BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLAMETTE OAKS, LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

GOODPASTURE PARTNERS LLC,
Intervenor-Respondent.

LUBA Nos. 2010-060 and 2010-061

GOODPASTURE PARTNERS LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

WILLAMETTE OAKS, LLC,
Intervenor-Respondent.

LUBA No. 2010-062

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Zack P. Mittge, Eugene, filed a petition for review and a response brief and argued on behalf of Willamette Oaks, LLC. With him on the briefs were William H. Sherlock and Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock, PC.

Michael C. Robinson, Portland, filed a petition for review and a response brief and argued on behalf of Goodpasture Partners LLC. With him on the briefs were Perkins Coie LLP.

Emily N. Jerome, City Attorney, Eugene, filed the response brief on behalf of respondent.

RYAN, Board Member; participated in the decision.

BASSHAM, Board Member; concurring.

HOLSTUN, Board Chair; dissenting.

REMANDED 03/08/2011

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

Opinion by Ryan.

NATURE OF THE DECISION

In LUBA Nos. 2010-060 and 2010-061, Willamette Oaks, LLC (Willamette Oaks) appeals a decision by the city planning commission approving a zone change, tentative planned unit development and an adjustment review. In LUBA No. 2010-062, Goodpasture Partners, LLC (Goodpasture Partners), the applicant below, appeals the same decision.

FACTS

The subject property contains two parcels totaling approximately 23 acres that lie to the north and south of Alexander Loop, which is designated as a local street in TransPlan, the City of Eugene Transportation Systems Plan (TSP). Although called a loop, at present Alexander Loop currently intersects with Goodpasture Island Road, a minor arterial in the TSP, in only one location. The proposal contemplates completing the loop with a second connection to Goodpasture Island Road to the north of the existing connection. Goodpasture Island Road, in turn, connects with Delta Highway at interchanges in two locations that are to the north and the south of the proposed development.

Goodpasture Partners applied for a zone change for the property from Medium Density Residential (R2) to Limited High Density Residential (R3), a planned unit development, and an adjustment, to develop a five-parcel PUD with 583 residential units in several buildings, and a single commercial building. As required by the Eugene Code (EC), Goodpasture Partners submitted a Traffic Impact Analysis (TIA) with its applications. The hearings officer approved the zone change, PUD application, and adjustment review, and Willamette Oaks appealed the decisions to the planning commission. The planning commission held an on the record hearing and voted to uphold the hearings officer's decisions with some modifications. These appeals followed.

REPLY BRIEFS

Willamette Oaks moves for permission to file a reply brief that exceeds five pages to respond to new matters raised in Goodpasture Partners' response brief, and to file a separate reply brief with fewer than five pages to respond to new matters raised in the city's brief. Goodpasture Partners moves for permission to file a reply brief to respond to Willamette Oaks' response brief. No party objects to the reply briefs, and they are allowed.

ASSIGNMENT OF ERROR (GOODPASTURE PARTNERS)

EC 9.7655(2) provides in relevant part that in order to appeal a decision of the hearings officer:

> "The appeal shall be submitted on a form approved by the city manager, be accompanied by a fee established pursuant to EC Chapter 2, and be received by the city no later than 5:00 p.m. of the 12th day after the notice of decision is mailed."

Willamette Oaks appealed the decisions of the hearings officer approving the zone change and PUD and paid an appeal fee in the amount of $16,229.48. According to Willamette Oaks and the city, the amount that Willamette Oaks paid as the appeal fee was the amount that city planning staff told Willamette Oaks to pay.[1] That amount, it turned out, was $135.37 less than the actual appeal fee.[2] Goodpasture Partners notified the city of the payment shortage and the city in turn notified Willamette Oaks that it owed an additional $135.37. Willamette Oaks then paid the additional $135.37.

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[1] The city's appeal form includes the following language:

> "A filing fee must accompany all Hearings Official * * * appeals. The fee varies depending upon the type of application and is adjusted periodically by the City Manager. Check with Planning Staff at the Permit and Information Center to determine the required fee * * *." Record 333.

[2] As we discuss later in our resolution of Willamette Oaks' seventh assignment of error, for an appeal of a hearings officer's decision the city charges an appeal fee that is equal to 50% of the application fee for the application that was the subject of the hearings officer's decision.

In its assignment of error, Goodpasture Partners argues that the city erred in allowing the planning commission to consider Willamette Oaks's appeals of the hearings officer's decisions approving Goodpasture Partners' applications because the appeal fee that Willamette Oaks paid when it filed its appeal was less than the appeal fee required by the EC. According to Goodpasture Partners, the phrase "* * * shall * * * be accompanied by a fee established pursuant to EC Chapter 2" in EC 9.7655(2) means that the requirement to pay the appeal fee is a mandatory prerequisite for appeal, and Willamette Oaks' failure to satisfy that prerequisite means that the city was obligated to reject Willamette Oaks' appeal. In support of its argument, Goodpasture Partners cites *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995). In *Ramsey*, LUBA upheld the city's refusal to accept a local appeal of a decision where the appellant failed to pay the required appeal fee and instead submitted a request for a fee waiver with the appeal form that the appellant delivered to the city.

The city adopted findings addressing Goodpasture Partners' argument, and interpreted EC 9.7655(2) not to require dismissal of the appeal:

> "While it is clear that the City's code requires that an appeal include an appeal fee, the City's code does not specify the consequence of an underpayment of an appeal fee based on a City staff miscalculation. We are cited to nothing in the code that indicates that the consequence should be dismissal of the appeal and we decline to do so, particularly considering the facts that this [appellant] relied on City staff's calculation, that the underpayment was slight and that it was immediately addressed when the appellant was notified." Record 12.

The city and Willamette Oaks respond that the planning commission correctly determined that nothing in EC 9.7655(2) indicates that its requirements are mandatory prerequisites, such that failure to satisfy any of those requirements should result in dismissal of a local appeal, or alternatively, in the city's refusal to accept an appeal. Willamette Oaks also points out that unlike the situation in *Ramsey*, where no appeal fee was ever paid and no fee waiver had been granted to support that nonpayment prior to filing the local appeal, as was required by the local code if no appeal fee was included with the appeal, Willamette Oaks paid the appeal

fee that the city told it to pay and its underpayment of the appeal fee was promptly rectified when called to Willamette Oaks' attention.

We review the planning commission's interpretation of EC 6.7655(2) to determine if it is correct. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). We agree with the planning commission's interpretation of EC 6.7655(2) that nothing in that code section specifies that the consequence for an underpayment of an appeal fee based on misinformation from planning staff is dismissal of a local appeal, and we agree with Willamette Oaks and the city that in that circumstance, the planning commission correctly concluded that the consequence for underpayment of an appeal fee is not to dismiss the local appeal. *See Ratzlaff v. Polk County*, 56 Or LUBA 740, 745 (2008) (where nothing in local law governing payment of appeal fees states that failure to pay appeal fee is a jurisdictional requirement, it is not error for a county to hear the appeal); *Golden v. Silverton*, 58 Or LUBA 399, 407 (2009) (if a local government wants to make dismissal of a local appeal the consequence for failure to comply with an informational requirement on an appeal form, the local government must do so with sufficient clarity to put parties on notice that such a failure will result in dismissal). Moreover, even assuming that payment of an appeal fee is a mandatory prerequisite, unlike the circumstances in *Ramsey*, Willamette Oaks satisfied any mandatory prerequisite to pay an appeal fee when it paid the fee that it was told to pay by the city. Willamette Oaks did not, as was the case in *Ramsey*, simply submit its appeal form without the required fee. The fact that the fee that Willamette Oaks submitted was less than the amount that was actually required under the EC, apparently due to an error by planning staff in calculating the amount of the appeal fee, does not mean that Willamette Oaks failed to comply with any mandatory EC 6.7655(2) requirement that an appeal fee accompany the appeal form.

Goodpasture Partners' assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (WILLAMETTE OAKS)

A. Transportation Planning Rule – Significant Effects Determination

OAR 660-12-0060 (the Transportation Planning Rule or TPR) requires that if a land use regulation amendment, such as the proposed zone change from R2 to R3, "significantly affects" a transportation facility, the local government must put in place one or more measures specified in OAR 660-012-0060(2). As relevant here, OAR 660-012-0060(1) provides that a plan or land use regulation amendment "significantly affects" an existing transportation facility if it would: (1) change the functional classification of an existing or planned transportation facility (OAR 660-012-0060(1)(a)); (2) reduce the performance of a transportation facility below the minimum acceptable standard identified in the relevant TSP (OAR 660-012-0060(1)(c)(B)), or (3) worsen the performance of a facility that is projected to perform below the minimum acceptable standard, in the relevant TSP (OAR 660-012-0060(1)(c)(C)). The second and third types of "significant affect" are both measured at the end of the planning period identified in the transportation system plan.[3]

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

> "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

In general, in order to determine whether a land use regulation amendment significantly affects a transportation facility under OAR 660-012-0060(1)(c)(B) or (C), a comparison is required between the traffic associated with the most traffic-intensive uses allowed under the existing zoning with traffic associated with the most traffic-intensive uses allowed under the proposed zoning. *See Mason v. City of Corvallis*, 49 Or LUBA 199, 219 (2005) (so holding with regard an earlier version of OAR 660-012-0060(1)(c)(B)). Based on Goodpasture Partners' TIA the city determined that the zone change would reduce the performance of two transportation facilities below the minimum acceptable standard identified in the city's TSP and would thus significantly affect those transportation facilities. The two transportation facilities that the city determined would be significantly affected are the intersection of Goodpasture Island Road at the Delta Highway southbound off ramp, and the intersection of Goodpasture Island Road at the Delta Highway northbound off ramp.

