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 No. 2012-091

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioner.

Glenn Klein, City Attorney, Eugene, filed a response brief on behalf of respondent.

Michael C. Robinson, Portland, filed s response brief and argued on behalf of intervenor-respondent. With him on the brief were Seth King and Perkins Coie LLP.

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

AFFIRMED 05/23/2013

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

Petitioner appeals a city decision approving intervenor-respondent Goodpasture Partners, LLC's (Goodpasture's) application for a Willamette Greenway Permit to construct off-site transportation improvements that were required by the city's approval of Goodpasture's planned unit development.

REPLY BRIEF

Petitioner moves for permission to file a reply brief under OAR 661-010-0039 to respond to alleged new matters raised in the city's and Goodpasture's response briefs. Petitioner argues that the new matters in Goodpasture's response brief are "a more detailed argument of why an undated planning document * * * and a LUBA decision * * * support the Planning Commission's findings * * *." Combined Reply Brief 1. Goodpasture objects to the reply brief, arguing that it does not respond to any new matters raised in the response briefs.

OAR 661-010-0039 provides in relevant part that "[a] reply brief shall be confined solely to new matters raised in the respondent's brief, state agency brief, or amicus brief." As we explained in *Wal-mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16, 19-20 (2007):

> "Generally, responses warranting a reply brief tend to be arguments that assignments of error should fail regardless of their stated merits, based on facts or authority not involved in those assignments. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1, 4 (2004); *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321, *aff'd* 163 Or App 592, 988 P2d 422 (1999). In other words, 'new matters' within the meaning of OAR 661-010-0039 generally are something like affirmative defenses, responses that an assignment of error should fail regardless of its stated merits, due to some extrinsic principle (for example, waiver)."

We also have explained that where arguments in a reply brief respond to arguments raised in the response brief that could not have been reasonably anticipated in the petition for review, we will generally allow the reply brief. *Wal-mart Stores, Inc. v. City of Gresham*, 54 Or

LUBA at 20; *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 527 (1999), *aff'd* 165 Or App 1, 994 P2d 1205 (2000).

In the petition for review, petitioner challenged the planning commission's reliance on (1) a planning study in the record and (2) a LUBA decision, to conclude that an area of ponds and slough are not a part of the Willamette River, and Goodpasture in its response brief defended the planning commission's reliance on the study and the LUBA decision. Goodpasture's defense in response to assignments of error of the planning commission's reliance on the planning study that is cited and referred to in the findings and its defense of the planning commission's reliance on a LUBA decision that is also cited and referred to in the findings is not a "new matter" within the meaning of OAR 661-010-0039. Rather, petitioner's reply brief seeks to introduce surrebuttal argument to Goodpasture's arguments in the response brief.

Petitioner argues that the new matter in the city's brief is "the suggestion that the City's adoption of the Greenway boundary in 1976 was merely 'conjecture about the historical reasons' for inclusion of the Delta Ponds/Debrick Slough within that boundary." Combined Reply Brief 1. For similar reasons, we do not think the reply brief responds to "new matters" set forth in the city's response brief. Petitioner's reply brief seeks to introduce surrebuttal arguments to the city's arguments in the response brief, and to restate its arguments already set out in the petition for review.

The motion to file a reply brief is denied.

FACTS

The challenged decision is the city's decision on remand from *Willamette Oaks, LLC v. City of Eugene*, 64 Or LUBA 328 (2011), *aff'd* 250 Or App 144, 281 P3d 685 (2012) (*Greenway I*). As we explained in *Greenway I*, a previous city decision approved Goodpasture's application for a zone change and planned unit development on its 23-acre property located in an area of the city known as Goodpasture Island, at the intersection of

Goodpasture Island Road and Alexander Loop.[1] That city decision required that Goodpasture construct off-site transportation improvements to widen the existing Goodpasture Island Road bridge over Delta Highway and construct a new bridge over Delta Highway northeast of the existing bridge. A map of Goodpasture Island is included as an Appendix at the end of this opinion.

The area where the transportation improvements are required to be constructed is located within the city's adopted Willamette River Greenway boundary.[2] The greenway boundary runs adjacent to the main channel of the Willamette River from north to south on the westernmost boundary of Goodpasture Island, curves to the east around the south end of Goodpasture Island, and runs along the east and west sides of a pond system known as Delta Ponds, the east and west sides of Delta Highway, and the east and west sides Debrick Slough. Water from Debrick Slough flows into the main channel of the Willamette River approximately .85 miles north of the existing bridge over Delta Highway.

The main channel of the Willamette River is located approximately 3,000 feet to the west of the subject transportation improvements. Beginning in the post-World War II era through the 1980s, three events occurred that are relevant to this appeal. First, beginning in the 1940s approximately two million cubic yards of sand and gravel were extracted from Goodpasture Island in the area that is now Delta Ponds, until mining ended in the early 1960s, after which time the mining operation was abandoned and the ponds remained.[3]

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[1] Petitioner owns and operates a retirement living center on the property adjacent to Goodpasture's property. *Willamette Oaks, LLC v. City of Eugene*, __ Or LUBA __ (LUBA No. 2012-081, January 22, 2013).

[2] The city's greenway boundary map is a large scale map that does not show the exact location or width of the greenway boundary line in relation to natural features such as the main channel of the river, Debrick Slough, the Delta Ponds wetlands, the Goodpasture wetlands, or man-made features such as Delta Highway. However, all parties agree that the proposed transportation improvements will be located within the greenway boundary and that the greenway boundary runs along both the east and west sides of the Delta Ponds, Debrick Slough, and Delta Highway.

[3] In 1979 and 1980 the city purchased a portion of the ponds for open space preservation and in 1988 Lane County purchased the remainder.

