

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

3
4 TERRA HYDR INC, TONQUIN INDUSTRIAL LLC,
5 BOB ALBERTSON, DONNA ALBERTSON,
6 ALBERTSON TRUCKING INC, MARK BROWN,
7 MCCAMMANT PROPERTIES INC, ERIC JOHNSON,
8 BROWN TRANSFER INC, MCGUIRE BROTHERS LLC,
9 STEVE MCGUIRE,
10 *Petitioners,*

11
12 vs.

13
14 CITY OF TUALATIN,
15 *Respondent,*

16
17 and

18
19 METRO,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2013-016

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Tualatin.

28
29 Wendie L. Kellington, Lake Oswego, filed the petition for review and argued on
30 behalf of petitioners.

31
32 Sean T. Brady, Tualatin, filed the response brief and argued on behalf of respondent.

33
34 Roger A. Alfred, Metro Senior Attorney, Portland, filed a response brief and argued
35 on behalf of intervenor-respondent.

36
37 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
38 participated in the decision.

39
40 REMANDED

11/01/2013

41
42 You are entitled to judicial review of this Order. Judicial review is governed by the
43 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city ordinance adopting a new city transportation system plan (TSP), which in relevant part adopts a map and financing provisions reflecting the proposed construction of a regional trail within the city.

FACTS

This appeal is one of several related appeals concerning the Ice Age Tonquin Trail (hereafter, the Trail), a proposed 22-mile trail connecting the Tualatin River to the Willamette River, which will run through the cities of Tualatin, Sherwood, Wilsonville and unincorporated areas of Washington and Clackamas Counties.¹

For a number of years, Metro staff in partnership with affected cities and counties has studied and planned for the new trail, resulting in Metro’s development of the Ice Age Tonquin Trail Master Plan (TTMP), which the Metro Council approved by resolution on February 28, 2013. A few days earlier, on February 25, 2013, the city council considered a resolution that approves the draft TTMP, and that directs staff to prepare amendments to the city’s parks master plan, development code and TSP to implement relevant portions of the TTMP. As it happened, the city was almost finished with a separate legislative proceeding to adopt a new TSP. The proposed new TSP included a map that reflects the Trail alignment proposed in the TTMP, as well as cost estimates and other text concerning the Trail. At that February 25, 2013 meeting, the city council adopted the resolution approving the TTMP, and also adopted by ordinance the new TSP. The new TSP is the subject of the present appeal.

Petitioners’ challenges to the new TSP are focused exclusively on the elements that concern the Trail and the TTMP. Petitioners are a group of businesses located on roughly

¹ For further background, see *Terra Hydr v Washington County*, __ Or LUBA __ (LUBA No. 2013-017/018/019/025, July 26, 2013), Order on Motions to Dismiss; and *Terra Hydr v. Metro*, __ Or LUBA __ (LUBA No. 2013-025, November 1, 2013).

1 fifty acres of land in unincorporated Washington County, but within the City of Tualatin's
2 planning area, in an area designated by Metro as a Regionally Significant Industrial Area
3 (RSIA). RSIA's are special industrial areas that are located near the region's most significant
4 transportation facilities and most suitable for movement of goods. The particular RSIA in
5 which petitioners' property is located is known as the Tonquin Industrial Group RSIA, or
6 TIG RSIA, which is located near Interstate 5. As explained below, Metro's legislation
7 generally requires that local governments protect RSIA's from incompatible uses and
8 specifically prohibits allowing several types of non-industrial uses in RSIA, including
9 "parks."

10 The TTMP adopted by Metro and approved by the city on February 25, 2013, includes
11 detailed plans that propose approximately 147,000 square feet of trail on petitioners'
12 property, to be acquired by Metro, not including acreage for associated Trail facilities. In
13 addition to the Trail itself, the TTMP proposes within the TIG RSIA a trailhead for public
14 access, an art, educational or interpretative facility of some kind, and two directional signs.

15 The new TSP includes a new bicycle and pedestrian policy, Policy 2, providing that
16 the city will "[w]ork with partner agencies to support and build the Ice Age Tonquin Trail."
17 Record 1058. The TSP also includes Figure 7, a map depicting existing and proposed bicycle
18 and pedestrian facilities. Figure 7 is a small scale map, and does not depict property
19 boundaries or other detailed information. A notation at the bottom states that "All locations
20 are approximate." Figure 7 includes a dark blue line representing the portions of the Trail
21 proposed in the city. The location of the dark blue line is consistent with the more detailed
22 Trail alignments proposed in the TTMP, and appears to show the Trail alignment crossing
23 through the TIG RSIA that includes petitioners' property. A map annotation identifies
24 "Regional Bicycle & Pedestrian Projects" and lists one project as: "Build the Tonquin Trail."
25 The map also depicts three short connecting trails north of petitioners' property, with an

1 annotation proposing to “Connect Tonquin Trail with neighborhoods.” TSP Table 13
2 includes a 7 million dollar cost estimate for these trail connections.

