasonably exercised its discretion under CGZO 18.33.040(G) to deviate from otherwise applicable development standards, including the CGZO 18.42.060(B)(2) requirement that joint parking be within 400 feet of the use. While nothing cited to us in the city's findings addresses CGZO 18.42.060(B)(2) or explicitly purports to deviate from that provision, the city adopted findings and conditions of approval that clearly authorize intervenors to seek the city's approval for additional off-site parking for special events, at distances that would require a shuttle. Given the discretion granted the city under the MUMP process, we cannot say that petitioners have demonstrated that the condition authorizing additional off-site parking is inconsistent with CGZO 18.42.060(B)(2).

E. Front Yard Setback

The city authorized 10 race days per month during the winter months and 15 days per month in the summer months. CGZO 18.17.090 provides that in the PR zone each lot shall maintain a front yard setback of at least 15 feet, and that front yards "shall not be used for the regular or constant parking of automobiles or other vehicles." The Speedway MUMP approval authorizes parking within a portion of the southern property boundary between the Speedway property and the WOE property, which the city deemed to be the Speedway's "front yard."

In response to CGZO 18.17.090, the city concluded that "[a]s race days occur less than 10 or 15 times per month, the City finds that this is classified as 'infrequent use' by the Off-Street Parking code, and hence does not qualify as 'regular or constant parking.'" Record 24. The code section cited, CGZO 18.42.070(F), permits parking areas to remain unpaved if used "infrequently," which the code defines as "an area used ten or less days or times per month."

Petitioners challenge the city's conclusion that up to 15 race days per month, an average of one race day every two days, is "infrequent" and not "regular or constant." According to petitioners, whether a parking use is "infrequent" has no bearing on whether it is "regular," which connotes repeated, recurring instances.

Intervenors respond that parking in the setback is clearly not "constant," as it will not occur all the time, and argue that it is also not "regular" because it does not occur at fixed or uniform intervals. We understand intervenors to argue that while there may be an *average* of up to 15 race days per month, those race days will occur in groups and at irregular intervals, not uniformly every two days.

We agree with petitioners that the CGZO 18.42.070(F) definition of "infrequent" does not assist the city. An activity may be regular, yet infrequent. Further, we do not understand the city's finding that 10 to 15 race days per month is classified as an "infrequent" use for purposes of CGZO 18.42.070(F), given that that term is defined to mean "ten or less days or times per month."

While there is no contention that parking associated with 10 to 15 race days per month would be "constant," we do not understand the basis for the city's conclusion that it is not "regular." Intervenors may be correct that "regular" means uniform or recurring intervals and the schedule of race days will not be entirely uniform. However, the city's brief notes that race events will typically occur on the weekend, which suggests a uniform and recurring interval. We conclude that remand is necessary for the city to explain why it believes that allowing parking in the front yard setback is consistent with CGZO 18.17.090.

Relatedly, petitioners also challenge under this assignment of error the city's decision to waive the requirement that on-site and off-site parking spaces along the riparian area be paved, based on the city's conclusion that 10 to 15 race days per month would be "infrequent" use. However, as noted, CGZO 18.42.070(F) defines "infrequent" to mean ten days or less use per month. We agree with petitioners that on remand the city must either

identify a sufficient basis to waive the paving requirement or require that the parking spaces be paved.[8]

The fifth assignment of error is sustained, in part.

SIXTH ASSIGNMENT OF ERROR

The Speedway site and the WOE both lie entirely within the Willamette Greenway. CGZO 18.46.170 requires a conditional use permit for "intensification, change of use, or development" of property within the Greenway. Neither the county nor the city has ever granted the Speedway use and structures a Greenway permit, and petitioners argue that the city erred in failing to require that intervenors submit a separate Greenway conditional use permit application as part of the MUMP approval process. Instead, petitioners argue, the city proceeded on the assumption that approval of the MUMP obviated the need to obtain a separate Greenway conditional use permit, subject to the Greenway standards in CGZO 18.46.170, as well as the general conditional use standards in CGZO 18.46.100. To the extent the city addressed those standards as part of the MUMP approval process, petitioners contend, those findings are inadequate.