The second event began in the 1950s, when a system of dams for flood control, hydroelectric power generation and habitat preservation was installed on the upper Willamette River above Goodpasture Island. The dam system is controlled by the U.S. Army Corps of Engineers and regulates river flows through the city of Eugene. Record 952-53. As explained by petitioner's groundwater hydrologist:

> "The historic connection of the main stem to the upstream end of Goodpasture Island Channel was truncated by construction of low-profile, man-made levees along the current main stem of the Willamette River at an unknown time. * * * Along the Goodpasture Island Channel east of the main stem a much taller flood-control levee was constructed circa 1964 during and after a flood on the Willamette River. This levee was built across Goodpasture Island Channel and operates today as part of the regional flood control structures. The flood control structure is located at the edge of the current bike path where the Willamette River Greenway splits to follow the two river channels. Construction of both the earthen embankments along the main stem and the flood control levee to the east altered the continuity of open surface water flow between Goodpasture Island Channel and the main stem but only at the upstream end. This continuity of surface water flow has been restored in part in recent years under the Delta Ponds renovation plans and construction. * * *" Record 572.

The flood control levee that is referred to in the passage quoted above is referred to by the parties alternatively throughout the briefs and the record as the "riprap channel" and the "man-made weir," and we understand these terms to be synonymous references to the flood control structure that is comprised of coarse sand and gravels and that is located on the south end of the island at river mile 180.43, and limits flows from the main channel of the Willamette River into the Delta Ponds. Record 571. We refer to that structure in this opinion as the man-made weir. The man-made weir is approximately 10 inches higher than the ordinary low water mark at river mile 180.43. Record 112, 573.

The third event that is relevant to this appeal occured at two points in time when the State of Oregon enacted ORS 390.300 *et seq*, the Willamette River Greenway statute (Greenway Law) in 1967, and in 1972, when the Land Conservation and Development Commission (LCDC) adopted Statewide Planning Goal 15 (Willamette River Greenway).

Goal 15 required local governments with lands along the Willamette River to establish the boundaries of the greenway, to establish a setback line for non-water related structures, and to adopt provisions to implement the Goal. Eugene Code (EC) 9.8800 *et seq* implements Goal 15.[4] In 1976 the city adopted its greenway boundaries and subsequently it adopted a greenway regulatory program.

The city's greenway regulatory program regulates development that is to be located within the city's 35-foot setback from the river more stringently than development that is located generally within the greenway boundary but outside of the city's 35-foot setback from the river. In the decision challenged in *Greenway I*, the city relied on its interpretation of the

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[4] In *Greenway I*, we explained:

> "Statewide Planning Goal 15 (Willamette River Greenway) requires that local governments map the boundaries of the Willamette River Greenway and develop a plan to manage land uses within the Greenway. * * * The subject property is located within the Greenway boundary. The city also adopted a refinement plan for the area of the city in which the property is located, known as the Willakenzie Area, that is called the Willakenzie Area Plan (WAP).
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> "The city's program for managing land uses within the Greenway boundary is found at EC 9.8800 *et seq*. EC 9.8815 provides in relevant part:
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> "**Willamette Greenway Permit Approval Criteria and Standards**. Willamette Greenway permit approval may be granted only if the proposal conforms to all the criteria in subsections (1) through (4), and the applicable standards of subsection (5) as follows:
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> "(1) To the greatest possible degree, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and *the river*.
>
> "(2) To the greatest possible degree, necessary and adequate public access will be provided along *the Willamette River* by appropriate legal means.
>
> "(3) The intensification, change of use, or development will conform with applicable Willamette Greenway policies as set forth in the Metro Plan.
>
> "(4) In areas subject to the Willakenzie Area Plan, the intensification, change of use, or development will conform with that plan's use management considerations. * * *
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> "The language in EC 9.8815(1) and (2) is nearly identical to language in Goal 15. Goal 15(F)(3)(b)(1) and (2)." 64 Or LUBA at 335-37 (emphases added; footnotes omitted.)

phrase "the Willamette River" as used in EC 9.8815(1) and (2), and in applicable Metro Plan and Willakenzie Area Plan (WAP) policies under EC 9.8815(3) and (4), as referring only to the main channel of the Willamette River (located approximately 3,000 feet from the proposed transportation improvements) to conclude that numerous provisions of the EC, Metro Plan, and WAP did not apply to the proposed improvements, or were met. *See* n 4. In its petition for review challenging that decision, petitioner argued that the city misinterpreted EC 9.8815(1) and (2) and applicable Metro Plan and WAP policies by failing to consider whether the Delta Ponds/Debrick Slough area is a part of the Willamette River and by failing to apply provisions that restrict development within the 35-foot Setback from the river.

We remanded the city's decision with instructions to the city to determine whether the Delta Ponds/Debrick Slough area is a "channel" of the Willamette River under Goal 15, which refers to the definitions of "Willamette River" at ORS 390.310(1) and (3):

> "The use of the word 'river' in city provisions implementing Goal 15 has the same meaning as that term is used in Goal 15. Goal 15 does not include a definition of 'Willamette River,' but the Goal requires review of uses within the Greenway boundary to ensure compatibility with the Willamette River Greenway statutes, at ORS 390.310 to 390.368. ORS 390.310, part of the Willamette River Greenway Statutes, provides a definition of 'Willamette River:'
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> > "'**Definitions for ORS 390.310 to 390.368**. As used in ORS 390.310 to 390.268, unless the context requires otherwise:
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> > "'(3) 'Willamette River' means that portion of the Willamette River, *including all channels of the Willamette River*, from its confluence with the Columbia River upstream to Dexter Dam and the Coast Fork of the Willamette River upstream to Cottage Grove Dam.' (Bold in original, italics added.)
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> "'Channel' is also defined at ORS 390.310(1) as including '* * * any channel that flows water at ordinary low water.' At a minimum, those definitions appear to provide more relevant context than the context cited and relied on by the hearings officer and planning commission, which must be considered in interpreting the term 'river' as used in the city's ordinances implementing Goal 15, if indeed those statutory definitions do not directly control the meaning of that term. The city's conclusion that the phrase 'the Willamette River' (or the shorthand term 'the river') means only the main channel of the

> Willamette River located to the west of the subject property does not appear to be consistent with the statutory definition of 'Willamette River' as including channels of the river, and fails to consider whether the Delta Ponds/Debrick Slough is a 'channel' of the Willamette River, as defined by ORS 390.310(1), and thus part of the Willamette River. We note that there is some evidence in the record indicating that water in the Debrick Slough flows throughout the year, but that evidence does not identify whether the water flows at 'ordinary low water.' * * * On remand, the city should consider the statutory definitions and determine whether under those definitions the Delta Ponds/Debrick Slough area is part of the Willamette River." 64 Or LUBA at 339-40.