3 TSP Table 15 lists regional multi-use path project costs estimates and prioritization.
4 Project BP18 is to “Build the segments of the Ice Age Tonquin Trail in the City,” for an
5 estimated cost of \$37 million dollars. Priority is listed as “Medium/Long term.” A footnote
6 attached to Project BP18 states in relevant part that:

7 “The exact alignment through or near the property held by the Tonquin
8 Industrial Group land owners in the SW Concept Plan area has not been
9 determined. The final trail alignment and design and construction details will
10 all be developed in the undetermined future and the processes will be
11 conducted with the participation of land owners, adjacent property owners, the
12 general public and other stakeholders at such time that the area annexes.”
13 Record 1063.

14 Finally, the findings supporting the TSP include findings concluding that construction of the
15 Tonquin Trail will help establish that the TSP is consistent with (1) a city policy requiring the
16 city to link its park and recreation system with a system of greenways and bicycle-pedestrian
17 facilities, and (2) Statewide Planning Goal 8 (Recreation). The findings also conclude that
18 the TSP is consistent with Metro’s Urban Growth Management Functional Plan (UGMFP)
19 and Metro’s Regional Transportation Functional Plan (RTFP).

20 **SECOND ASSIGNMENT OF ERROR**

21 Petitioners argue that the TSP, by proposing construction of the Trail across
22 petitioners’ property located within a RSIA, is inconsistent with Metro policies protecting
23 RSIAAs.

24 Statewide Planning Goal 2 (Land Use Planning) requires that the city’s TSP comply
25 with “regional plans adopted under ORS [chapter] 268.” Pursuant to authority granted under
26 ORS chapter 268, Metro has adopted several regional plans, including the Regional
27 Framework Plan (RFP) and its components, including two functional plans, the UGMFP and
28 the RTFP.

1 RFP Policy 1.4.4 requires local governments to protect regionally significant
2 industrial areas from “incompatible uses.” RFP Policy 1.4.4 is implemented in part by Title 4
3 of the UGMFP, which is codified at Metro Code (MC) 3.07.410 *et seq.* MC 3.07.410 is the
4 purpose statement for Title 4, and states in relevant part that “Title 4 seeks to provide and
5 protect a supply of sites for employment by limiting the types and scale of non-industrial uses
6 in Regionally Significant Industrial Areas (RSIAs), Industrial and Employment Areas.”

7 Title 4 and other UGMFP titles include a number of provisions intended to protect
8 RSIAs by limiting the types and scale of non-industrial uses. The TIG RSIA was brought
9 into the UGB in 2002. Until the city adopted planning and zoning that complied with the
10 UGMFP, MC 3.07.1130(D)(2) prohibited the city from approving within the RSIA “a park or
11 any other institutional or community service use intended to serve people who do not work or
12 reside in the area.” As discussed below, the city subsequently adopted planning and zoning
13 designations intended to comply with Title 4.

14 MC 3.07.420 addresses the “Protection of Regionally Significant Industrial Areas.”
15 MC 3.07.420(D) provides:

16 Cities and counties shall review their land use regulations and revise them, if
17 necessary, to prohibit the siting of schools, places of assembly larger than
18 20,000 square feet or parks intended to serve people other than those working
19 or residing in the RSIA.”

20 As explained below, the city has adopted zoning that prohibits “parks and recreational
21 facilities” in the TIG RSIA.

22 Under the second assignment of error, petitioners argue the proposed Trail constitutes
23 a “park” within the meaning of MC 3.07.420(D), because it is a linear recreational facility
24 that is clearly intended to serve people other than those working or residing within the RSIA.²

² Petitioners also argue that the Trail and associated facilities may constitute “places of assembly larger than 20,000 square feet.” We do not address this alternative argument, because our conclusion below that the Trail constitutes a “park” within the meaning of MC 3.7.420(D) is dispositive. However, we tend to agree with respondents that the Trail and associated facilities likely do not constitute “places of assembly” within the meaning of MC 3.7.420(D).

1 Because the TSP approves a “park” within the TIG RSIA, petitioners argue that the TSP is
2 inconsistent with MC 3.07.420(D). Before turning to the merits of that argument, we first
3 address two preliminary issues raised by the city.