A. A Separate Greenway Conditional Use Application and Permit is Not Required

Intervenors respond that the city correctly did not require intervenors to submit a separate Greenway conditional use permit, because the city's code contemplates that the MUMP process will consolidate review of multiple land use applications, including greenway conditional use permits. Intervenors note that CGZO 18.33.010(B) states that one purpose of the MUMP process is to "[c]onsolidate review of multiple land use applications, [for example] conditional use permit, design review permit, greenway conditional use permit, historic alteration review." Consistent with that purpose, intervenors argue, as part of the

[8] Petitioners argue that if the parking spaces are paved, they constitute "structures" and therefore must be counted for purposes of calculating lot coverage. If necessary, the city should address this issue as well.

MUMP review process the city noticed and addressed in findings all applicable conditional use criteria, including those in CGZO 18.46.170 and 18.46.100. Record 22-47. Because the city addressed and found compliance with all applicable conditional use permit standards, intervenors argue, there is no need or point in requiring intervenors to file a separate Greenway conditional use permit application, or for the city to issue a separate permit.

We agree with intervenors that the MUMP code provisions contemplate combined review of all required permits, and that the relevant code provisions do not require that a MUMP applicant seek and obtain a separate conditional use permit where one would be required in the absence of a MUMP application. While nothing cited to us in the code makes that explicit or entirely clear, we note that CGZO 18.33.040(H) lists as one of the "Development Standards" for a MUMP application the "Conditional Use General & Applicable Conditions" set forth in Chapter 18.46, including GCZO 18.46.100 and 18.46.170. Similarly, CGZO 18.33.040(J) provides that the criteria for historic landmarks apply whenever a MUMP application proposes alterations for designated historic landmarks. These provisions would be unnecessary if a separate permit application and permit approvals were required in order to approve a conditional use or historic alteration as part of a MUMP application. The text and context of the MUMP code provisions strongly suggest that a MUMP application consolidates all required permits into a single land use approval, subject however to the same standards as if separate applications were filed, and therefore the city's failure to require intervenors to submit a separate Greenway conditional use permit application and approve a separate permit is not error.

B. Adequacy of Findings

Petitioners also challenge the adequacy of the city's findings of compliance with the general conditional use and the Greenway conditional use permit standards.

1. General Conditional Use Standards

CGZO 18.46.100 sets out seven general conditional use standards, which are applicable to MUMP applications by virtue of CGZO 18.33.040(G). In addition, CGZO 18.46.110 authorizes the city to "designate conditions in connection with the conditional use permit as it deems necessary * * *," and lists twelve areas in which the city may impose conditions, such as "[r]egulation of uses, special yard setbacks, coverage and height." CGZO 18.46.110(A).

Petitioners argue, correctly, that the city failed entirely to address the seven general conditional use standards at CGZO 18.46.100. Neither the city nor intervenors cite to any findings addressing CGZO 18.46.100, or explain why no such findings are necessary.

The city did adopt extensive findings addressing the twelve CGZO 18.46.110 conditions. Petitioners challenge those findings, arguing that the conditions the city chose to impose are insufficient. Intervenors respond, and we agree, that given the discretion afforded the city under CGZO 18.46.110, petitioners' mere disagreement regarding the type and extent of conditions that should be imposed under that provision does not provide a basis for reversal or remand. This subassignment of error is sustained, in part.

2. Design Standards

CGZO 18.46.170 set out the standards for a Greenway conditional use permit. CGZO 18.46.170(C)(1) provides that "[a]ll requests for a Greenway conditional use permit are subject to the provisions of [GCZO] 18.50 and 18.58." CGZO 18.50 sets out the city's general design review criteria. Petitioners argue that the city failed entirely to address any of the design review criteria at CGZO 18.50.

Intervenors respond that the city found that the CGZO 18.50 design review standards would apply to any building permits for new structures or additions to existing structures on the site, and imposed a condition to that effect. Record 32, 64. According to intervenors, the city implicitly concluded, contrary to petitioners' view, that the CGZO 18.50 design review

standards do not apply to the entire site as a whole, or in the context of approving a MUMP within the Greenway. Intervenors argue that CGZO 18.46.170(C)(1) triggers design review standards only when a separate Greenway conditional use permit is applied for, not when a MUMP overlay zone is applied for, even if the MUMP approval standards incorporate the Greenway conditional use permit standards.