1. First Subassignment – OAR 660-012-0060(1)

In its first subassignment of error, Willamette Oaks argues that the city erred because it evaluated traffic under the new R3 zone as conditionally approved by the city to be limited by a vehicle trip cap. As a condition of approval of the zone change, the city limited traffic that may be generated under the new R3 zone with a "vehicle trip cap," so that traffic from that R3 zone development would not exceed the traffic that would be generated by uses that are already allowed under the current R2 zone.[4] The city explained how it will implement the vehicle trip cap so that the maximum number of trips is not exceeded:

> "(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."

[4] That condition of approval is:

> "Mitigation #3 – Trip Cap - The maximum development on the site shall be limited so that it would not produce more than 287 trips in the AM peak hour and 321 trips during the PM peak hour as determined by the Institute of Transportation Engineers Trip Generation Manual. The city may allow development intensity beyond this maximum number of peak

> "[T]he trip cap condition will be recorded with the zone change notice and will also clearly be shown on the final PUD site plan. Once approved through the final PUD process, this final site plan is recorded as an exhibit to the performance agreement that is recorded with the property. As compliance with the final PUD site plan is required at [the time of] building permit, compliance with the trip cap will also be assured.
>
> "As noted in the staff memo * * * the 287 AM peak hour trips and the 321 PM peak hour trips in the applicant's proposed trip cap correspond to the applicant's PUD proposal for:
>
> > "Apartments: Used 'Apartment' (ITE Land Use Code 220) (458 units)
> >
> > "Senior Housing: Used 'Senior Adult Housing – Attached' (ITE Land Use Code 252) (125 Units)
> >
> > "Commercial Development: Used 'Specialty Commercial' (ITE Land Use Code 814) (Commercial space 7,011 square feet)
>
> "Tracking compliance at building permit based on the PUD proposal for the number of units and commercial space will provide a practical means to ensure compliance with the trip cap." Record 578.

Goodpasture Partners responds that the TIA evaluated potential trips under an unrestricted R3 zone and concluded that many transportation facilities, including the two identified by the city, would be significantly affected. Record 1432. However, Goodpasture Partners explains, the TIA also evaluated potential trips under the conditioned R3 zone that limits the potential new trips to the same number of trips that could be generated under the current R2 zoning and concluded that under that conditioned zoning, the two intersections described above would be significantly affected. The TIA includes a table showing the highest number of projected new trips under an unrestricted R3 zoning (7,254, with 583 am peak hour trips and 668 pm peak hour trips), the highest number of projected trips under the current R2 zoning (3,696, with 293 am peak hour trips and 342 pm peak hour trips), and the highest number of projected trips under R3 zoning restricted by a vehicle trip cap, which is

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> hour vehicle trips only if the applicant submits to the city and ODOT a traffic impact analysis that demonstrates that the proposed intensification of use would be consistent with [the TPR]. The applicant shall seek and the city shall consider such approval using the city's Type II land use application procedure." Record 35 (emphasis in original).

equal to the number of projected trips under the R2 zoning. Record 1435. The TIA concludes that "[t]he subject properties, under the new zoning with the proposed 'vehicle trip cap' would not reduce or further degrade transportation facility performance levels below standards regardless of study year." *Id.*

In *Griffiths v. City of Corvallis*, 50 Or LUBA 588, 596 (2005) we noted that a proper baseline for comparison of the differences in traffic generated under the current zone and the proposed zone could be development that is proposed concurrently with the zone change, if that zone change decision is conditioned in a way that would effectively require a new demonstration that the TPR is satisfied in order to modify those development plans. As noted, one of the conditions of approval of the zone change is a vehicle trip cap. As the TIA explains it, the trip cap "would limit the traffic generated to that which can be generated by the current zoning, *i.e.* to no more than a 'reasonable worst case' R2 trip generation scenario." Record 1435. Given that condition, it is permissible for the city to evaluate the traffic that will be generated by the R3 zone as conditioned, rather than the R3 zone without the trip cap condition, in determining whether the proposed rezoning will significantly affect transportation facilities.

Willamette Oaks cites our decision in *DLCD v. City of Warrenton*, 37 Or LUBA 933, 940-942 (2000) (*Warrenton*) as support for its argument.[5] However, our decision in *Warrenton* rejected the city's reliance on unfunded future transportation improvements that were not included in the city's TSP to conclude that the proposed rezoning, as mitigated by those unplanned and unfunded improvements, would not have a significant effect on a transportation facility. In the present appeal, we do not see that it is error under OAR 660-012-0060(1)(c) to consider the zoning trip cap condition of approval in determining whether

[5] Willamette Oaks also cites the Oregon Department of Transportation Guidelines for Implementing the TPR. Record 612. However, the guideline cited by Willamette Oaks cautions that an applicant should not rely on mitigation in the form of transportation improvements that are not likely to occur by the end of the planning period to avoid a finding of significant effect. That is not what the city did in this case.

the proposed R3 zoning will significantly affect a transportation facility. The trip cap condition of approval will limit the additional number of trips that could potentially be generated by that R3 zoning, just as the use and density limitations that are imposed by the R3 zoning district itself will limit the additional number of trips that can be expected by development under that zoning. To the extent *Warrenton* suggests that proposed zoning conditions of approval that limit the number of additional trips that could otherwise be expected under a proposed zoning map amendment cannot be considered when determining whether the proposed conditional rezoning will significantly affect a transportation facility, we disavow that suggestion.

We recognize that it is at least possible to characterize allowing such conditions of rezoning to be considered when determining whether the proposed rezoning will significantly affect transportation facilities to be premature consideration of mitigation measures under OAR 660-012-0060(2) and (3). But we do not think OAR 660-012-0060 must be interpreted to mandate a *pro forma* exercise of considering the traffic impacts of unconditional R3 zoning, when unconditional R3 zoning is not proposed and the proposed R3 zoning is conditioned in a way that will prevent the full traffic impact that would result from unconditional R3 zoning.

The first subassignment of error is denied.

2. Second Subassignment – OAR 660-012-0060(1)(a)

In its second subassignment of error, Willamette Oaks argues that the proposed zone change violates OAR 660-012-0060(1)(a) because the increase in traffic on Alexander Loop Road resulting from the change to the R3 zone, and the PUD's proposal to extend Alexander Loop to connect with Goodpasture Island Road will "change the functional classification" of Alexander Loop from a local street to a neighborhood collector. OAR 660-012-0060(1)(a). As we understand Willamette Oaks' argument, it is that the city erred in approving the PUD

without a corresponding amendment to the TSP to change the functional classification of Alexander Loop from a local street to a neighborhood collector.

The city and Goodpasture Partners (respondents) respond first that the city correctly concluded that OAR 660-012-0060(1)(a) does not apply because the zone change does not include a request for an amendment to the TSP to change the functional classification of Alexander Loop and the city's decision does not amend the TSP to enact such any such change. According to respondents, the plain language of OAR 660-012-0060(1)(a) limits its application to decisions that actually adopt an amendment to a plan or land use regulation that changes a transportation facility's functional classification. According to respondents, OAR 660-012-0060(1)(a) is not triggered when there is no amendment to a local government's transportation system plan, and city street classifications do not automatically change when the development authorized by a zone change will increase traffic.

We agree with respondents that OAR 660-012-0060(1)(a) is directed at decisions that change the functional classification of a transportation facility that is included in a TSP through an amendment to the TSP. OAR 660-012-0060(1)(a) does not apply where no such plan amendment is sought. When OAR 660-012-0060(1)(a) and OAR 660-012-0060(1)(c)(A) are read together, it is clear that the former is directed at decisions that amend a TSP to change the functional classification of a facility, while the latter is directed at decisions that allow development that is inconsistent with a transportation facility's functional classification.

The second subassignment of error is denied.

3. Third Subassignment - OAR 660-012-0060(1)(c)(A)

OAR 660-012-0060(1)(c)(A) provides that a decision that allows land uses or levels of development that would result in types of travel or access, or levels of travel or access that are inconsistent with the functional classification of a transportation facility have a "significant effect" on that transportation facility. Whether an amendment "significantly

affects" a transportation facility under OAR 660-012-0060(1)(c)(A) depends on how the relevant classification scheme defines the different functional classifications, and how such classifications are distinguished from each other. *Alliance for Responsible Land Use v. Deschutes Cty*, 40 Or LUBA 304, 339 (2001), *aff'd* 179 Or App 348, 42 P3d 948 (2002).