On remand, the city determined that the Delta Ponds/Debrick Slough is not a "channel" of the Willamette River and again approved Goodpasture's greenway permit without applying EC provisions that restrict development within the greenway setback. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In its first assignment of error, we understand petitioner to argue that the planning commission misconstrued the city's adopted greenway map when it concluded that the ponds and slough are not a channel of the river.[5] The central argument in petitioner's first assignment of error is that the city's 1976 decision to include the ponds and slough area within the greenway boundary means that as *a matter of law* the ponds and slough area are a "channel" of the Willamette River, regardless of whether the area currently qualifies as a "channel" under the statutory definition.[6] Petition for Review 5, 15. That is so, we understand petitioner to argue, because the greenway map shows the greenway boundary's location a distance of 150 feet along each side of the ponds and slough, consistent with ORS 390.318(1), which requires in relevant part that "* * * all lands situated within 150 from the

[5] LUBA is authorized to reverse or remand a decision if the local government "[i]mproperly construed the applicable law[.]" ORS 197.835(9)(D).

[6] Petitioner's first assignment of error is:

> "The Planning Commission misapplied and misinterpreted the City's rationale for establishment of its Greenway boundary in a manner that is in conflict and inconsistent with Goal 15, the Greenway statute and the City's comprehensive plan and by failing to apply the Greenway setback that was the basis for that boundary to the permit application." Petition for Review 4.

ordinary low water line on each side of each channel of the Willamette River * * *" be included in the greenway boundary.[7] Petition for Review 7.

The city and intervenor respond that whether the ponds and slough were originally included within the city's greenway boundary because they were, at that time, a channel of the river is irrelevant to determining whether, under ORS 390.310(1), the ponds and slough are currently a channel of the river. Stated differently, we understand respondents to argue that the question to be answered in this appeal is not whether the ponds and slough *were* a channel at the time the city's greenway boundary was adopted, but whether they *are* presently a channel.

If the city's adopted and acknowledged greenway map (Retained Exhibit F, Sheet 95 of 107) contained measurements that supported petitioner's contention that the map shows the greenway boundary located 150 feet from each side of the ponds and the slough, we might agree with petitioner that the city intended to include the slough and ponds within the greenway because it believed they were a "channel" of the Willamette River. In that case, the city's adopted and acknowledged greenway map would arguably control and, in order to eliminate any inconsistency between the adopted and acknowledged map and changed facts on the ground, the city would need to amend the map. ORS 197.175(2)(d) ("[p]ursuant to ORS chapters 195, 196 and 197, each city and county in this state shall * * * [i]f its comprehensive plan and land use regulations have been acknowledged by the commission,

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[7] ORS 390.318 provides that for each jurisdiction implementing Goal 15, the greenway boundary must include:

> "[A]ll lands situated within 150 feet from the ordinary low water line on each side of each channel of the Willamette River and such other lands along the Willamette River as the department and units of local government consider necessary for the development of such greenway; however, the total area included within the boundaries of such greenway shall not exceed, on the average, 320 acres per river mile along the Willamette River. The Willamette River Greenway shall also include all islands and all state parks and recreation areas situated along the Willamette River; however, for the purposes of computing the maximum acreage of lands within such greenway, the acreage of lands situated on such islands and within such state parks and recreation areas shall be excluded."

make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations[.]")

For purposes of this opinion, we will assume the city's understanding of the location of the river at the time the city adopted the greenway boundary might have some legal significance in how the city must apply the disputed greenway boundary setbacks today, when the location of the river may have changed. However, it is not clear from the city's greenway map or any city legislation cited to us that the city included the pond and slough area in the greenway because it believed the area constituted a "channel" of the river and intended the 35 foot setback to apply to that area. The city's official adopted greenway map is at a scale of 1 inch = 400 feet, and on certain areas of the map, and in particular on the area of the map that depicts the Debrick Slough, the distance from Debrick Slough to the greenway boundary line is significantly less than 150 feet. Retained Exhibit F, Sheet 95 of 107. It is closer to 50 feet, perhaps less. The map also includes a boundary to the east of the ponds and slough and east of Delta Highway that is significantly further than 150 feet away from the slough and the ponds. To the west of the slough and the ponds it is difficult to discern the location of the boundary in relation to the slough and ponds. Accordingly, it is not clear from looking at the greenway map that the ponds and slough area were included within the greenway boundary because the city believed that that area was a "channel" of the Willamette River.

The planning commission concluded that the ponds and slough area on both sides of Delta Highway were included in the greenway boundary because it was an "area of critical concern" identified in a 1975 study of the Goodpasture Island area, and not because it was a "channel" of the Willamette River:

> "* * * Willamette contends that the subject property is located within the Greenway is evidence that the Delta Ponds/Debrick Slough is part of the 'Willamette River.' The planning commission does not agree with this contention. In fact, statements in historic city documents indicate that the City

> has long considered the Delta Ponds/Debrick Slough to be a distinct water body from the Willamette River. * * *
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> "First, the Planning Commission finds there is substantial evidence in the whole record that the City added the Delta Ponds/Debrick Slough to the Greenway as 'other lands' outside of the 150-foot-wide Greenway boundary surrounding the channel of the Willamette River. * * * the City submitted the Goodpasture Island Study into the record. The 'Parks and Open Space' section of that document clarifies that the city included the Delta Ponds/Debrick Slough (the former gravel ponds) within the Greenway, not because they were within 150 feel of a channel of the Willamette River but because they were an area of critical concern:
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> > "'The Willamette River Greenway Plan defines a 'Greenway Boundary' that includes lands situated within 150 feet of the ordinary low water line on each side of each channel of the Willamette River. Beyond this boundary, extending to a maximum of one and one-half miles is the 'River Influence Zone.' Within this zone, special 'areas of critical concern' are delineated that reflect local topography, vegetation and wildlife features existing along the river. * * * The Greenway Map designated the Goodpasture Island gravel ponds as an 'area of critical concern.'
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> "* * * The foregoing evidence refutes Willamette's contention that the City included the area along the Delta Ponds/Debrick Slough within the Greenway because it was within 150 feet of a channel of the Willamette River. Rather, it was included even though it was '[b]eyond this boundary.'" Record 13-14 (internal citations omitted.)