4 **A. Specific Alignment**

5 As an initial matter, the city argues that most of the alleged conflicts between the
6 Trail and petitioners’ industrial uses claimed by petitioners throughout the petition for review
7 stem from the specific alignment proposed in the TTMP’s detailed maps.³ However, the city
8 argues that the challenged decision is the city’s TSP, not Metro’s TTMP, and the TSP
9 expressly states that the exact alignment for the Trail through the RSIA has not yet been
10 determined. We understand the city to argue that petitioners cannot obtain reversal or
11 remand of the challenged TSP based on conflicts associated with a particular alignment,
12 because the TSP does not choose a particular alignment across the TIG RSIA.

13 We generally agree with the city that petitioners’ challenges in this appeal are limited
14 to the determinations made in the TSP, which do not include the exact alignment of the Trail
15 through the TIG RSIA. Figure 7 in the TSP adopts a general alignment that no party disputes
16 crosses through the TIG RSIA, but the TSP expressly does not choose a particular alignment
17 within the TIG RSIA.

18 That said, the question presented in the second assignment of error is not dependent
19 on a particular alignment, nor does it turn on the existence of specific conflicts or
20 incompatibilities. That question is a legal one: whether the Trail that the TSP proposes for
21 construction across the TIG RSIA constitutes a “park” within the meaning of MC
22 3.07.420(D). In answering that question, we see no error in evaluating the Trail as proposed

³ For example, petitioners argue that the TTMP maps depict the trail alignment in a portion of the TIG RSIA within the narrow right of way of McCament Drive, which petitioners contend will make it impossible for petitioners to use McCament Drive for freight mobility needs. However, that particular alleged incompatibility will exist only if Metro and the city in fact decide to locate the trail alignment within McCament Drive right-of-way, as opposed to elsewhere in the TIG RSIA.

1 in the TTMP, including the associated facilities that the TTMP proposes within the TIG
2 RSIA, and elsewhere within the city. The city has formally approved the TTMP by
3 resolution, and in the challenged TSP the city has adopted a general alignment and financing
4 provisions to construct the Trail segments as proposed in TTMP. Even if the specific
5 alignment has not yet been determined, there is little room for doubt that the TSP reflects the
6 city’s intent to construct the Trail as proposed in the TTMP, including the trailhead,
7 interpretative and other facilities proposed in the TIG RSIA and elsewhere in the city. In
8 short, in determining whether the Trail constitutes a “park” within the meaning of the
9 applicable legislation, we think it appropriate to consider the character of the entire Trail.

10 As proposed in the TTMP, the 22-mile long Trail will consist not only of the 14-foot
11 wide constructed multi-use bicycle and pedestrian path, which petitioners allege will occupy
12 approximately 147,000 square feet within the TIG RSIA, but a number of other features,
13 most notably trailheads, including a trailhead proposed within the TIG RSIA. As described
14 in the TTMP, “minor” trailheads can include parking, drinking fountains, benches, bicycle
15 racks, trash receptacles, pet waste bag dispensers, and an information kiosk. Petition for
16 Review App 3, 89. A “major” trailhead (which is apparently what is contemplated for the
17 TIG RSIA) can include, in addition, restrooms, shelters, picnic areas, wayfinding stations,
18 interpretative signs, a secure bike parking area, a bike maintenance station, a fitness course,
19 and a larger parking area. *Id.* In addition, the TTMP proposes a number of art, educational
20 and interpretative facilities, including one within the TIG RSIA. These facilities will provide
21 “trail users with information about the trail, native flora and fauna, history and culture, and
22 the significance of elements along the trail.” *Id.* at 92. Signage themes are tied to the Ice
23 Age Floods National Geologic Trail, and could include information on geology and natural
24 history, wildlife and habitat, native plants and ecology, cultural history, and the Glacial Lake
25 Missoula Ice Age floods. *Id.* Indeed, the general alignment of the Trail was chosen to
26 provide users an opportunity to observe and learn about distinctive geologic landforms left

1 over from the ice age floods, including glacial erratics, scablands, kolk ponds, flood channels
2 and ripple marks. As proposed in the TTMP, and as partially implemented in the TSP, the
3 Trail viewed as a whole appears to be a multi-featured recreational and educational facility.
4 As explained below, we agree with petitioners that the Trail is a “park” within the meaning of
5 MC 3.07.420(D).

6 **B. Applicability of UGMFP.**

7 The city also argues that nothing in the UGMFP, including MC 3.07.420(D), applies
8 to the challenged TSP. According to the city, the only Metro criteria that apply to adoption of
9 the TSP are those found in Metro’s RTFP, the Regional Transportation Functional Plan. The
10 city cites MC 3.07.010 and 3.07.020, part of the UGMFP, to support that assertion.
11 However, neither provision supports the city’s argument.⁴ The closest language is the last
12 sentence of MC 3.07.020, which states only that the RTFP serves as the “primary

⁴ MC 3.07.010 and 3.07.020 provide:

“3.07.010 Purpose

“The regional policies which are adopted by this Urban Growth Management Functional Plan recommend and require changes to city and county comprehensive plans and implementing ordinances. The purpose of this functional plan is to implement regional goals and objectives adopted by the Metro Council as the Regional Urban Growth Goals and Objectives (RUGGO), including the Metro 2040 Growth Concept and the Regional Framework Plan. The comprehensive plan changes and related actions, including implementing regulations, required by this functional plan as a component of the Regional Framework Plan, shall be complied with by cities and counties as required by Section 5(e)(2) of the Metro Charter.