In its third subassignment of error, Willamette Oaks argues that the city erred in failing to adopt findings that address under OAR 660-012-0060(1)(c)(A) whether the zone change would significantly affect Alexander Loop. According to Willamette Oaks, it presented evidence that the zone change would significantly affect that transportation facility because it would result in traffic volumes and connections comparable to those of a neighborhood collector and thus would result in levels of traffic on Alexander Loop that are inconsistent with its functional classification as a local street.

The planning commission adopted the following findings that set out the errors alleged by petitioners and the planning commission's response:

> ***"c. The Hearings Official erred by misapplying the Eugene Arterial and Collector Street Plan to approve a zone change that would alter the functional classification of Alexander Loop without a finding of significant affect, or imposing appropriate mitigation measures, and where the applicant failed to seek an amendment to the Transportation System Plan.***
>
> ***"d. The Hearings Official erred by allowing land uses that would result in types or levels of travel that are inconsistent with the functional classification of Alexander Loop with out a finding of significant affect, and without imposing appropriate mitigation measures.***
>
> "The Planning Commission finds that the applicant did not err. Based on the five street classification factors, even with the additional trips generated by the proposed zone change, staff and Hearings Official properly concluded that Alexander Loop would remain a local street. Alexander Loop would connect to Goodpasture Island Road, which is a minor arterial (as collector streets "often do"), Alexander Loop would serve traffic that has its point of origin on Alexander Loop and does not serve through traffic. The record includes several examples where actual ADT is greater or lower than the Typical Traffic Volume Ranges shown in the *Arterial and Collector Street Plan*. See February 3, 2010 City staff Memorandum to Hearings Official, Attachment A

(Pages 274-286 of the record). Similarly, Alexander Loop specifically provides property access, which collectors typically limit.

"Even if more weight was to be given to ADT than the other four classification factors, the ADT that the proposed zone change will add to Alexander Loop does not necessitate reclassifying the street. Specifically, using the most recent information provided by the applicant, the projected daily traffic volumes on the two legs of Alexander Loop are approximately 1,900 to 2,500 ADT, including: Arcadia Street; Crest Drive; Friendly Street south of 28th; Orchard Street; Villard Street; Elysium Street east of Coburg; Acorn Park Street; 24th Avenue west of Willamette; 8th Avenue from Chambers to Jefferson; and, and 32nd from Alder to Onyx. These streets all carry between 1,500 and 3,900 ADT. Additionally, there are collector streets that carry fewer than 1,500 daily trips as well (some as low as 400 ADT), including: 39th Avenue west of Willamette; Jeppesen Acres Road east of Gilham; 25th Avenue west of Hawkins; Donald Street north of Fox Hollow; Friendly Street south of 18th; Gilham Road north of Ayres; Beacon Drive. See February 3, 2010 City staff Memorandum to Hearings Official. * * *

"The Hearings Official correctly rejected as unpersuasive testimony offered by Appellant's consultant that attempted to apply the City's street classification methodology to the facts of this case. The Hearings Official correctly found that the proffered analysis did not appear to comport with the point system utilized by the City. The Planning Commission finds that the appellant has failed to submit substantial evidence to rebut the conclusion that Alexander Loop is properly classified as a local street. Based upon substantial evidence in the record, the Planning Commission finds that the Hearings Official did not err in concluding that the functional classification of Alexander Loop will remain as a local street." Record 26-27 (emphasis in original).

The city points out that the February 3, 2010 supplemental staff report that is referenced in the findings makes clear that the city's analysis in that staff report was concerned with determining, under OAR 660-012-0060(1)(c)(A), whether the traffic levels on Alexander Loop would be inconsistent with its classification as a local street.[6] That staff report

[6] The city explains that in the city's view, Willamette Oaks either contributed to or caused any confusion on the part of the hearings officer and the planning commission regarding application of the TPR by being vague when presenting its arguments under OAR 660-012-0060(1)(a) and OAR 660-012-0060(1)(c)(A) and by relying on the same arguments and evidence to support its position under either subsection. The TPR is arguably one of LCDC's most complicated rules to understand and apply, and it seems to be in all parties' best interests to strive for precision in identifying the subsection or subsections to which an argument relates. Such precision also assists LUBA in reviewing the parties' arguments.

concluded that although traffic volumes on Alexander Loop would increase, based on an analysis of all five classification factors that the city uses to classify streets, the zone change would not significantly affect the performance of Alexander Loop as a local street. We understand the planning commission to have concluded, based in part on the analysis in that supplemental staff report, that the city's classification system for classifying streets does not classify streets based on traffic volume alone but rather includes five classification factors that together are used to calculate a numeric rating for a street.[7] We understand the planning commission to have rejected Willamette Oaks' argument that focused on the increase in traffic volumes and the additional connection to Goodpasture Island Road because it failed to account for the interplay among those five factors or explain why application of those factors meant that there would be levels of traffic or types of access that are inconsistent with the local street classification.

Although the findings conclude that "the functional classification of Alexander Loop will remain as a local street," the introduction to the findings quoted above indicate that the city is addressing both OAR 660-012-0060(1)(a) and OAR 660-012-0060(1)(c)(A), and we understand that conclusion to be a conclusion under OAR 660-012-0060(1)(c)(A) that the zone change will not allow levels of development that would result in a significant effect on Alexander Loop. Willamette Oaks does not explain why those findings are inadequate, and we think that they are adequate to explain the city's reasoning.

Under this subassignment of error, Willamette Oaks also argues that the city's conclusion that no significant effect on Alexander Loop would occur is not supported by substantial evidence in the record. Willamette Oaks points to evidence in the record regarding increased traffic volumes on Alexander Loop. However, as we explain above, the city concluded that the question of whether the zone change would allow levels of

[7] As set forth in Willamette Oaks' petition for review, those five factors are (1) average daily trips (ADT); (2) alternative modes of transportation; (3) length; (4) spacing; and (5) connectivity. Petition for Review 9.

development that are inconsistent with Alexander Loop's classification as a local street is not answered by merely determining whether there is an increase in traffic volumes, but also considers the other four factors that determine a street's classification. For that reason, we need not consider Willamette Oaks' substantial evidence challenge.

The third subassignment of error is denied.

4. Fourth Subassignment – OAR 660-012-0060(1)(c) Planning Period

OAR 660-012-0060(1)(c) requires that traffic impacts be measured "at the end of the planning period identified in the adopted transportation system plan." In its fourth subassignment of error, Willamette Oaks argues that the city erred in measuring traffic impacts to area facilities through 2031, when the relevant planning period under the TSP for local facilities is through 2015, and the relevant planning period for state facilities under the Oregon Highway Plan is through 2025.[8]

Goodpasture Partners responds that the city required it to assess traffic impacts beyond 2015 and in fact through 2031 in large part because the phased building schedule for the phased PUD anticipates completion in 2020, after the planning period in the TSP expires. Second, Goodpasture Partners responds, Willamette Oaks has not explained how assessing traffic impacts through 2031 affects the city's analysis or conclusions under the TPR or established that assessing traffic impacts through a date that is later than the planning horizon specified in the relevant transportation systems plans requires reversal or remand. While there are some circumstances that might call into question the efficacy of use of a date that is later than the applicable planning horizon, such as when a failure is projected to occur at the end of the (shorter) planning period specified in the applicable TSP, but the later planning horizon that is chosen coincides with transportation facility improvements that are scheduled to be completed at or prior to that later date and that will remedy the failure at that later date,

[8] Apparently some of the affected transportation facilities are within the jurisdiction of the State of Oregon while others are within the city's jurisdiction.

so that a gap occurs during which a facility fails. However, Willamette Oaks does not argue that those circumstances are present here. We agree with Goodpasture Partners that the city did not err in assessing traffic impacts beyond the applicable planning periods.

The fourth subassignment of error is denied.

B. Mitigation of Significant Effects

Based on the TIA, the city concluded that the zone change and PUD would significantly affects two transportation facilities that are already performing below the acceptable level of service and that exceed applicable volume to capacity ratios (in other words are "failing"): the intersection of Goodpasture Island Road at the Delta Highway southbound off ramp and the intersection of Goodpasture Island Road at the Delta Highway northbound off ramp. OAR 660-012-0060(3) allows a local government to approve a zone change that would significantly affect an already failing transportation facility if development resulting from the zone change will mitigate the impacts to avoid "further degradation" of the facility. [9]

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

> "*Notwithstanding sections (1) and (2) of this rule*, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:
>
> "(a) The facility is already performing below the minimum acceptable performance standard identified in the TSP or comprehensive plan on the date the amendment application is submitted;
>
> "(b) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;
>
> "(c) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures;
>
> "(d) The amendment does not involve property located in an interchange area as defined in paragraph (4)(d)(C); and

1. New Bridge over Delta Highway

The city conditioned its approval of the zone change on Goodpasture Partners' construction at its expense of a new bridge over Delta Highway.[10] Willamette Oaks argues that the city erred in conditioning the zone change on the construction of the new bridge without an amendment to the TSP to identify the new bridge as a planned for facility under the TSP. According to Willamette Oaks, the TSP prioritizes capital system improvements like construction of a new overpass facility by geographic area, name, and cost, as well as other factors. Willamette Oaks argues that the proposed new bridge is inconsistent with the TSP because it is an arterial capacity improvement that is not provided for or prioritized in the TSP. Therefore, Willamette Oaks argues, the city must amend the TSP to incorporate the bridge as a planned improvement prior to approving the zone change.