The Goodpasture Island study is a 1975 study that predates the city's adoption of the greenway boundary map and that evaluated the existing designation of a large part of the island for commercial uses in light of the Preliminary Willamette River Greenway Plan prepared for the Oregon Department of Transportation. Record 452, 477. The study recommended that the area of Goodpasture Island north of the Delta Ponds be designated on the city's comprehensive plan for medium density residential use rather than commercial use, and annexed into the city. The study also recommended that "the gravel ponds" (Delta Ponds) be preserved as permanent open space. Record 477, 481.

Petitioner disputes the evidentiary value of the Goodpasture Island Study in interpreting the greenway map. Petitioner points to supplemental findings in support of the

city resolution that adopted the Greenway boundary (Supplemental Findings) as providing better evidentiary support for its contention that the ponds and slough area and the ponds area east of Delta Highway were included within the boundary because they were a channel of the river. The Supplemental Findings explain that the greenway boundaries are based "primarily" on the boundaries proposed on ODOT's Preliminary Greenway Plan, and explains the city's rationales for "departure from the DOT boundaries * * *." Record 419-421. Petitioner cites Supplemental Finding Rationale 6 in support of its contention that the city intended to include the ponds and slough in the greenway because they were a channel of the river. Supplemental Finding Rationale 6 explains the reason the city chose to depart from the direction of ORS 390.318 that the boundary be established "150 feet *from the ordinary low water line*," and instead established the boundary "150 feet *behind the * * * top of the river bank * * *.*" Record 420 (emphases added). The city explained that the ordinary low water line is difficult to locate because of the extreme fluctuation in flows during various times of the year, and the boundary would be inundated during high water flows, making the boundary impossible to locate on the ground during those times.

However, intervenor responds, and we agree, that the planning commission's conclusion that the ponds and slough were included in the boundary because they were important natural areas is correct and is supported by the city's adopted map. The Goodpasture Island study provides additional support for the planning commission's conclusion.[8] Moreover, the language in Supplemental Finding Rationale 6 provides no particular support for petitioner's interpretation of the greenway map, but merely recognizes

[8] For example, the Goodpasture Island study's introduction section states that one of its purposes is to integrate the "Preliminary Willamette Greenway Plan" into the city's planning for the Goodpasture Island area. Record 452.

that the city has chosen a different starting point for measuring the boundary than the "ordinary low water line" set forth in ORS 390.318.

Other language in the Supplemental Findings, as well as the city's adopted Goal 15 inventory, suggests that the ponds and slough area were included for their value as natural and open space areas rather than because they were part of the Willamette River. First, the greenway inventory adopted by the city as required by Goal 15, Paragraph B identifies under inventory Category 6, "Significant natural and scenic areas, and vegetative cover" "* * * [a] secondary natural area [that] is the gravel pond and slough system on Goodpasture Island. That area has also been included within the Greenway boundaries and recommended for preservation." Record 417-18. Under inventory Category 11, "Hydrological conditions," the city identifies as a "primary *water exchange area[]* related to the Willamette River * * * [t]he gravel pond and slough area on Goodpasture Island," and explains that the area has "been included within the Willamette Greenway boundaries." Record 418 (emphasis added). That identification of the ponds and slough as "water exchange areas" rather than "channels" of the river is consistent with the planning commission's conclusion that the ponds and slough were considered distinct from the river, and included as important natural areas, and not because they were a "channel" of or part of the river.

Second, Supplemental Findings Rationale 2 explains that the city modified the proposed boundary to include "[p]roperty on both sides of Delta Highway extending from the Delta-Belt Line interchange past the Delta-Goodpasture Island interchange," due to its primarily public ownership and its inclusion in local plans for a recreation system, including a canoe system that "would be linked with the Willamette River." Record 419. That language identifies the point of reference as the highway, and not the slough or ponds, and suggests that the city considered the area on both sides *of the highway* as important for future park uses that could in the future be "linked with" the river, which suggests that the area was not already a part of the river.

Finally, the city also departed from ODOT's proposed boundaries that apparently originally included most if not all of Goodpasture Island to "include the gravel pond area but to delete the area between Goodpasture Island Road and the Willamette River which is presently included." Record 419. In Supplemental Finding Rationale 3, the city explained:

> "The gravel pond area is identified on all local plans as part of a regional park system related to the Willamette River. However, the area between Goodpasture Island Road and the river is intended for residential development and, except for that portion of the actual river frontage discussed below, inclusion of future residential area is not necessary to meet the Greenway purposes." Record 419-20.