The city's findings recite that the MUMP application proposes five new structures. The city's decision does not explain why the CGZO 18.50 design review standards will only apply to those new structures or additions to new structures, and then only at the time of building permit application. While it seems reasonable that design review standards would apply only to new structures or additions, not existing structures on the site, at least some of the CGZO 18.50 design review standards appear to apply broadly to the site as a whole, not just a particular proposed building or structure. For example, the CGZO 18.50.040 design standards require the applicant to preserve the landscape in its natural state, to demonstrate a desirable, efficient, and workable interrelationship among buildings, parking, circulation, and open space, and to provide landscaping to assure a pleasant and aesthetic on-site environment.

It is even less clear why the city believes that the CGZO 18.50.040 design standards apply only at the time of building permit approvals. As noted, CGZO 18.46.170(C)(1) requires that all requests for a Greenway conditional use permit are subject to CGZO 18.50, and CGZO 18.33.040(H) provides that MUMP applications are subject to the general and additional conditional use standards in CGZO 18.46, which would seem to make the CGZO 18.50 design review standards applicable to a MUMP application that proposed development in the Greenway. Intervenors' position, that CGZO 18.46.170(C)(1) triggers design review only when an applicant submits a separate Greenway conditional use application, seems inconsistent with their above view, with which we agreed, that the MUMP

approval process subsumes other required permits such as the Greenway conditional use permit.

Because the city failed to explain in terms we understand why the CGZO 18.50 design review standards need not be addressed in the MUMP application, at least with respect to the five new proposed structures, remand is necessary for the city to either explain its position on that point or adopt findings addressing the CGZO 18.50 design review standards. This subassignment of error is sustained.

3. Greenway Conditional Use Permit Standards

CGZO 18.46.170(C)(2) sets out the seven Greenway conditional use permit standards.[9] Petitioners challenge the adequacy of the city's findings under each standard. In

[9] CGZO 18.46.170(C)(2) provides:

> "The planning commission shall consider the following objectives and make affirmative findings on each of them:
>
> "a. Significant fish and wildlife habitats will be protected;
>
> "b. Identified scenic area, viewpoints and vistas will be preserved;
>
> "c. Any structure must be located outside the existing riparian vegetation or behind a setback line which is at least 15 feet (whichever is the greatest distance) from the top of the river bank to insure that areas of natural, historical or recreational significance will be protected, conserved, maintained or enhanced to the maximum extent possible;
>
> "d. The natural vegetation along the river will be maintained to the maximum extent that is practicable in order to assure scenic quality, protection of wildlife, protection from erosion and screening of uses from the river;
>
> "e. The proposed development change or intensification of use is compatible with the site and surrounding area;
>
> "f. Any development will be located away from the river to the maximum extent possible;
>
> "g. The proposed development, change or intensification of use will provide the maximum landscaped area, open space or vegetation that is feasible between the activity and the river."

addition, petitioners challenge compliance with the riparian setback vegetation maintenance standards at CGZO 18.46.170(D).

a. Fish and Wildlife Habitat

The city required intervenors to install a sediment and oil separator within one year of approval, and to connect to the city sewage system within two years. Petitioners argue that in the interim period fish and wildlife habitat are at risk from oil spills and septic leaks. Intervenors respond that the city's initial approval was in 2005 and that "time has flown while Petitioners have been litigating." Response Brief 37. Further, intervenors argue, and we agree, that petitioners have not demonstrated that allowing the applicants one to two years to install oil separators and connect to the city's system threatens fish and wildlife habitat. Petitioners cite to nothing in the record indicating any existing or immediately pending risk to habitat. This subassignment of error is denied.

b. Scenic Viewpoints

In three pages of findings, the city identified a number of steps to preserve and enhance the riparian setback and trees on the property, imposed related conditions, and found that as conditioned the proposal complies with the CGZO 18.46.170(C)(2)(b) obligation to preserve identified scenic viewpoints, which the city found to be the view of the bank from the river and the view of the Speedway site through the trees on the adjoining regional park. Petitioners argue simply that "[n]o proof exists that these measures will protect the identified vistas." Petition for Review 35. However, petitioners cite to nothing in the record suggesting otherwise. Intervenors argue, and we agree, that petitioners' argument is undeveloped and fails to demonstrate a basis for reversal or remand. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982). This subassignment of error is denied.