> "(e) For affected state highways, ODOT provides a written statement that the proposed funding and timing for the identified mitigation improvements or measures are, at a minimum, sufficient to avoid further degradation to the performance of the affected state highway. However, if a local government provides the appropriate ODOT regional office with written notice of a proposed amendment in a manner that provides ODOT reasonable opportunity to submit a written statement into the record of the local government proceeding, and ODOT does not provide a written statement, then the local government may proceed with applying subsections (a) through (d) of this section." (Emphasis added.)

[10] That condition provides:

> "Pursuant to OAR 660-012-0060(3)(c), the applicant's proposed mitigation measures #1, #2 and #3 set out below, shall be in place by the time of first occupancy of the first phase of the PUD.
>
> " * * * * *
>
> "**Mitigation #2 – Goodpasture Island Road Bridge** – Widen Goodpasture Island Road to include dual left-turn lanes from Goodpasture Island Road to Northbound Delta Highway by: (a) constructing a second bridge structure north of the existing Goodpasture Island bridge over Delta Highway, such that the existing bridge would accommodate eastbound travel and the new bridge would accommodate westbound travel; (b) widening Goodpasture Island Road east of the existing bridge to accommodate two eastbound left-turn lanes and single through lanes in each direction; (c) widening the northbound Delta Highway on-ramp to two lanes to facilitate the two left-turn lanes and a lane drop to merge traffic into a single lane in advance of the existing weaving area; (d) tapering Goodpasture Island Road to the existing width; and (e) installing traffic signal modifications to accommodate the proposed roadway changes." Record 29-30.

In *Lufkin v. Salem*, 56 Or LUBA 718 (2008), we rejected a similar argument that an amendment to the city's transportation system plan was required by mitigation measures imposed as conditions of approval by the city under OAR 660-012-0060(2), where the petitioners did not explain how any particular mitigation measure was inconsistent with the TSP:

> "[T]he city may choose to comply with OAR 660-012-0060(1) by one or a combination of the means listed at OAR 660-012-0060(2), and the rule does not necessarily obligate the city to amend the TSP to reflect transportation improvements required by conditions of approval imposed under OAR 660-012-0060(2)(e). That said, if imposition of conditions of approval under OAR 660-012-0060(2)(e) would require transportation improvements that are *inconsistent* with the acknowledged TSP, then the city may be required to also amend the TSP, either pursuant to OAR 660-012-0060(2)(d) or simply to ensure that the amendment complies with the Goal 2 (Land Use Planning) consistency requirement." *Id*. at 723-24.

If imposition of the condition of approval requiring a new bridge to be constructed over Delta Highway would require transportation improvements that are inconsistent with the TSP, then the city might be required to amend the TSP in order to comply with Statewide Planning Goal 2 (Land Use Planning). For example, if the TSP provided for a new overpass over Delta Highway in a location that is close enough to the location of the proposed bridge that access spacing standards would be violated by the construction of both facilities, or otherwise provided for a facility that is specifically intended to address the current failing situation, we would likely agree that the city needs to amend the TSP to account for that inconsistency. However, like the petitioners in *Lufkin*, Willamette Oaks merely points to the TSP's identification of a hierarchy of transportation improvements and the absence of any provision for the bridge in the TSP in support of its argument. That argument is not sufficient to demonstrate an inconsistency that results from the construction of the new bridge.

Willamette Oaks also argues that the mitigation measure requiring the new bridge is not an allowed measure under OAR 660-012-0060(2)(e) because it does not fall within the

meaning of "minor transportation improvement" as used in that subsection.[11] However, as the portion of the decision quoted above makes clear, the city did not base its decision on OAR 660-012-0060(2); it based its decision on OAR 660-012-0060(3). OAR 660-012-0060(3) provides an alternative method for a local government to approve a zone change where there will be a significant effect on facilities that already perform below the minimum acceptable level of performance specified in the TSP at the time of the zone change. *See* n 9. Therefore, Willamette Oaks' arguments under OAR 660-012-0060(2)(e) do not provide a basis for reversal or remand.

Finally, Willamette Oaks argues that the city was required to include the new bridge in the city's public facility plan under Statewide Planning Goal 11 (Public Facilities). Willamette Oaks argues that OAR 660-011-0010 requires local governments to list "significant public facilities projects," which is defined to include "construction or reconstruction of a * * * transportation facility within a public facility that is funded or utilized by members of the general public." OAR 660-011-0005(6).

The city disputes that an amendment to the city's public facility plan was required to add the new bridge, and points to OAR 660-011-0045(2)(a), which provides in relevant part:

> "Certain public facility project descriptions, location or service area designations will necessarily change as a result of subsequent design studies, capital improvement programs, environmental impact studies, and changes in potential sources of funding. It is not the intent of this division to:

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[11] OAR 660-012-0060(2) provides in relevant part:

> "Where a local government determines that there would be a significant effect, compliance with section (1) shall be accomplished through one or a combination of the following:
>
> "* * * * *
>
> "(e) Providing other measures as a condition of development or through a development agreement or similar funding method, including transportation system management measures, demand management or *minor transportation improvements*. Local governments shall as part of the amendment specify when measures or improvements provided pursuant to this subsection will be provided." (Emphasis added).

> "(a) [P]rohibit projects not included in the public facility plans for which unanticipated funding has been obtained; * * *."

According to the city, that section of the Goal 11 rule specifically addresses the current situation in which unanticipated funding for a project that is not currently included in the city's public facility plan has been obtained and provides that the Goal 11 rules are not intended to prohibit that project from going forward merely because it is not included in the city's plan. We agree with the city.

2. Vehicle Trip Cap

As noted above, the city also conditioned approval of the zone change by imposing a vehicle trip cap. *See* n 4. Willamette Oaks' arguments challenging the trip cap are somewhat difficult to follow. We attempt to address them all in this section. In this subassignment of error, Willamette Oaks first repeats the arguments it made above under OAR 660-012-0060(1) that the city impermissibly used the trip cap to avoid an evaluation of whether the most intensive use of the property under the R3 zone would significantly affect Alexander Loop, and that even with the trip cap, the zone change would significantly affect the function of Alexander Loop. For the reasons explained above, we reject those arguments.

Willamette Oaks next argues that a vehicle trip cap is not a permissible means of mitigating the significant effects of the zone change. First, we understand Willamette Oaks to argue that the condition of approval imposing the trip cap is invalid because it does not include a monitoring or enforcement mechanism. Second, Willamette Oaks argues that the trip cap is not a permissible mitigation measure under OAR 660-012-0060(2)(e). We address each argument in turn.

Goodpasture Partners first responds that to the extent any monitoring or enforcement of a condition is required, the trip cap is monitored and enforced when the city receives an application for a building permit under the final, approved PUD and site plan and then allocates from the trip cap the number of trips associated with a particular use at the time a building permit is issued for that use. According to Goodpasture Partners, after all of the

trips within the trip cap have been allocated, no further development of the property can occur unless the trip cap is increased. The city will monitor trips by monitoring the building permits issued as development occurs. While the condition of approval does not provide quite that level of detail about how the trip cap condition will be enforced, evidence in the record supports the city's conclusion that the trip cap is enforceable. Record 578 (staff report explaining how trip cap functions).

Goodpasture Partners also responds that the trip cap is not a mitigation measure that the city imposed under OAR 660-012-0060(2)(e), but rather a mitigation measure under the OAR 660-012-0060(3)(c) non-degradation standard, discussed in detail above under the discussion of the new bridge over Delta Highway. The portion of the decision quoted in that section of the opinion makes clear that the city imposed the trip cap condition "pursuant to OAR 660-012-0060(3)(c)" and not pursuant to OAR 660-012-0060(2)(e). Therefore, we need not consider Willamette Oaks' argument that the trip cap is not a permissible mitigation measure under OAR 660-012-0060(2)(e). Absent any argument that the trip cap is not a permissible mitigation measure under OAR 660-012-0060(3)(c), Willamette Oaks' arguments do not provide a basis for reversal or remand.