Taken together, Supplemental Finding Rationales 2 and 3 and the city's inventory under Goal 15, Paragraph B support the planning commission's conclusion that the ponds and slough were not included within the boundary because they were a channel of the river but rather because of their important natural features and their future use in a city-wide water recreation system.[9]

In the first assignment of error, we also understand petitioner to argue that the Metro Plan's adopted "Willamette River Greenway, River Corridors, and Waterways Element" goal, which is to "[p]rotect, conserve, and enhance the natural, scenic, environmental, and economic qualities of river and waterway corridors," supports petitioner's argument that the ponds and slough are a channel of the river. According to petitioner, the city has determined in its comprehensive plan provisions that implement Goal 15 to protect and preserve more water areas than just the Willamette River, including "river and waterway corridors." While that may be true as far as it goes, we fail to understand how the city's comprehensive plan

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[9] The planning commission's conclusion is also consistent with LUBA's decision in *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277 (1988), *aff'd* 96 Or App 536, 773 P2d 23 (1989). In *Kellogg Lake*, we rejected an argument from the petitioner that the inclusion of Kellogg Lake within the greenway boundary necessarily meant that the setbacks that applied to development adjacent to the Willamette River applied to proposed development adjacent to Kellogg Lake. Petitioner's argument in the first assignment of error is similar to the argument we rejected in *Kellogg Lake*. However, because we determine that the planning commission correctly concluded that the ponds and slough were not included within the greenway boundary as a channel of the river, we need not address petitioner's argument that the planning commission incorrectly relied on *Kellogg Lake Friends*.

goal has any bearing on whether the ponds and slough area is a "channel" of the Willamette River pursuant to ORS 390.310(1).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

EC 9.8815 and applicable provisions of the Metro Plan and the WAP establish a greenway setback of 35 feet from the top of the river bank for new structures built in the WAP planning area.[10] As we explained in *Greenway I*, if a non-water-dependent transportation facility requires placement of fill within the setback Metro Plan Policy D-11 requires an exception to Goal 15. 64 Or LUBA at 341. WAP use management considerations also prohibit the placement of new structures within 35 feet of the top of the river bank. Therefore, if the city incorrectly interpreted the location of the Willamette River to exclude the ponds and slough area, and those areas are part of "the Willamette River" or "the river" as used in the city's Goal 15 regulatory program provisions, then the transportation improvements are proposed to be located within the 35 foot greenway setback from the river.

In its second assignment of error, we understand petitioner to argue that the city erred in failing to require Goodpasture to take an exception to Goal 15 as required by Metro Plan D-11. Also in the second assignment of error, petitioner argues that the city erred in failing to apply the 35 foot setback set out in the WAP use management considerations to the proposed improvements because, according to petitioner, the proposed improvements will be located within 35 feet of the top of the ponds and slough area that are a channel of the river.

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[10] Goal 15, Paragraph C.3.k requires local governments to establish a "greenway setback:"

> "A setback line will be established to keep structures separated from the river in order to protect, maintain preserve and enhance the natural, scenic, historic and recreational qualities of the Willamette River Greenway, as identified in the Greenway Inventories. The setback line shall not apply to water-related or water dependent uses."

Petitioner's second assignment of error is largely dependent on succeeding under its first assignment of error. We denied petitioner's first assignment of error, and accordingly, Metro Plan and WAP provisions that apply to development within the setback from the river do not apply to the proposed improvements.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ORS 390.310(1) provides that the Willamette River includes "* * * any channel that flows water at ordinary low water." Petitioner's licensed groundwater hydrologist, Lambie, presented evidence to support petitioner's position that the ponds and slough are a channel of the river. Lambie presented evidence that water flows from the Willamette River into the ponds and slough area in the following ways: (1) surface water flows at times from the Willamette River under the top of the rocks and sand and gravel in the man-made weir into the ponds and slough through hyporheic exchange; and (2) groundwater flows from the Willamette River into the ponds through the ground.[11] Record 203-206, 317, 573. As we discuss in more detail below, the planning commission concluded that the ponds and slough are not a "channel" as that term is defined in ORS 390.310(1). Petitioner assigns error to the planning commission's conclusion.

1. Groundwater Flows

Lambie provided evidence that on average 13.5 million gallons of water per day flow into the ponds and slough area, and approximately 3.5 million gallons per day of water exits from the Debrick Slough into the Willamette River at its northern connection to the river. Record 575. In a September 28, 2012 analysis, Lambie concluded that "* * * groundwater is a principal mechanism of the Willamette River flow of water to and from the Goodpasture

[11] Lambie explains a hyporheic exchange as "* * * a river discharging surface water through its streambanks and receiving return flow of river water. * * *" Record 204.

Island Channel. It is groundwater flow that keeps Goodpasture Island Channel wet and discharging back to the main stem during low flow periods." Record 572.

Goodpasture's registered hydrogeologist, Weber, presented evidence that at ordinary low water, water from the main channel of the river could not flow as groundwater into the ponds and slough area. According to Weber, the surveyed groundwater levels on Goodpasture Island that were documented in 2005 by the U.S. Geological Survey are higher than the river levels except when the river is at its highest stage (i.e. not at ordinary low water), meaning that at all times of the year except when the river is highest, groundwater discharges *to* the main channel of the river (and ponds and slough area) and not vice versa.[12] Record 317-18. The planning commission found Weber rebutted Lambie's claim that water flows from the main channel into the groundwater under Goodpasture Island, and then flows into the ponds and slough.[13] Record 8.

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[12] In a report dated October 9, 2012, Weber explained:

> "The Willamette River near Eugene is a mainstream river in the bottom of a broad valley. This type of river is a regional discharge sink for groundwater. This concept is widely accepted and documented in various publications * * *. The U.S. Geologic Survey (USGS) has completed extensive studies of the groundwater hydrology of the Willamette River system * * * and has documented groundwater discharge to the river. In other words, groundwater is understood to flow from groundwater to the river, not vice versa as [petitioner's expert] contends. For groundwater to discharge to the river, groundwater levels have to be higher than the river levels.
>
> " * * * * *
>
> "In my opinion, the source of flow in the Delta Ponds/Debrick Slough at low water is local and regional groundwater discharge, not groundwater that originated from the Willamette River. * * *" Record 317-18 (footnote omitted).