c. Riparian Setback and Vegetation

Three existing buildings are located within the 15-foot riparian setback. The city prohibited location of new buildings within the setback, and required that if the three existing

buildings are replaced or added onto they must be located outside the setback. As discussed earlier, the city also required removal of all parking areas outside the setback and construction of a fence. Petitioners argue that CGZO 18.46.170(C)(2)(c) requires the city to order the removal of the three existing dwellings from the setback, and further that CGZO 18.46.170(C)(2)(d) requires the city to order restoration of riparian vegetation that has been damaged or lost from decades of parking and development within the setback.

Intervenors respond that CGZO 18.46.170(C)(2)(c) and (d) are framed in terms of prospective development or future tense obligations, and do not require either that the applicant remove existing buildings within the setback or restore natural vegetation lost from activities that may have dated back to the 1950s. We agree with intervenors that petitioners have not established that either CGZO 18.46.170(C)(2)(c) or (d) require the city to order the removal of the three existing buildings or restore natural vegetation lost through past activities. Although petitioners argue that the three existing buildings are "illegal," petitioners do not explain the basis for that assertion or identify any authority that would require the city to order the removal of existing buildings within the setback in the course of approving the MUMP decision. Absent a more developed argument on this point, this subassignment of error is denied.

d. Compatible with Surrounding Area

Petitioners challenge the city's finding that the Speedway is "compatible with the site and the surrounding area," in two particulars: transportation issues and noise.[10]

[10] Intervenors initially advance a brief general defense that petitioners did not raise below issues regarding transportation and noise issues with respect to the compatibility standard at CGZO 18.46.170(C)(2)(e), and therefore those issues are waived under that standard. However, there is no dispute that petitioners and other participants vigorously raised issues below regarding transportation impacts and noise impacts, including the specific arguments made under this subassignments of error regarding impacts on the surrounding neighborhood, prompting the city to adopt responsive findings. Absent a more focused waiver argument, we cannot say that petitioners failed to raise the issues identified in this subassignment of error.

(i). Access Road

With respect to transportation issues, petitioners argue that the single access road onto the Speedway property is narrow and unimproved, and the applicants lack complete easements over the road where it crosses nearby properties. Although the city required intervenors to improve and widen the road, petitioners argue that the city should have also required intervenors to prove that they have acquired the necessary easements. Finally, petitioners argue that the Speedway relies upon an illegal railroad undercrossing for its primary access point, that the state is considering whether to close the underpass, and if that illegal underpass is closed then traffic will necessarily be routed onto nearby residential streets.[11]

Intervenors respond that petitioners fail to explain why issues related to the adequacy of the access road—its width, composition or the legal right to use it—have any bearing on "compatibility * * * with the surrounding area." We agree with intervenors that petitioners offer no explanation for why issues related to the adequacy of the access road are relevant under the CGZO 18.46.170(C)(2)(e) compatibility standard.

With respect to the railroad underpass, however, petitioners argue that potential closure of that main access point will direct significant levels of traffic onto neighboring residential streets. That argument appears to bear directly on the CGZO 18.46.170(C)(2)(e) "compatibility with the surrounding area" standard. Neither the city nor intervenors provide any focused response to that argument. The city addressed that issue in considering other criteria, finding that if the state closes the underpass the applicants must submit a revised traffic impact analysis. However, we rejected those findings and related conditions as

[11] Petitioners argue here and elsewhere that the secondary emergency access road that the city required is inadequate, apparently because petitioners believe that the secondary road follows an existing bike path and no condition of approval requires that it be upgraded to accommodate emergency vehicles. If so, petitioners argue, emergency vehicles will have to use the single main access road, which has a narrow "choke point." However, Condition 9 clearly requires that the secondary access be upgraded to handle emergency vehicles.

inadequate, as discussed in the second assignment of error. Because the city must address that issue in any event, we conclude that remand is appropriate under this subassignment of error to address that issue under the CGZO 18.46.170(C)(2)(e) "compatibility with the surrounding area" standard. This subassignment of error is sustained, in part.