“Any city or county determination not to incorporate all required functional plan policies into comprehensive plans shall be subject to the conflict resolution and mediation processes included within the RUGGO, Goal I provisions, prior to the final adoption of inconsistent policies or actions.

“3.07.020 Regional Policy Basis

“The regional policies adopted in this Urban Growth Management Functional Plan are formulated from, and are consistent with, the RUGGOs, including the Metro 2040 Growth Concept. The overall principles of the Greenspaces Master Plan are also incorporated within this functional plan. In addition, the Regional Transportation Functional Plan (RTFP), adopted on June 10, 2010, as Metro Code 3.08, serves as the primary transportation policy implementation of the 2040 Growth Concept.”

1 transportation policy implementation of the 2040 Growth Concept.” However, that statement
2 does not get anywhere near suggesting that a city’s TSP is exempt from complying with
3 otherwise applicable UGMFP policies. Further, we note that the city council’s adopted
4 findings conclude that the TSP is consistent with the UGMFP, which does not suggest that
5 the city council believed that the UGMFP is inapplicable.

6 **C. The Trail is a “Park” within the meaning of MC 3.07.420(D).**

7 On the merits of the second assignment of error, the city and Metro both argue that
8 under Metro’s legislation and as implemented in the city’s code , a “trail” does not constitute
9 a “park” within the meaning of MC 3.07.420(D). In fact, respondents argue, both Metro and
10 the city’s code allow “trails” as outright permitted uses in RSIA’s.

11 Petitioners’ argument that the Trail constitutes a “park” within the meaning of MC
12 3.07.420(D) begins with the definition of “park” at MC 10.01.020(d). MC 10.01.020(d)
13 defines “park” to mean “a forest, reservation, playground, beach, natural area, recreation
14 center, cemetery, or any other similar area owned, operated or managed by Metro, through its
15 Regional Parks and Greenspaces Department, and devoted to active or passive recreation.”
16 Petitioners argue that the Trail falls within the broad definition at MC 10.01.020(d), because
17 it will be a linear recreation area, similar to a beach, parts of which will be owned and
18 perhaps managed by Metro, and clearly devoted to active and passive recreation.

19 MC 10.01.020(d) is part of a section of Metro Code that provides regulations for the
20 use of Metro owned or operated regional parks and greenspaces facilities. Initially, it is
21 doubtful that MC 10.01.020(d) is intended to provide a definition for the term “park” as that
22 term is used in MC 3.07.420(D). The definition at MC 10.01.020(d) is directed solely at
23 Metro owned or operated facilities, while MC 3.07.420(D) is directed at parks authorized by
24 cities and counties. Those two categories may overlap but are not identical. The term “park”
25 as used in MC 3.07.420(D) clearly encompasses parks authorized under city or county plans
26 and regulations, including parks owned or operated by cities, counties and special districts.

1 In other words, the term “park” used in MC 3.07.420(D) is broader than the term as defined
2 in MC 10.01.020(d), because it includes city or county parks not owned or operated by
3 Metro. Metro parks as defined at MC 10.01.020(d) presumably also require authorization
4 under city and county plans and regulations, and are therefore also included in the scope of
5 the term “park” as used in MC 3.07.420(D). One uncertainty in the present case is that it is
6 not clear to us which entities will own and operate the Trail. As we understand it, Metro will
7 acquire and own much of the 22-mile long Trail, but the TTMP contemplates that the three
8 cities involved will manage and maintain the portions of the Trail within their jurisdictions,
9 presumably through their parks and recreation departments.

10 However, we do not see that uncertainty over ownership or management matters for
11 purposes of resolving whether the Trail is a “park” within the meaning of MC 3.07.420(D).
12 If Metro does not own or manage the Trail, and the definition at MC 10.01.020(d) does not
13 apply for that reason, then we must decide the meaning of “park” as used in MC 3.07.420(D)
14 without the assistance of that definition. If Metro’s legislation does not supply a definition or
15 answer, then it seems appropriate to consider applicable city or county code definitions and
16 general dictionary definitions. As discussed below, the proposed Trail seems to fall plainly
17 within the city’s code definition of “park.” In addition, the Trail also appears to fall within
18 the broad dictionary definition. *See Webster’s Third New Int’l Dict.* (2002), 1642 (defining
19 park in relevant part as a “tract of land maintained by a city or town as a place of beauty or of
20 public recreation”).