Willamette Oaks next challenges the TIA's projection of the number of trips allocated to the commercial portion of the PUD in order to calculate the maximum number of peak hour trips allowed by the development under the trip cap. According to Willamette Oaks, the TIA assumed that the commercial space would develop as "specialty commercial" development under the Institute of Traffic Engineers (ITE) development category, but nothing in the decision restricts the commercial zoned space to the "specialty commercial" category. Willamette Oaks cites to its traffic engineer's assessment that development permitted outright in the C-1 zone could result in traffic levels that are six times greater than the level assumed in the applicant's TIA. Specifically, Willamette Oaks cites to evidence in the record that development of a bank and a restaurant in the commercial portion of the PUD

would generate as many as 144 pm peak hour trips, while the TIA assumed that the commercial portion would generate only 21 pm peak hour trips.

However, as we understand the trip cap to function, when Goodpasture Partners proposes a use on the commercial portion of the property, that use will be assigned a number of trips based on the Institute of Transportation Engineers Trip Generation Manual. If the use is assigned a higher number of trips than the TIA assumed, for example if a bank or restaurant is the proposed use, then as we understand the trip cap, assigning those trips to the commercial use will decrease the remaining number of trips available for the rest of the development. In that situation, Goodpasture Partners will be forced to curtail commercial development more quickly than assumed in the TIA or to choose between a more traffic intensive use of the commercial portion of the PUD and full development of the residential portion of the PUD. But that choice does not make the assumptions in the TIA incorrect, as far as we can tell.

Willamette Oaks next argues that the requirement set forth in the condition of approval that requires any increase in development intensity beyond the maximum number of peak hour trips to undergo a separate application and evaluation for compliance with the TPR is an improper deferral by the city regarding the application's compliance with the TPR to a later date and to a process that is without the same participatory rights. Willamette Oaks cites *Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007) in support of its argument.

The city responds that *Gould* is inapposite. In the present appeal, the city did not defer finding compliance with the TPR. Rather, the city found that the TPR is fully satisfied by the trip cap, but imposed an additional condition that any modification to increase the allowed number of trips under the trip cap would require a new application and a new demonstration with public participatory rights. According to the city, that condition goes well beyond what would be required under normal circumstances to modify a condition of

approval and requires a Type II procedure that includes notice and an opportunity for public participation. We agree with the city that it did not defer a current finding of compliance with the TPR, and that nothing in the city's requirement that any modification of the trip cap condition of approval must undergo Type II review runs afoul of *Gould*.

Finally Willamette Oaks contends that the city erred in determining that only two nearby transportation facilities are currently failing. Willamette Oaks cites to evidence in the record that it contends demonstrates that the zone change affects "at least eight failing facilities." Record 1946-47. However, we do not see any support for that argument on the cited record pages. The cited record pages contain tables that list several intersections and indicate that in 2031, the level of service and volume to capacity ratios of those intersections will be exactly the same under the current R2 zoning and the proposed R3 zoning (as conditioned by the vehicle trip cap). Thus, those pages demonstrate that Goodpasture's zone change to R3, with the trip cap condition, will not "worsen the performance" of those traffic facilities that are projected to fail in 2031 under the current R2 zoning.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR (WILLAMETTE OAKS)

EC 9.8675 requires Goodpasture Partners to submit a TIA that satisfies the city's Standards for Traffic Impact Analyses, which specify certain information that is to be included in a TIA. In its second assignment of error, Willamette Oaks argues that the TIA submitted by Goodpasture Partners fails to satisfy several of those standards: R-98650-F(2), F(3.2), F(5), F(9), and F(10).[12] Goodpasture Partners responds that Willamette failed to raise any issue regarding R-9.8650-(F)(5) below and is precluded from raising it before LUBA. ORS 197.835(3). However, Willamette Oaks raised the issue at Record 938.

[12] The text of those standards is located at Record 981-985.

Goodpasture next responds that Willamette Oaks' assignments of error provide no basis for reversal or remand, because a mere allegation of failure to comply with an application requirement does not provide a basis for remand of the decision where an application has been deemed complete. We agree with Goodpasture. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369, 378 (2009) (even if application requirements may not have been satisfied, absent a showing that the failure to satisfy the requirements resulted in noncompliance with at least one mandatory approval criterion, there is no basis for reversal or remand of the decision).

In its third assignment of error, Willamette Oaks argues that because the TIA fails to include all of the required information, the city erred in concluding that several Metro Plan, WAP and EC provisions are satisfied. However, the city is not required to determine whether all of the application requirements are satisfied in order to approve the application. Rather, the city is required to determine, based on all of the evidence in the record, whether the applicable approval criteria are satisfied, and we do not understand Willamette Oaks to argue that the city erred in determining that any approval criteria were satisfied or that substantial evidence in the record does not support that determination. Accordingly, these assignments of error provide no basis for reversal or remand of the decision.

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR (WILLAMETTE OAKS)

In the fourth assignment of error, Willamette Oaks argues that the city erred in allowing Goodpasture Partners to proceed with its PUD application without holding a neighborhood meeting, as required by EC 9.7007. The ordinance enacting EC 9.7007 was adopted by the city on August 11, 2008, and was appealed to LUBA. That ordinance provided that its effective date would be "30 days from the date of its passage * * * or *upon the date of its acknowledgement as provided by ORS 197.625*, whichever is later." Response Brief of City 22 (emphasis in original). LUBA issued a decision affirming the city's

adoption of the ordinance on June 12, 2009, and no party appealed that decision. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009). The PUD application was filed on June 18, 2009. Willamette Oaks argues that the ordinance took effect on June 12, 2009 when LUBA affirmed the city's decision and that because the PUD application was filed after EC 9.7007 took effect, Goodpasture Partners was required to comply with EC 9.7007.

The city responds that under ORS 197.625(1) and (2), the ordinance was acknowledged on the date that the deadline to appeal LUBA's 2009 *Home Builders* decision to the Court of Appeals expired without appeal, on July 6, 2009.[13] We agree with the city that EC 9.7007 was not acknowledged on the date that LUBA issued its decision. Rather, under ORS 197.625(1) and (2), the 21-day deadline for appealing LUBA's decision to the Court of Appeals would have to expire before the ordinance would be considered acknowledged under ORS 197.625(2). *See Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341, 348 (2006) (so assuming).

The fourth assignment of error is denied.

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[13] ORS 197.625 provides in relevant part:

> "(1) If a notice of intent to appeal is not filed within the 21-day period set out in ORS 197.830 (9), the amendment to the acknowledged comprehensive plan or land use regulation or the new land use regulation shall be considered acknowledged upon the expiration of the 21-day period. An amendment to an acknowledged comprehensive plan or land use regulation is not considered acknowledged unless the notices required under ORS 197.610 and 197.615 have been submitted to the Director of the Department of Land Conservation and Development and:
>
> > "(a) The 21-day appeal period has expired; or
> >
> > "(b) If an appeal is timely filed, the board affirms the decision or the appellate courts affirm the decision.
>
> "(2) If the decision adopting an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation is affirmed on appeal under ORS 197.830 to 197.855, the amendment or new regulation shall be considered acknowledged upon the date the appellate decision becomes final."

FIFTH ASSIGNMENT OF ERROR (WILLAMETTE OAKS)

EC 9.8320(11)(d) and EC 9.6710 together require a geotechnical analysis for the zone change, in order to "ensure that public and private facilities in developments in areas of known or potential unstable soil conditions are located, designed, and constructed in a manner that provides for public health, safety, and welfare." EC 9.6710. EC 9.8320(6) requires the applicant to demonstrate through a geotechnical analysis, that "[t]he PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response." Finally, EC 9.8865(2) requires that the zone change must be consistent with applicable Metro Plan policies.[14]

In its fifth assignment of error, Willamette Oaks argues that the geotechnical analysis submitted by Goodpasture Partners was deficient, and that the city erred in deferring findings compliance with EC 9.6710 and EC 9.8320(6) to a later process that does not involve a public hearing prior to a decision. Goodpasture Partners responds that the city properly postponed a determination of compliance with the applicable geotechnical criteria to a later phase in the PUD development process - the final PUD approval phase.

The facts surrounding the city's consideration of Goodpasture' geotechnical analysis and the applicable approval criteria are somewhat confusing and we set them out below as we understand them. Goodpasture Partners submitted geotechnical reports as required by EC 9.8320(11)(d) and EC 9.6710. Willamette Oaks submitted evidence into the record from its geotechnical consultants that called into question the validity of some of Goodpasture

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[14] According to Willamette the zone change does not comply with Metro Plan Natural Hazards Policy C32, which provides:

> "Local governments shall require site specific soil surveys and geologic studies where potential problems exist. When problems are identified, local governments shall require special design consideration and construction measures to be taken to offset the soil and geologic constraints present, to protect life and property, public investments, and environmentally sensitive areas."