(ii). Noise

Petitioners argue that the noise generated by the Speedway will exceed the maximums imposed by Department of Environmental Quality (DEQ) standards, and in order to ensure compliance with the CGZO 18.46.170(C)(2)(e) "compatibility with the surrounding area" standard the city should have required the Speedway to conform to those standards.

Intervenors respond that the city in fact required compliance with the applicable DEQ noise standards for racetracks at OAR 340-035-0040, and imposed conditions to ensure compliance. Record 39-40, 55-56. We agree with intervenors that petitioners' arguments regarding noise and DEQ standards do not demonstrate reversible error. This subassignment of error is denied.

e. Location Away from River

As noted, CGZO 18.46.170(C)(2)(f) requires that "[a]ny development will be located away from the river to the maximum extent possible." Petitioners contend that the city erred in permitting parking within or just outside the riparian area, in allowing the three existing structures to remain within the riparian area, and in permitting the racetrack itself to remain in the floodplain.

Intervenors argue that CGZO 18.46.170(C)(2)(f) is framed in the future tense and obviously applies only to new development, not existing development. We agree with intervenors that CGZO 18.46.170(C)(2)(f) does not require the city to evaluate existing structures or development. In addition, petitioners do not explain where on the subject property the racetrack or other existing development could be relocated that would be any further from the river than their present locations. Although the MUMP application proposes

five new structures, petitioners do not argue that the location of those five new structures is inconsistent with CGZO 18.46.170(C)(2)(f). This subassignment of error is denied.

f. Maximum Landscaped Area

CGZO 18.46.170(C)(2)(g) requires that "proposed development, change or intensification of use will provide the maximum landscaped area, open space, or vegetation that is feasible between the activity and the river." The city's findings rely on conditions requiring a fence, exclusion of parking from the riparian area, and similar requirements to satisfy this standard. Petitioners argue that the city could have feasibly required additional landscaped, open space or vegetated areas between the river and the Speedway. However, petitioners do not specify where such areas or the parking they would displace could be located on the property. Absent a more developed argument, we reject this subassignment of error.

g. Vegetative Maintenance Standards

CGZO 18.46.170(D) sets standards for maintaining existing vegetation within the riparian area and prohibits removal of such vegetation. Petitioners complain that decades of prior parking and development within the 15 foot riparian area has removed much of the original vegetation in the riparian area, and that the city erred in failing to require that the vegetation be replaced.

Intervenors respond, and we agree, that CGZO 18.46.170(D) applies prospectively to protect existing vegetation and does not require property owners to restore vegetation removed decades earlier. In any case, intervenors note that the decision requires protection and enhancement of the existing riparian vegetation. This subassignment of error is denied.

The sixth assignment of error is sustained, in part.

SEVENTH ASSIGNMENT OF ERROR

CGZO 18.33.060 provides that a MUMP application may be approved if the city finds:

"A. That the location, design, and size are such that the development can be integrated with its surroundings, or in the case of a departure in character from the surrounding land uses that the location and design will address the impacts of the development;

"B. That the traffic generated by the development does not reduce the level of service below a fair standard as established in the Cottage Grove Transportation Plan;

"C. That the location, design, size and land uses are such that the development can be adequately served with existing or planned facilities and services, such as utilities, fire, or engineering standards, which may be provided in phases."

Petitioners challenge the adequacy of the city's findings under these three criteria.

A. Integrated into Surroundings.

The city found compliance with CGZO 18.33.060(A) based in part on a finding that the proposed Speedway use is "'integrated into [its] surrounding by virtue of having always been there.'" Record 49 (quoting unidentified source, presumably the application). Petitioners argue that this conclusion is factually and legally incorrect, and that the existing Speedway use is not the same facility that existed in 1974 when contrary county zoning was first applied. According to petitioners, substantial changes and intensifications of the Speedway have occurred since that time, some of which do not qualify as lawful expansions or alterations of the original nonconforming use. *See Leach v. Lane County*, 45 Or LUBA 580 (2003) (affirming in part and remanding in part hearings officer's decision determining the scope and extent of the lawful nonconforming racetrack use). Petitioners argue that the applicants sought and the city approved expanded levels of the original nonconforming use that have not "always been there" and therefore that rationale does not support the city's finding that the proposed Speedway use is "integrated with its surroundings." Petitioners then cite several externalities of the Speedway operation, such as noise, light and water pollution, that petitioners argue render the Speedway not well integrated into its surroundings.