21 Turning to the city’s code, Tualatin Municipal Code (TMC) 5-02-030 defines “park”
22 in relevant part to include “public bike paths and pedestrian ways (but not sidewalks along
23 city streets), [and] recreation facilities * * *.” Petitioners argue that the Trail falls within the
24 city’s broad definition, either as public bike path and pedestrian way or as a recreation
25 facility.

1 Further, petitioners argue that it is consistent with the purpose of MC 3.07.420(D) to
2 treat the proposed regional trail as a “park,” because the trail is clearly “intended to serve
3 people other than those working or residing in the RSIA” and will effectively remove a
4 certain amount of acreage within RSIA’s from potential industrial use and development.
5 Petitioners contend the purpose of MC 3.07.420(D) is to preserve scarce regionally
6 significant industrial areas for industrial uses, by prohibiting certain communal facilities that
7 are intended to serve the broader community rather than the workers or residents of a RSIA.
8 That purpose is also reflected in MC 3.07.410, the general purpose statement for Title 4,
9 which as noted provides that Title 4 is intended to “protect a supply of sites for employment
10 by limiting the types and scale of non-industrial uses in Regionally Significant Industrial
11 Areas.”

12 Metro’s response does not address petitioners’ arguments based on the definitions at
13 MC 10.01.020(d) and TMC 5-02-030, or dispute petitioners’ view of the purpose of the
14 Metro provisions protecting RSIA’s. Instead, Metro argues that (1) nothing in Metro’s
15 legislation specifically states that a regional trail constitutes a “park” for purposes of MC
16 3.07.420(D) and (2) context provided by one Metro Code provision suggests that a “trail”
17 may be a feature of a Metro park, and therefore, Metro argues, a trail cannot constitute a
18 “park” by itself. Metro cites to MC 10.01.0120, which is part of the regulations governing
19 use of Metro parks and greenspaces, and which states that within the boundary of a Metro
20 “park” a bicyclist shall be permitted to ride a bicycle over “any grassy area or wooded trail[.]”
21 Metro argues that “[i]f petitioners are correct that all trails are also always a ‘park,’ then this
22 code section is nonsensical.” Metro Response Brief 5.

23 However, petitioners are not arguing that all trails are necessarily parks. They are
24 arguing, and we do not understand Metro to dispute, that the proposed regional trail facility
25 falls within the broad definitions of “park” at MC 10.01.020(d) and TDC 5-02-030. Under
26 any definition, a “park” can certainly consist of a recreational area that includes within it

1 multiple recreational features, such as playgrounds and trails. However, there is no logical or
2 textual reason why a “park” cannot also consist of a linear recreational area dominated by a
3 single recreational element, such as multi-use shared path. That view is consistent with MC
4 10.01.020(d), which defines “park” to mean, among other things, a “playground” or a
5 “beach.” That is, a recreational area that consists solely of a playground or a beach may be a
6 “park” as defined at MC 10.01.020(d). Similarly, under TDC 5-02-030, a recreational area
7 consisting solely of public bike paths and pedestrian ways can clearly constitute a “park.”

8 It is true that nothing cited to us in Metro’s legislation expressly states that a regional
9 trail can be a “park” for purposes of MC 3.07.420(D). But it is equally true that nothing cited
10 to us in Metro’s legislation states that a regional trail is not a “park” for purposes of MC
11 3.07.420(D). As to the context provided by the bicycle regulations at MC 10.01.120, at most
12 that context suggests that “wooded trails” are a possible feature of Metro parks, not that a
13 regional trail such as the proposed Trail cannot be a “park” for purposes of MC 3.07.420(D).
14 As explained above, MC 10.01 is the set of regulations governing the use of Metro-owned or
15 operated parks. The term “park” in MC 3.07.420(D) is broader than the category of Metro-
16 owned or operated parks, and obviously includes city and county parks. To the extent the
17 bicycle regulations at MC 10.01.120 can be understood to impliedly limit what constitutes a
18 Metro park, it cannot be understood to limit the broader meaning of “park” as that term is
19 used in MC 3.07.420(D).

20 Perhaps most importantly, Metro does not dispute petitioners’ argument that it is
21 consistent with the purpose of Title 4 in general and MC 3.07.420(D) in particular to treat the
22 proposed Trail as a “park.” The Trail is clearly intended to serve people other than workers
23 or residents of an RSIA, and it will remove land within at least the TIG RSIA from potential
24 industrial use. Petitioners argue, and no party disputes, that within the TIG RSIA alone the
25 proposed Trail will occupy over three acres of industrial land, not counting the acreage
26 necessary for the proposed art, educational or interpretative facility or trailhead amenities

1 such as parking, restrooms, etc. We agree with petitioners that it is consistent with the
2 purpose of MC 3.07.420(D) and the Title 4 scheme to protect RSIA's to treat the proposed
3 Trail as a "park."