Partners' evidence, and in particular that questioned the location of test borings on what appeared to be only one of the proposed PUD parcels, Parcel 4, and the depth of those borings. A condition of approval recommended by planning staff required Goodpasture Partners to submit additional geotechnical information, including information from borings on the remaining four parcels and proposed mitigation strategies for identified risks prior to final PUD approval.[15]

The hearings officer concluded that although Goodpasture Partners did not rebut Willamette Oaks' experts' evidence prior to the close of the evidentiary record and although Goodpasture Partners and the city had not fully assessed geotechnical risks, the applications could be approved with the planning department's recommended condition of approval. The hearings officer also imposed an additional condition of approval "[t]o ensure that the applicant conducts a complete geotechnical analysis" that requires Goodpasture Partners to respond to issues raised in Willamette Oaks' evidence and "address all points in [Willamette Oaks' evidence]" prior to building permit approval. Record 409.

The planning commission adopted the hearings officer's findings, but the planning commission modified the hearings officer's additional condition of approval to provide that review of the additional geotechnical information provided by Goodpasture Partners should be done in a Type II process, and to provide that the required information should be provided prior to final PUD approval, rather than at the building permit stage.[16] The planning commission concluded:

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[15] That condition of approval provided:

> "Prior to final PUD approval, the applicant shall ensure the geotechnical report is internally consistent with respect to the boring numbers and elevations. Additionally, the applicant shall submit a detailed geotechnical information on Parcels 1, 2, 3, and 5 along with specific recommendations for mitigation of geologic constraints. The applicant's geotechnical analysis recommendations regarding foundations shall be implemented during the subsequent PEPI, building, and site development permits." Record 408.

[16] EC 9.7200 provides in relevant part:

> "This condition effectively defers a finding of compliance with the applicable standard. This is a permissible deferral because the record shows that compliance with the approval standard is possible. The Planning Commission finds that EC 9.8320(11)(d) and EC 6.710 require completion of a geological and geotechnical analysis and that, based on the testimony of the applicant's geotechnical experts and City staff, it is possible to prepare this analysis in accordance with the identified criteria. This deferral is also supported by the fact that the future review will provide the same participatory rights as allowed in the original process.
>
> "With the revised condition of approval, it is ensured that the geotechnical analysis requirements will be met prior to final PUD approval and in a manner that is consistent with Oregon law." Record 22.

In *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992), we set out the options involved in multi-stage land use approvals:

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

> "The Type II review process provides for review by the planning director of an application based on provisions specified in this land use code. The application process includes notice to nearby occupants and property owners to allow for public comments prior to the planning director's decision. The process does not include a public hearing unless the planning director's decision is appealed."

We assume that the city is proceeding under the third option of postponing to a later stage its decision about whether the proposed PUD satisfies the applicable geotechnical criteria. *See Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007) (it is permissible in some circumstances to postpone a determination of compliance with applicable criteria to a later stage decision).

However, as the Court of Appeals explained in *Gould*, that later stage decision must be "infuse[d] * * * with the same participatory rights as those allowed * * *" in the tentative PUD phase. *Id*. at 162. Willamette Oaks argues that deferring that determination to a later Type II proceeding does not satisfy that requirement because in a Type II proceeding, no public testimony is allowed prior to a determination on the merits. In *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190, 215 (2009), we concluded that the public process called for when a local government postpones a determination of compliance with an applicable approval criterion need not be the identical process that was provided during the first stage. The city's Type II process provides for notice of the decision and a *de novo* hearing upon appeal, and Willamette Oaks does not explain why such a process is not "infuse[d] * * * with the same participatory rights as those allowed" under the tentative PUD proceeding.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR (WILLAMETTE OAKS)

EC 9.7655(2) provides in relevant part that "[n]o new evidence pertaining to appeal issues shall be accepted" in an appeal of a hearings officer's decision. "Evidence" is defined as "facts, documents, data or other information offered to demonstrate compliance with or noncompliance with the standards believed by the proponent to be relevant to the decision." EC 9.0500; ORS 197.763(9)(b).

During the May 5, 2010 planning commission hearing, Goodpasture Partners' consultants testified in response to questions from planning commission members. In its

sixth assignment of error, Willamette Oaks argues that the city committed procedural error in accepting that testimony because that testimony contained new evidence and Willamette Oaks was not provided an opportunity to rebut that evidence.[17] Specifically, Willamette Oaks argues that the testimony of Goodpasture Partners' geotechnical consultant, Remboldt, improperly responded to a report that was submitted by Willamette Oaks' engineering geologist, Schlieder, during the proceedings before the hearings officer that criticized Remboldt's geotechnical analysis.[18] However, we do not think that Willamette Oaks has demonstrated that the Remboldt testimony contained new evidence. Remboldt's testimony appears to have summarized the geotechnical analysis of the subject property that he prepared that is located at Record 768-882, and opined that he disagreed with Schlieder's submission before the hearings officer. That disagreement in itself does not constitute "facts, documents, data or other information offered to demonstrate compliance * * * with the standards * * *" applicable to the decision, and is not an "ultimate conclusion" that was different in any way from his conclusion set forth in the geotechnical report.

Willamette Oaks also argues that Goodpasture Partners' traffic consultant's (Genovese's) testimony contained new evidence in the form of (1) his opinion that a traffic signal at the pedestrian crossing at the intersection of Alexander Loop and Goodpasture Island Road was needed, and (2) his opinion that the new bridge qualified as a "minor transportation improvement" under OAR 660-012-0060(2)(e). However, the TIA contains the opinion or conclusion that a traffic signal is needed at the referenced intersection pedestrian crossing, and Genovese's restatement of that conclusion before the planning commission was not new evidence. Record 1481. Goodpasture Partners also cites to

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[17] ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights" of the petitioners.

[18] The Schlieder submission was not an independent analysis of the geotechnical conditions on the subject property, but rather a review and critique of the Remboldt report. Record 533, 996.

Genovese's prior opinion set forth in the record before the hearings officer that the bridge constituted a "minor transportation improvement" under OAR 660-012-0060(2)(e). Record 742-44. We agree with Goodpasture Partners that Genovese's restatement of his opinion concerning the bridge during his testimony before the planning commission did not constitute new evidence.

Willamette Oaks also argues that the testimony of Goodpasture Partners' planner contained new evidence when that planner discussed whether the city was interested in locating a park on the subject property. Goodpasture Partners responds, and we agree, that the discussion regarding the potential for locating a park on the property was a restatement of testimony that was in the record and did not constitute new evidence. Record 583. Moreover, even if the planner's testimony could constitute new evidence, Willamette Oaks has failed to identify an applicable approval criterion to which the testimony relates.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR (WILLAMETTE OAKS)

As explained above in our resolution of Goodpasture Partners' assignment of error, the city charged Willamette Oaks an appeal fee of approximately $14,870.87 to appeal the hearings officer's decisions on the PUD and adjustment to the planning commission. Prior to and during the hearing before the planning commission, Willamette Oaks attempted to challenge the amount of the appeal fee it was charged and to introduce evidence into the record to support that challenge. Record 136. However, the planning commission declined to accept evidence regarding Willamette Oaks' appeal fee challenge and declined to address Willamette Oaks' challenge in its final decision because, according to the city, the applicable provisions of the EC do not allow the planning commission to accept that evidence and the

planning commission lacks the authority to review such a challenge when considering an appeal of a hearings officer's decision.[19]

In its seventh assignment of error, Willamette Oaks argues that the city committed a procedural error that prejudiced Willamette Oaks' substantial rights when it refused to accept evidence and testimony during the planning commission hearing that challenged the amount of the appeal fee Willamette Oaks was charged for its appeal of the PUD and adjustment decisions as violating ORS 227.180(1)(c).[20] Willamette Oaks also argues on the merits that the appeal fee violates ORS 227.180(1)(c), because the fee is based solely on a percentage of the application fee, rather than a calculation of the "average cost of such appeals." *See 1000 Friends of Oregon v. Crook Co.*, 60 Or LUBA 232, 237-38 (2009) (determining the "average cost of such appeals" for purposes of ORS 215.422(1)(c) requires some kind of arithmetic calculation of the average of a set of numbers). We turn first to Willamette Oaks' procedural arguments.

Willamette Oaks argues that the planning commission erred in redacting from the record certain paragraphs in Willamette Oaks' written submittals that apparently included arguments and evidence challenging the appeal fee. Record 11, 137 (redacted submittals).

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[19] EC 9.7655(2) and (3) provide in relevant part:

> "(2) * * * No new evidence pertaining to appeal issues shall be accepted.
>
> "(3) The appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how and hearings official or historic review board failed to properly evaluate the application or make a decision consistent with applicable criteria. The basis of the appeal is limited to the issues raised during the review of the original application."

[20] ORS 227.180(1)(c) provides in relevant part:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. * * *"

We understand Willamette Oaks to argue that the city is obligated to allow a fee challenger an opportunity to include in the record arguments and necessary evidence challenging the local fee, even if the local review body does not have authority to consider those arguments and evidence.[21] The city responds that the city properly rejected Willamette Oaks' testimony and evidence regarding its challenge to the appeal fee because the EC limits the scope of the issues that may be resolved by the planning commission in an appeal of the hearings officer's decision.