Intervenors respond that the city's findings under CGZO 18.33.060(A) do not rely exclusively or even primarily on the historical existence of the Speedway. According to intervenors the city adopted two pages of findings concluding that, as conditioned, the Speedway complies with CGZO 18.33.060(A). Record 49-50. We agree with intervenors that the finding that the Speedway has "always been there" appears to play a relatively minor role in the city's explanation for why the Speedway complies with CGZO 18.33.060(A). Petitioners do not challenge other elements of those findings. In addition, the city's findings acknowledge that over the years various additional structures (grandstands, concessions booths etc.) have appeared on the site, but the findings conclude that the "overall impact footprint of the site" has not changed. Record 49. We understand the findings to conclude that more recent expansions or intensifications of the Speedway have not significantly affected the basic externalities of the racetrack use itself, for purposes of determining whether the Speedway is "well integrated into its surroundings." Absent a more focused challenge to that conclusion, we agree with intervenors that petitioners have not demonstrated that the city's findings of compliance with CGZO 18.33.060(A) are erroneous or inadequate.

B. Traffic Generation.

Petitioners challenge the evidentiary support for the city's conclusion that the "traffic generated by the development does not reduce the level of service below a fair standard as established" in the city's TSP. Several arguments under this subassignment of error repeat and add nothing to arguments made under second assignment of error, addressing compliance with Goal 12 and the TPR. However, petitioners also dispute the sufficiency of the traffic impact analysis in three other respects.

First, petitioners argue that the TIS is incomplete, citing to a statement in the TIS that even though all intersections passed the city's "Fair" level of service standard, "the increased traffic volumes on the residential streets after an event will increase by xxxx." Record 1778

(LUBA No. 2006-056). However, petitioners do not explain the significance of the omitted "xxxx" figures, for purposes of demonstrating compliance with the city's level of service standard. Absent some explanation, this argument does not provide a basis for reversal or remand.[12]

Second, petitioners note that the TIS was peer reviewed, and the reviewer questioned why manual turning movement counts were not provided at the five intersections studied. Again, however, petitioners do not explain the significance of that omission. Further, we note that in response to the reviewer, the author provided an explanation for why he chose not to use manual turning movement counts. Record 1408 (LUBA No. 2007-056). Petitioners do not acknowledge that response or explain why it is insufficient.

Third, petitioners note that the TIS relied on average daily traffic levels prepared two years earlier, in 2003, from which the author extrapolated existing (2005) background traffic levels. Petitioners assert that extrapolation from two-year old data is insufficient to support the assumed 2005 traffic levels. However, petitioners do not explain why.

In sum, petitioners' arguments under CGZO 18.33.060(B) do not provide a basis for reversal or remand.

C. Facilities and Services.

Petitioners argue that the city's findings regarding whether the Speedway is adequately served by existing or planned facilities and services are inadequate. Petitioners repeat their argument that the city has failed to require that the Speedway connect to the city sewer system "at the first possible date subsequent to annexation," as CGCP Annexation and Utility Services Policy 6 requires. In addition, petitioners argue that the Speedway site lacks an effective secondary emergency road.

[12] We note that a supplemental letter from the author of the TIS clarified that the missing number should be "85% to 90%." Record 1408 (LUBA No. 2006-056).

Intervenors respond that the city required that the Speedway site be connected to the city sewer system within two years of approval, in addition to many other conditions involving public facilities. With respect to the secondary road, the site plan shows and conditions require intervenors to construct a secondary emergency road. We agree with intervenors that petitioners have not established that the findings and conditions related to CGZO 18.33.060(C) are inadequate.

The seventh assignment of error is denied.

The city's decision is remanded.