4 **D. The Trail is a "Park" within the meaning of the city's legislation.**

5 Metro and the city next argue that the most convincing support for their view that the
6 Trail should not be treated as a "park" for purposes of MC 3.7.420(D) is that the city's
7 development code allows "trails" as outright permitted uses in the TIG RSIA.

8 However, respondents have not established that the city's code allows the proposed
9 Trail in the TIG RSIA. The city assumed planning responsibility for the TIG RSIA when the
10 area was brought into the UGB. As noted, until the city adopted planning and zoning that
11 complied with the UGMFP, MC 3.07.1130(D)(2) prohibited the city from approving within
12 the RSIA "a park or any other institutional or community service use intended to serve people
13 who do not work or reside in the area." After the city adopted a concept plan and
14 comprehensive planning for the area, the city zoned the TIG RSIA "Manufacturing Business
15 Park" or MBP, and applied an overlay zone, the Tonquin Light Manufacturing Overlay zone.
16 The overlay zone allows all uses permitted in the MBP base zone, with some additional uses
17 and restrictions. However, neither zone expressly allows "trails," much less "regional trails,"
18 in the TIG RSIA.

19 The closest the MBP regulations come is to allow "Greenways and Natural Areas,
20 including but not limited to bike and pedestrian paths and interpretive stations." Tualatin
21 Development Code (TDC) 64.020(11). Metro and the city apparently understand TDC
22 64.020(11) to allow bike and pedestrian paths and interpretative stations, and by extension a
23 regional trail, as an outright permitted use in the MBP zone. However, what that provision
24 instead allows is "greenways" and "natural areas," which can *include* bike and pedestrian
25 paths. It does not purport to authorize bike and pedestrian paths in places other than in
26 greenways and natural areas. As discussed below, the TDC provisions governing wetlands

1 and natural areas allow trails and bicycle and pedestrian paths, subject to restrictions.
2 However, according to the city, there are no greenways, natural areas or other similarly
3 protected resources within the TIG RSIA.

4 Given the purpose of the MBP zone and Title 4 of the UGMFP to protect industrial
5 sites from non-industrial uses, it makes regulatory sense to allow bike and pedestrian paths in
6 greenways and natural areas that may be located within an RSIA, but not a regional trail such
7 as the proposed Trail. That is because greenways and natural areas are typically protected
8 and not developable with industrial uses in any event. Allowing bike and pedestrian paths in
9 greenways and natural areas, even within an RSIA, seems consistent with MC 3.07.420(D),
10 because greenways or natural areas do not compete with industrial uses for scarce land, which
11 is a chief regulatory concern of UGMFP 3.07.420(D) and of Title 4 in general. Conversely,
12 allowing in RSIA a regional trail and associated facilities that are intended to serve non-
13 residents and non-workers, and that remove potentially significant amounts of otherwise
14 developable land from industrial use, seems inconsistent with the purpose of UGMFP
15 3.07.420(D) and Title 4.

16 As noted, the city specifically implemented MC 3.07.420(D) by providing in the
17 Tonquin Light Manufacturing Overlay zone that “parks and recreation facilities” are
18 prohibited in the TIG RSIA. TDC 64.040(8). In this respect, the TDC appears to be more
19 protective of the RSIA than Metro would require, since *all* parks are prohibited, as well as all
20 “recreational facilities,” not just those intended to serve persons who do not reside or work in
21 the industrial area. As noted, the city’s municipal code broadly defines “park” to include
22 “public bike paths and pedestrians ways” excluding sidewalks, as well as “recreational
23 facilities.” TMC 5-02-030. The city’s code includes no definition of “recreational facility”
24 that we can find. However, the proposed Trail plainly falls within the definition at TMC 5-
25 02-30, and appears to fall squarely within the prohibition on “parks and recreational
26 facilities.” Again, given the purpose of UGMFP 3.07.420(D) and Title 4, and the MBP and

1 Tonquin Light Manufacturing Overlay zone, to protect industrial sites from competition with
2 non-industrial uses that serve the broader community, it seems entirely appropriate to
3 understand the scope of “parks and recreation facilities” as those terms are used in TDC
4 64.040(8) to include the proposed regional trail facility.