While the city may be correct that the city's planning commission does not have the authority under the EC to consider that appeal fee challenge during the appeal of a hearings officer's decision, and that no new evidence regarding appeal issues may be accepted by the planning commission, those EC provisions are not dispositive of Willamette Oaks' procedural arguments. In *Young v. Crook County*, 56 Or LUBA 704, 717, *aff'd* 224 Or App 1, 197 P3d 48 (2008), we rejected an argument that in the context of an as-applied challenge to an appeal fee the local government has the initial burden of demonstrating that the appeal fee complies with the statute. We explained that the initial burden rests on the fee challenger to demonstrate that the fee violates the statute. We described the requirement in *Young* as a requirement that a challenger establish a "*prima facie* case" that the appeal fee that is charged is more than the statute allows. *Id*. at 717. Once a *prima facie* case has been made, the local government then has some obligation to demonstrate that the appeal fee complies with the statute. *See Mazorol v. City of Bend*, 59 Or LUBA 260, 267-68 (2009) (concluding that the petitioners had established a *prima facie* case that the statute is violated by an appeal

[21] After the record in this appeal was settled, Willamette Oaks also filed two separate motions to accept evidence outside the record and specifically sought to depose the city's planning staff and attorneys regarding their time spent on processing Willamette Oaks' appeal of the hearings officer's decisions. We denied those motions because we concluded that Willamette Oaks had not established a basis under OAR 661-010-0045 for accepting the particular evidence that Willamette Oaks sought to introduce. *Willamette Oaks, LLC v. City of Eugene*, __ Or LUBA __ (LUBA Nos. 2010-060, 2010-061 and 2010-062, Order, November 12, 2010) and *Willamette Oaks, LLC v. City of Eugene*, __ Or LUBA __ (LUBA Nos. 2010-060, 2010-061 and 2010-062, Order, December 1, 2010).

fee based in part on whether there is a further appeal to LUBA and remanding the decision to the city to demonstrate that the appeal fee complies with ORS 227.180(1)(c)). Further, at least where the local code provides for an opportunity to submit testimony and evidence before the final decision maker, the local government is obligated to grant a fee challenger's request to submit testimony and evidence challenging the appeal fee. *Eder v. Crook County*, 60 Or LUBA 204, 230 (2009).

Young, *Mazorol*, and *Eder* all involved appeals of the governing body's final decision on the appeal and application. The present case is the first time we have addressed an as-applied challenge to an appeal fee to a lesser review body, the planning commission, to whom the governing body has delegated authority to render the local government's final decision on the appeal and application. A further complication is that, under the city's code, the planning commission does not have authority to accept new evidence on appeal issues and almost certainly does not have authority to overturn or reduce an appeal fee that the governing body has adopted. While the governing body has the general authority to consider an as-applied challenge to an appeal fee that it has adopted, it is doubtful that any governing bodies have delegated that specific authority to lesser review bodies, in delegating the authority to render the local government's final decision.

The foregoing circumstances make it problematic for an appeal fee challenger to make the kind of *prima facie* case that we and the Court of Appeals in *Young* have said must be made in order to bring an as-applied fee challenge to LUBA. As we noted in *Eder*, it is unreasonable to expect potential fee challengers to make that *prima facie* case during the open record period before the initial review body, before an appealable decision is rendered and before the challenger has reason to know whether the decision will be an unfavorable decision they wish to appeal. 60 Or LUBA at 231.

A *prima facie* case is defined as **"**(1) the establishment of a legally required rebuttable presumption; (2) [a] party's production of enough evidence to allow the fact-trier

to infer the fact at issue and rule in the party's favor." *Black's Law Dictionary*, 1310 (9th ed. 2009) In some cases, depending on the nature of the challenge to the appeal fee, a *prima facie* case can be made based solely on legal arguments, as in *Mazorol*. However, in most cases, the requirement to establish that *prima facie* case will require a challenger to demonstrate through some supporting evidence that the fee does not comply with the statute. *Young*, 224 Or App at 5 (mere complaints that an appeal fee is unreasonable or excessive are insufficient, without some evidentiary showing).

In the present case, the city does not dispute that Willamette Oaks attempted to submit argument and evidence challenging the appeal fee. We do not know the character of that argument and evidence, because the planning commission refused to accept it and the city redacted those portions of Willamette Oaks' submittal. It is possible that if that argument and evidence were before us, we might find it insufficient, as we and the Court of Appeals did in *Young*, to meet Willamette Oaks' burden to establish a *prima facie* violation of the statute, sufficient to shift the burden to the city to demonstrate that the appeal fee charged is consistent with the statute. However, the planning commission's redaction makes it impossible to perform that review.

Although it is a close and difficult question, and not a particularly satisfying solution, we conclude that, in order to allow effective review of an as-applied appeal fee challenge in these circumstances, the local final decision maker must allow the fee challenger to submit argument and evidence into the record, even if due to local regulations the delegated local final decision maker does not have authority to accept new evidence or to consider appeal fee challenges. If the fee challenger submits such argument and evidence, local government staff or other parties may choose to submit any documents deemed necessary to respond to the challenge, such as the adopted findings or evidence supporting the governing body's initial legislative decision adopting of the appeal fee. Thus, even if that fee challenge is not

considered or addressed by the delegated final decision maker for whatever reason, LUBA can still perform its review function.

Because we sustain Willamette Oaks' procedural assignment of error, it would be premature for us to resolve Willamette Oaks' challenge on the merits, based on the legal theory that an appeal fee calculated on a percentage of the application fee is, without more, inconsistent with ORS 227.180(1)(c) because, as relevant here, it is not based on a calculation of the "average cost of such appeals." In *1000 Friends of Oregon v. Crook County*, we set out some observations regarding how the "average cost of such appeals" can be determined. For present purposes, it seems appropriate to observe that an appeal fee based on a percentage of the application fee is not *necessarily* inconsistent with the statute. Application fees, like appeal fees, must be no more than the "actual or average cost" of processing the application. ORS 227.175(1). If the local government has chosen to set application fees for certain permits based on the "average cost" of processing such permits, and there is substantial evidence of a correlation between the average costs of processing certain permits and the average costs of processing the *appeals* of such permits, it may well be that such evidence could support a percentage approach to setting appeal fees. *See Doty v. City of Bandon*, 49 Or LUBA 411, 422 (2005) (review of legislative decision setting application fees and, due to percentage approach to appeal fees, also appeal fees). However, we do not consider that question further.

Based on the foregoing, the city's decision must be remanded to the city for further proceedings, which will at a minimum provide Willamette Oaks the opportunity to submit into the record the argument and evidence that the planning commission redacted, and to allow the city or others to submit any responsive material deemed necessary. The city governing body, if it chooses, can consider the appeal fee issue on remand or instead the city can simply close the record and allow petitioner to seek further review by LUBA, if it wishes.

In the particular circumstances of this case, remand is limited to the appeal fee issue, but unfortunately that is sometimes the case. *See Jensen Properties v. Washington County*, __ Or LUBA __ (LUBA No. 2010-008, May 5, 2010), *aff'd* 236 Or App 478, __ P3d __ (2010) (remanding solely to address appeal fee issue); *Mazorol*, 59 Or LUBA 260 (same). Because we do not remand under any other assignment of error challenging the city's decision, we see no reason why the city cannot, on remand, bifurcate the PUD and adjustment approval from the appeal fee issue if it chooses and proceed to separately re-adopt the PUD and adjustment decisions. Under the law of the case principle in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), such a re-adopted PUD decision cannot be again challenged on grounds that were raised or could have been raised in the present appeal.

The seventh assignment of error is sustained, in part.

The city's decision is remanded.

Bassham, Board Member, concurring.

For many of the reasons stated in Board Chair Holstun's dissent, it is easy to agree that LUBA should overturn decades of case law and start applying the fiscal exception to appeal fee disputes. However tempting that would be, I do not believe the cases we discussed in *Montgomery v. City of Dunes City*, ___ Or LUBA ___ (LUBA No. 2009-125, April 13, 2010), slip op 9-17 were wrongly decided under the current statutory scheme. In recent decades the legislature has included in ORS chapters 215 and 227, the chapters governing city and county land use regulation, several provisions regarding local appeal fees, including a requirement that local governments charge no more than $250 for the initial appeal of a permit decision without a hearing (effectively requiring local governments to subsidize such appeals), limiting transcript fees to reasonable amounts no more than $500 (ditto) and, as noted, limiting local appeal fees beyond the initial hearing to those that are reasonable, and no more than the average cost of such appeals or the actual cost of the appeal. Such provisions did not exist in 1982, when we decided *Friends of Lincoln County*,

7 Or LUBA 114, 117-19 (1982). Collectively, I think these statutes reflect a legislative intent to foster citizen participation in land use matters, which is consistent with one of the central themes of the first statewide planning goal, Goal 1 (Citizen Involvement). Indeed, the Court of Appeals in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981) suggested that financing decisions involving citizen involvement in the land use program may be an exception to the fiscal exception to LCDC's jurisdiction. *Id*. at 538. In sum, I think the issue of whether local appeal fees comply with the statutes in ORS 215 and 227 is a core rather than peripheral land use concern, affecting citizen access to LUBA among other things, and is not simply a local fiscal matter. All in all, I believe LUBA to be the most appropriate forum to review the kind of challenges to local appeal fees under ORS chapters 215 and 227 presented in this appeal.