[13] The planning commission found:

> "Although * * * Lambie contends that the Willamette River flows into the Delta Ponds/Debrick Slough through a groundwater connection, the Planning Commission finds that this evidence is lacking both factually and legally. First, as a factual matter, the planning commission finds that there is no basis to conclude that there is a groundwater connection between the Willamette River and the Delta Ponds/Debrick Slough. Goodpasture's registered geologist, [Weber], has reviewed Mr. Lambie's report and has opined that the source of water flowing into the Delta Ponds/Debrick Slough is not, in fact, groundwater from the Willamette River but rather local and regional groundwater discharge. * * * The planning commission

We understand petitioner to argue that the planning commission's decision to rely on Weber's evidence and testimony is not a decision that a reasonable person would make, based on the evidence in the record.[14] Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). LUBA will generally not second guess a land use decision maker's choice between conflicting expert testimony, so long as it appears to LUBA that a reasonable person could decide as the decision maker did based on all of the evidence in the record. *Westside Rock v. Clackamas County*, 51 Or LUBA 264, 294 (2006); *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 276 (2006) ("[t]he critical issue for the local decision maker will generally be whether any expert or lay testimony offered by * * * opponents raises questions or issues that undermine or call into question the conclusions and supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts"). We agree with the city and intervenor that a reasonable person could rely on Weber's rebuttal of Lambie's evidence regarding the source of the groundwater to the ponds and slough to conclude that there is no established groundwater flow from the main channel of the river to the ponds and slough area.

The planning commission also interpreted the phrase "flows water at ordinary low water" to not include any groundwater flowing under ground into the ponds and slough.[15]

> finds that Mr. Weber's testimony is more credible and reasonable than Mr. Lambie's testimony that there is groundwater flow from the Willamette River to Delta Ponds/Debrick Slough." Record 8.

[14] LUBA is authorized to reverse or remand a decision if the local government "[m]ade a decision not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C).

[15] The planning commission found:

> "[T]he Planning Commission finds that even if a groundwater connection between the two water bodies existed, this connection does not establish that the Delta Ponds/ Debrick Slough is a 'channel' of the Willamette River. * * * First, nothing in the plain language of ORS 390.310(1) or (3) expressly or implicitly provides that the 'Willamette River' includes groundwater flows. In fact, the Planning Commission finds based upon testimony from Goodpasture at the public hearing * * * that such an interpretation may upset established land use policies by establishing the precedent that the 'Willamette River' including its

We understand petitioner to argue that the planning commission's interpretation of ORS 390.310 as including only the flow of surface water misconstrues the statute because the statute does not specifically exclude groundwater "flows." Petition for Review 37.

We owe no deference to the city's interpretation of a state statute. *Kenagy v. Benton County*, 115 Or App 131, 134, 838 P2d 1076 (1992). As noted, ORS 390.310(1) provides that the Willamette River includes "any channel that flows water at ordinary low water." Thus, to be a channel the water body at issue must "flow[] water at ordinary low water." All parties appear to agree that in order to be a channel of the Willamette River, water must flow both into the channel from the main river stem and flow out of the channel back into the river downstream.

The word "flow," and the phrase "flows water at ordinary low water," are not further defined in the Greenway Law. Under *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 610-11, 859 P2d 1143 (1993), in order to ascertain the meaning of ORS 390.310(1), we first analyze the statutory text and context, using the "plain, natural, and ordinary" meaning of undefined language used in the statute, along with applicable rules of construction that directly bear on

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> underground channels, covers a very wide area, including many developed locations in the City.
>
> "Second, the planning commission finds that [petitioner's] interpretation is inconsistent with statutes that provide context for ORS 390.310 *et seq* * * *. For example, * * * the [Oregon] Attorney General opined that 'ordinary low water' in the Greenway Law has the same meaning as set forth in ORS 274.005(4):
>
> > "'Line of ordinary low water means the line on the bank or shore to which the water ordinarily recedes annually in season.'
>
> "38 Or Op Atty Gen 1295. Thus the legislature has established that 'ordinary low water' is to be measured in relation to 'the bank of shoreline,' concepts which do not exist in subsurface conditions where groundwater is located. Further, pursuant to ORS [] 274.025, the 'line of ordinary low water' is used to define the state's ownership, which extends to submersible and submerged 'lands of all navigable streams.' By contrast, ORS 537.515 defines 'groundwater' as: 'Any water * * * beneath the land surface or beneath the bed of any stream * * *.' Thus because the 'line of ordinary low water' relates only to surface lands, and 'groundwater' relates only to <u>areas</u> <u>beneath surface lands</u>, the existence of 'groundwater' cannot establish flow at 'ordinary low water' under the Greenway Law. * * *" Record 8-9 (underlining in original).

the interpretation of text. If the intended meaning remains unclear after a text and context analysis, we can proceed to consider legislative history, if any, and finally if the meaning is still unclear apply general maxims of statutory construction.

We give words of common usage their plain and ordinary meaning. *PGE*, 317 Or at 611, 859 P2d at 1146. One definition of "flow" is "**a** (1): to issue in a stream * * *." *Webster's Third New Int'l Dictionary* 875 (unabridged ed. 1981). The reference in the definition to a "stream" tends to support an interpretation of the phrase as referring to surface flows. But nothing in the ORS 390.310(1) definition itself conclusively resolves the question of whether "flow" includes groundwater. Thus, we must look beyond the text to relevant context.

Relevant context is provided by other related laws. ORS 274.005(4) was enacted in 1967, the same year that ORS 390.310(1) was first enacted. ORS 274.005(4) provides a definition of "line of ordinary low water" for purposes of determining the state's title to submersible and submerged lands as the "line on the bank or shore to which the water ordinarily recedes annually in season."[16] That definition clearly refers to a surface body of water. ORS 537.515 on the other hand defines "groundwater" for purposes of laws governing water appropriation in part as water "beneath the land surface or beneath the bed of any stream, lake, reservoir or other body of surface water * * *."