5 **E. Public Facilities and Services**

6 Finally, the city argues that the proposed regional trail is allowed outright in the TIG
7 RSIA as a type of “public facilities and services.” Title 4 limits land divisions within RSIA,
8 in order to preserve larger parcels of land for industrial uses. However, MC 3.07.420(F)(4),
9 part of the Title 4 UGMFP provisions protecting RSIA, provides for an exception, to allow a
10 local government to subdivide property or to subject property to rights-of-way within an
11 RSIA in order to “[t]o provide public facilities and services,” or to “provide a public
12 amenity.”⁵ The city argues that the Trail is a “public facility” or a “public amenity,” and
13 therefore the Trail is allowed outright in the TIG RSIA.

14 The city does not cite to any definition of “public facilities and services,” “public
15 amenity,” or any Metro legislation that purports to include the Trail or any regional trail
16 within the scope of “public facilities and services” or “public amenity.”

⁵ MC 3.07.420(F) provides, in relevant part:

“Cities and counties may allow division of lots or parcels into smaller lots or parcels as follows:

“* * * * *

“4. Notwithstanding paragraphs 2 and 3 of this subsection [limiting land divisions in RSIA], any lot or parcel may be divided into smaller lots or parcels or made subject to rights-of-way for the following purposes:

- “a. To provide public facilities and services;
- “b. To separate a portion of a lot or parcel in order to protect a natural resource, to provide a public amenity, or to implement a remediation plan for a site identified by the Oregon Department of Environmental Quality pursuant to ORS 465.225[.]”

1 Although the city does not cite it, we note that MC 3.07.1010(vv) defines the term
2 “public facilities and services” to mean “sewers, water service, stormwater services and
3 transportation.” Notably, that definition does not mention trails or regional trails. Although
4 the city does not make this argument, it is certainly possible to argue that the Trail will
5 function, at least in part, as a facility for “transportation.” The city has adopted a general
6 Trail alignment and financing provisions into its TSP, and as noted Metro contemplates that
7 the specific Trail alignment, once that is determined, will be adopted into Metro’s Regional
8 Transportation Plan. As we understand it, the Trail alignment must be adopted into local
9 transportation plans in order to qualify for federal transportation funding. Thus, the Trail
10 could be viewed, at least for some purposes, as a transportation facility, and be characterized
11 as a “public facility” within the meaning of MC 3.07.420(F)(4).

12 However, absent a more developed argument from respondents, we decline to
13 conclude that the Trail must be characterized as a “public facility” for purposes of MC
14 3.07.420(F)(4), and therefore is not a “park” for purposes of MC 3.07.420(D). No party has
15 cited, and we cannot find, any Metro legislation that suggests that the Trail or any regional
16 trail must be exclusively characterized as a transportation facility or public facility for
17 purposes of Title 4. As far as we can tell, Metro’s plans and legislation appear to treat the
18 Trail and regional trails in general as recreational facilities or, at most, a hybrid of
19 recreational and transportation facilities.

20 Metro first identified the Tonquin Trail and other regional trails as regional assets to
21 be planned and developed in the 1992 Greenspaces Master Plan. Portions of the 1992
22 Greenspaces Master Plan were later incorporated into Chapter 3 of the RFP, entitled “Nature
23 in Neighborhoods,” and RFP Appendix H, entitled “Parks, Open Space and Recreation,”
24 which sets out a number of policies governing parks, opens spaces, natural areas and regional
25 trails. Notably, there is nothing in RFP Chapter 2, the RFP transportation element, that
26 mentions regional trails. The RTFP is the functional plan that imposes transportation

1 requirements on local governments. The RTFP mentions regional trails only once, in
2 requiring local governments to allow connections between a number of uses, including
3 regional trails. The Regional Transportation Plan (RTP), a component of the RFP, is Metro’s
4 over-arching transportation plan for the entire region, intended to satisfy federal planning and
5 financing requirements. The RTP includes a map of the regional trail network. However, as
6 far as we can tell the RTP includes few if any substantive policies regarding regional trails.
7 As noted, the bulk of Metro’s substantive policy planning for regional trails appears to be
8 located in RFP Chapter 3 and RFP Appendix H. We can find nothing in Metro’s legislation
9 that purports to require that regional trails be treated exclusively as transportation facilities.