In any case, even if LUBA has gone down the wrong road since 1982 I think the principle of *stare decisis* would counsel against a wholesale reversal of such well-established law, absent compelling justification. Further, as I suggested in my concurrence in *Montgomery*, I do not think it necessary to conclude that *Friends of Lincoln County* was wrongly decided. That case involved a differently worded statute, ORS 92.044, and moreover involved a challenge to the county's attempts to recover the county's actual costs in preparing the transcript. As we held in *Montgomery*, where the local government employs an actual cost approach, disputes over recovery of actual costs are likely to fall within the fiscal exception, and therefore are not subject to LUBA's jurisdiction. I do not see any necessary contradiction between *Friends of Lincoln County* and any of the appeal fee cases we have resolved since 1982.

For the above reasons, I respectfully disagree with my colleague and concur in the decision.

Holstun, Board Chair, dissenting.

Under ORS 227.180(1)(c), the appeal fee that the city charged Willamette Oaks may not be "more than the average cost of such appeals or the actual cost of the appeal * * *." If Willamette Oaks believes the appeal fee that the city required in this case is "more than the average cost of such appeals or the actual cost of the appeal," I believe Willamette Oaks' remedy is to file an appropriate action in circuit court to seek a refund of the portion of the appeal fee that Willamette Oaks believes exceeds the statutory limit. I believe LUBA lacks jurisdiction to consider Willamette Oaks' argument that the appeal fee is excessive, because the city's decision to charge Willamette Oaks a particular appeal fee qualifies as a "fiscal decision," and LUBA lacks jurisdiction to review such fiscal decisions. *See Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981) (city decision to impose a systems development charge is a fiscal decision that is not reviewable by the Land Conservation and Development Commission for compliance with statewide planning goals). Although *Housing Council* concerned the Land Conservation and Development Commission, the Court of Appeals has also recognized an exception to LUBA's jurisdiction for fiscally motivated decisions. *Westside Neighborhood v. School Dist. 4J,* 58 Or App 154, 161, 647 P2d 962, *rev den* 294 Or 78 (1982) (school district decision to close school for financial reasons is not a land use decision reviewable by LUBA). And in at least one case, the Court of Appeals has concluded that an ordinance that amends and adopts new mining fees can be both a land use decision reviewable by LUBA and a fiscal matter that is reviewable by the circuit court. *Scappoose Sand and Gravel, Inc. v. Columbia County,* 161 Or App 325, 332, 984 P2d 876 (1999) (circuit court has jurisdiction to render declaratory judgment in challenge to an ordinance establishing surface mining fees, even though the amendment constituted a land use regulation amendment that was also reviewable by LUBA).

In *Friends of Lincoln County*, LUBA held that a city decision to charge a local appeal transcript fee qualified as a fiscal decision, and I believe LUBA's reasoning in *Friends of*

Lincoln County applies with equal force to local appeal fees. As we explained in *Montgomery*, over the last 29 years LUBA has issued a number of decisions that have departed from *Friends of Lincoln County* and decided challenges to city and county decisions that establish and collect permit application fees and local land use appeal fees, although none of those decisions acknowledge *Friends of Lincoln County* or make any attempt to explain why *Friends of Lincoln County* was wrongly decided.[22] In assuming jurisdiction over those challenges, LUBA has encountered a host of problems, many of them attributable to the fact that appeal fees are frequently payable at the same time the evidentiary record closes.[23] In *Eder v. Crook County*, the county court had discretion to expand the evidentiary record on appeal, and based on the facts in that case, LUBA held that the county court should have exercised that discretion to allow petitioners to make the required *prima facie* case that the appeal fee charged in that case exceed the statutory limit. 60 Or LUBA at 230-31. But in the present case, under EC 9.7655(2) and (3), the planning commission's review in this matter is strictly limited to the evidentiary record that was compiled by the planning commission. Under the majority's resolution of the seventh assignment of error, the planning commission must violate the EC and allow petitioners to make a *prima facie* evidentiary showing that the appeal fee violates ORS 227.180(1)(c). In other words, LUBA is remanding a decision that it would otherwise affirm on the merits, so that the city can

[22] The first case following *Friends of Lincoln County* where LUBA rejected a challenge to a local appeal fee was *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995). Other LUBA cases considering permit or appeal fee challenges include: *1000 Friends of Oregon v. Crook County*, 60 Or LUBA 232 (2009); *Eder v. Crook County*, 60 Or LUBA 204 (2009); *Mazorol v. City of Bend*, 59 Or LUBA 260 (2009); *McGovern v. Crook County*, 57 Or LUBA 443, (2008); *Young v. Crook County*, 56 Or LUBA 704, *aff'd* 224 Or App 1, 197 P3d 48 (2008); *Sommer v. Josephine County*, 52 Or LUBA 806 (2006); *Landwatch v. Lane County*, 52 Or LUBA 140 (2006); *Doty v. City of Bandon*, 49 Or LUBA 411 (2005); *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 408 (2003); *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002).

[23] Because LUBA has interpreted OAR 661-010-0045 not to allow it to do so, parties do not have the option of presenting evidence for the first time at LUBA to demonstrate that an appeal fee violates the statute.

conduct additional evidentiary proceedings to resolve the appeal fee dispute, an evidentiary dispute that has nothing to do with the city's land use decision on the merits.

The problems the city and parties will encounter in resolving their dispute will not end with figuring out how petitioners are to go about making a *prima facie* case after the evidentiary record has closed or how the planning commission can or must respond to that *prima facie* showing. ORS 227.180(1)(c) does not specify the period of time over which the statutory "average cost" limit must be computed. Someone is going to have to figure out over what period of time the statutory "average cost of such appeals" is to be computed. If the city responds to Willamette Oaks' excessive fee claim by relying on the statutory "actual cost of the appeal" limitation, determining whether that limit has been exceeded will be problematic. Since the appeal will not be over at the time of a fee challenger's *prima facie* showing, it will not be possible to know for sure what the actual cost of the appeal is. As these fee disputes become more common and time consuming, both locally and at LUBA, the land use merits are beginning to take second chair to protracted evidentiary and legal disputes regarding whether the fees a local government charges for permit applications and land use appeals violate statutory limits on such fees.

It is true, as the concurring opinion in *Montgomery v. Dunes City* noted, that ORS 227.180(1)(c) post-dates and seems to have been adopted in response to *Friends of Lincoln County*. But that statute merely *authorizes* the city to impose an appeal fee and *limits* the amount of the fee that can be charged. ORS 227.180(1)(c) says nothing about whether LUBA or the circuit courts should have jurisdiction to review city decisions to set or collect land use appeal fees. If anything, that legislative silence suggests the legislature did not intend to question LUBA's conclusion in *Friends of Lincoln County* that a city decision to collect a land use appeal transcript fee is a fiscal decision that is not reviewable by LUBA.

Finally, while I agree that *stare decisis* counsels against overruling many years of "well-established" law, LUBA's foray into reviewing local government permit and appeal

fees has not produced coherent or well-established law. It has been an ill-advised dance through a field of land mines and, I conclude, it is time that LUBA recognizes that its decision to assert jurisdiction in *Ramsey* to decide the merits of a dispute concerning whether a local appeal fee exceeds the statutory limit on such fees was wrong. Following *Ramsey*, LUBA's efforts to shove a square peg into a round hole have become more strained with every case LUBA has decided. At its heart, a local government decision to collect a fee to recover its costs of processing land use permits and appeals is a fiscal decision that has nothing to do with the land use merits of a permit application or land use appeal. That the decisions setting and imposing these fees may have significant financial effects on permit applicants and land use appellants and may technically qualify as land use decisions does not necessarily mean LUBA has exclusive jurisdiction to review these fiscal decisions. *Scappoose Sand and Gravel*, Inc., 161 Or App at 332. LUBA certainly has no particular expertise that the circuit courts lack to resolve such disputes. There are good reasons why LUBA has no business reviewing local government fiscal decisions. *See Housing Council*, 48 Or App at 537-38 (discussing the many non land use considerations that may affect fiscal decision making). I think LUBA's decision in *Friends of Lincoln County* was correct. I would overrule *Ramsey* and the cases that have followed *Ramsey*, to the extent they are inconsistent with the holding in *Friends of Lincoln County*. *See* n 22. I would decline to consider the seventh assignment of error, because in that assignment of error Willamette Oaks seek review of a city fiscal decision.