Petitioner does not point to any other relevant definitions or context to support its interpretation of the phrase "flows water at ordinary low water" as including groundwater flows. Petitioner points to a statement by a legislator during the 1973 legislative proceedings on amendments to ORS 390.310 in House Bill 2497 that suggested that legislator's

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[16] An Oregon Attorney General's opinion that is referenced in the planning commission's findings concludes that "there is no reason to believe that the legislature used the term 'ordinary low water' in the Greenway Law in any different sense than it used that term in ORS 274.005." 38 Or Op Atty Gen 1295; *see* n 15.

understand of the phrase as "anything that has water coming down would be low water." However, that legislative history is inconclusive and does not support petitioner's theory that the phrase "flows water at ordinary low water" is intended to include groundwater.

Accordingly, based on the plain meaning of the word "flow" and relevant context provided by the definition of the "line of ordinary low water" in ORS 274.005(4), we conclude that the phrase "flows water at ordinary low water" as used in ORS 390.310(1) most likely refers to the flow of water of a surface body of water from the main channel of the Willamette River into the disputed body of water.[17]

2. Water Flowing Through the Man-Made Weir

As noted, petitioner's expert Lambie testified that one source of water in the ponds/slough area at times of ordinary low water is water flowing from the main channel of the river through the gravel and rocks of the man-made weir, which he called hyporheic flow. It is undisputed that most times of the year surface water from the main channel flows over the weir directly into the pond/slough area. However, Goodpasture's professional engineer, Hurley, presented evidence that the man-made weir is higher in elevation than the ordinary low water line where the main channel of the river and the ponds and slough are closest at river mile 180.43. Record 317. The planning commission concluded that the evidence in the record from both Lambie and Hurley demonstrated that the man-made weir is approximately 10 inches higher in elevation than the ordinary low water line of the river at river mile 180.43 where the weir is located, and that consequently, at ordinary low water surface water in the main channel of the river could not flow over the man-made weir. Record 7.

Petitioner does not dispute that the elevation of the man-made weir at the ordinary low water line where the river and ponds and slough area are closest geographically is higher

[17] In the record, this is referred to as the "rubber duck" test, which asks whether a rubber duck could float downstream on the water surface from the main channel into and out of the side channel at ordinary low water. Record 911; Retained Exhibit T, Exhibit 3E.

than the ordinary low water line, by approximately 10 inches. However, we understand petitioner to argue that the planning commission's decision that there is no flow of water from the main channel of the river through the rocks and sand and gravel of the weir during ordinary low water is not based on substantial evidence in the record. Petition for Review 39-40.

In an October 8, 2012 technical memorandum, Lambie presented evidence that water from the river flows directly *through* the rocks and sand and gravel that comprise the man-made weir through a so-called hyporheic flow of water. Record 204; *see* n 11. However, the planning commission concluded that Lambie's October 8, 2012 testimony and evidence of hyporheic exchange was inconsistent with and contradicted his previous testimony that groundwater flow was the primary source of water in the ponds and slough area during low flow periods:

> "* * * Mr. Lambie's supplemental report contradicts his original testimony that the [ponds and slough area] was largely fed by groundwater supplies. * * * By contrast, [the] supplemental analysis – as characterized by [petitioner's attorney] - states that 'what is occurring is not the type of percolating ground water flow that several Commissioners asked about at the October 2 hearing.' * * * Lambie's analysis does not adequately explain why he has now reached a revised conclusion as to the nature of flow in the area. As a result, Mr. Lambie's supplemental analysis calls into question both the original analysis and the supplemental analysis.
>
> "Additionally, the Planning Commission is not persuaded because Mr. Lambie's supplemental analysis relies upon irrelevant authorities. For example, at pages 1 and 2, the supplemental analysis offers two possible definitions of the term 'channel.' One of these definitions is from the North Carolina Administrative Code and the other is from the Bouvier American Law Dictionary. Neither the State of Oregon nor the City have adopted either of these definitions. Further, there is no evidence that either of these definitions applies in a context analogous or even similar to the Greenway Law. In short, these definitions are neither controlling nor persuasive authority. Accordingly, they are irrelevant to the Planning Commission's analysis. Likewise, Mr. Lambie's citation to a 1923 Oregon Supreme Court discussion of a watercourse is not relevant because it did not construe the definitions set forth in ORS Chapter 390. Therefore, the Planning Commission finds that this case is not directly applicable." Record 9-10.

We understand petitioner to argue that the planning commission's rejection of Lambie's evidence regarding hyporheic exchange was unreasonable. The choice between conflicting evidence is the local decision maker's, and that includes the choice between conflicting evidence supplied by the same expert. In the present appeal, we understand the planning commission to have considered Lambie's September 28, 2012 testimony, his October 2, 2012 hearing testimony, and his October 8, 2012 testimony and found the October 8 testimony to contradict his earlier testimony. As such, the planning commission determined that Lambie's testimony regarding the existence of a hyporheic exchange of water was not particularly credible. Under those circumstances, where the local government decision maker is faced with reviewing and understanding highly technical scientific evidence and testimony and determining what weight that evidence and testimony should be given in determining the legal issues, we think a reasonable person could have found, as the planning commission did, that later testimony supplied by Lambie contradicted earlier testimony and could have reasonably chosen not to rely on that later testimony. *See Applebee v. Washington County*, 54 Or LUBA 364, 390 (2007) (the local decision maker has discretion to weigh the credibility and reliability of witness testimony on a disputed factual issue, and where that evaluation is based on a considered assessment, it will be a rare circumstance where LUBA overturns that credibility judgment); *Sanders v. Clackamas County*, 10 Or LUBA 231, 237 (1984) (LUBA is not authorized to second guess the judgments made by local decision makers with respect to the credibility of evidence presented at local land use hearings.)

However, even if the evidence in the record conclusively demonstrates the existence of a hyporheic flow of water, we do not think that such a method of transmitting water from the river to the ponds and slough area falls within the ORS 390.310(1) description of "flows water at ordinary low water." In other words, even assuming Lambie's evidence of a hyporheic exchange is accurate, that fact would not establish as a matter of law that the ponds

and slough are a channel of the river under ORS 390.310(1). Stated differently, we understand Lambie to have provided evidence that water flows *under* the top layer of rock and soil that comprises the man-made weir. For the reasons explained above, the fact that water flows under rock and soil from the main channel of the river does not establish that water from the main channel "flows water at ordinary low water" into the ponds and slough area.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

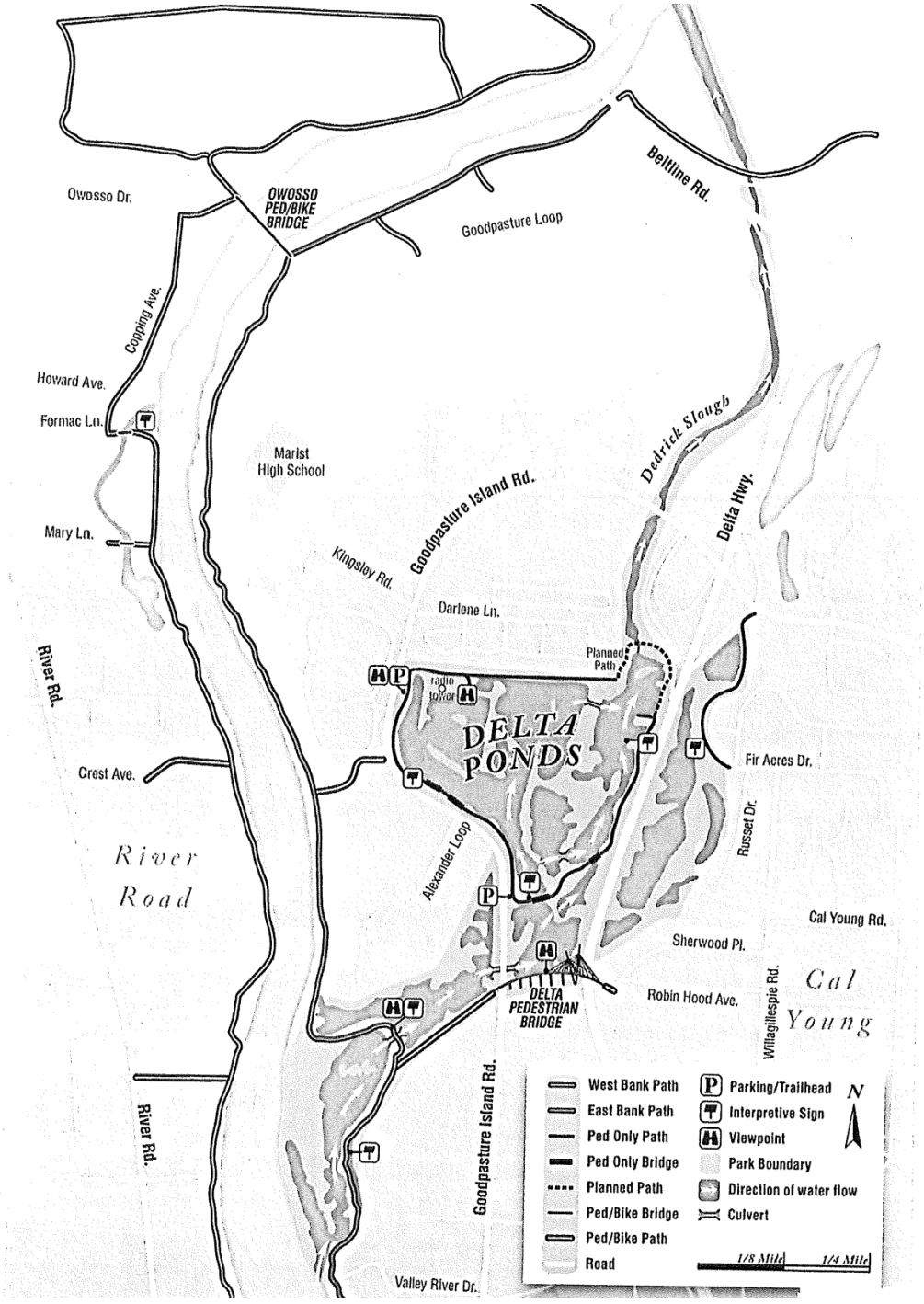
In its fourth assignment of error, we understand petitioner to argue that the planning commission erred in concluding that Goal 15 did not apply directly to the decision. Record 28. We agree with the planning commission that Goal 15 does not apply directly as an approval criterion. ORS 197.175(2)(d).

We also understand petitioner to argue that the planning commission's conclusion that the ponds and slough were included in the greenway boundary because they were areas of critical concern is inconsistent with Goal 15's purpose to "protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic, and recreational qualities of lands along the Willamette River Greenway." Petition for Review 47-48. To the extent the remainder of the fourth assignment of error is a restatement and refinement of petitioner's first assignment of error, we have previously denied that assignment of error. To the extent it is not, the remainder of petitioner's fourth assignment of error is insufficiently developed for our review and accordingly, provides no basis for reversal or remand. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The fourth assignment of error is denied.

The city's decision is affirmed.

Appendix


Owosso Dr.
OWOSSO PED/BIKE BRIDGE
Goodpasture Loop
Beltline Rd.
Cropping Ave.
Howard Ave.
Formac Ln.
Marist High School
Goodpasture Island Rd.
Dedrick Slough
Delta Hwy.
Mary Ln.
Kingsley Rd.
Darlene Ln.
Planned Path
Radio Tower
DELTA PONDS
River Rd.
Crest Ave.
Fir Acres Dr.
Russet Dr.
River Road
Alexander Loop
Cal Young Rd.
Sherwood Pl.
Robin Hood Ave.
Willagillespie Rd.
Cal Young
DELTA PEDESTRIAN BRIDGE
River Rd.
Goodpasture Island Rd.
Valley River Dr.
West Bank Path
East Bank Path
Ped Only Path
Ped Only Bridge
Planned Path
Ped/Bike Bridge
Ped/Bike Path
Road
Parking/Trailhead
Interpretive Sign
Viewpoint
Park Boundary
Direction of water flow
Culvert
N
1/8 Mile
1/4 Mile