10 If the Trail consisted simply of a pedestrian and bicycling facility, it might be easier
11 to characterize it exclusively as a facility for “transportation” and hence a “public facility”
12 within the meaning of MC 3.07.420(F). But, as explained above, the Trail as proposed in the
13 TTMP is a many-featured recreational and educational facility. The TTMP proposes a
14 number of trailheads, including one within the TIG RSIA. Trailheads can include a large
15 parking area, drinking fountains, benches, bicycle racks, trash receptacles, pet waste bag
16 dispensers, information kiosks, restrooms, shelters, picnic areas, wayfinding stations,
17 interpretative signs, a secure bike parking area, a bike maintenance station, and a fitness
18 course. In addition, the TTMP proposes a number of art, educational and interpretative
19 facilities, including one within the TIG RSIA, providing users with information about ice age
20 floods and the significance of flora, fauna, history and culture along the trail. The Trail
21 alignment terminates at the Tualatin River and the Willamette River, and was chosen to
22 connect remnants of the ice age floods landscape and existing parks and natural areas.
23 However the Trail is characterized, it is not exclusively or even primarily a transportation
24 facility. The most accurate characterization seems to be that the Trail is primarily a
25 recreational facility that also has a limited role as a transportation facility.

1 However, as a matter of law, the Trail cannot be both a “park” within the meaning of
2 MC 3.07.420(D) and a “public facility” with the meaning of MC 3.07.420(F)(4). One use
3 category is prohibited in RSIA and the other is allowed. If the Trail must be characterized as
4 one or the other, in our view the characterization that is most consistent with the text and
5 purpose of the Title 4 scheme for protecting RSIA is to characterize the Trail as a park. As
6 noted, the Trail is not intended to serve industrial uses in an RSIA and will necessarily
7 remove some acreage from potential industrial development. The Trail is fundamentally a
8 recreational facility serving the larger regional community. Public facilities like water,
9 sewer, stormwater and transportation typically serve the area in which they are located or may
10 represent essential infrastructure for the broader community. However, the proposed regional
11 Trail is not intended to serve the TIG RSIA and is more a desired community amenity than
12 essential infrastructure.

13 MC 3.07.420(F)(4) also allows, as an exception to the general prohibition on certain
14 land divisions within RSIA, that land may be divided or separated to “provide a public
15 amenity.” In addition to arguing that the Trail is a “public facility,” the city argues that the
16 Trail is allowed within an RSIA as a “public amenity.” The Metro Code does not include a
17 definition of “public amenity.” However, the scope of a “public amenity” clearly cannot
18 include a “park” or any other use prohibited in RSIA under Title 4, so the same
19 interpretative issue is presented: should the Trail be characterized as a “park” or “public
20 amenity” for purposes of MC 3.07.420(D) and Title 4? The answer, it seems to us, is the
21 same. Because the Trail is most accurately characterized as a “park,” we conclude that it is
22 not a “public amenity” within the meaning of MC 3.07.420(F)(4).

23 **F. Conclusion**

24 In sum, we agree with petitioner that the Trail as a whole constitutes a “park” within
25 the meaning of MC 3.07.420(D) and TDC 64.040(8), and therefore the city erred in locating
26 the Trail alignment within the TIG RSIA. Remand is necessary for the city to modify TSP

1 Figure 7 to reflect a different Trail alignment outside the TIG RSIA, or to adopt other
2 measures consistent with this opinion.

3 The second assignment of error is sustained.

4 **FIRST ASSIGNMENT OF ERROR**

5 The first assignment of error alleges that the city’s decision to locate the Trail
6 alignment within the TIG RSIA violates the consistency requirement of Statewide Planning
7 Goal 2 (Land Use Planning), which requires that local government decisions be consistent
8 with regional plans adopted under ORS chapter 268. Petitioners argue that, for the same
9 reasons set out in the second assignment of error, the Trail alignment adopted by the city is
10 inconsistent with MC 3.07.420(D). Also for the same reasons, petitioners argue that the city
11 violated the coordination obligation of Goal 2, and its decision is not supported by an
12 adequate factual base.

13 As far as we can tell, petitioners’ arguments under Goal 2 are entirely derivative of
14 petitioners’ arguments based on MC 3.07.420(D), and do not provide an independent basis
15 for reversal or remand. Accordingly, we do not resolve the first assignment of error.

16 **THIRD ASSIGNMENT OF ERROR**

17 The third assignment of error argues that the city’s decision is contrary to Statewide
18 Planning Goal 9 (Economic Development), because locating the Trail alignment within the
19 city’s industrial areas, including the TIG RSIA, will reduce the supply of land available for
20 industrial uses, and fails to protect industrial development from incompatible uses. Goal 9
21 and related administrative rules require that local governments maintain an “adequate supply”
22 of industrial land.

23 Our conclusion under the second assignment of error that the city is prohibited from
24 locating the Trail alignment within the TIG RSIA obviates many of the arguments under this
25 assignment of error. Petitioners also appear to make a broader Goal 9 challenge not limited
26 to the TIG RSIA, arguing that locating the Trail alignment within any non-RSIA industrial

1 area in the city requires analysis under Goal 9 with respect to the adequacy of the city's
2 supply of industrial land. That might be, but petitioners do not identify other industrial areas
3 through which the city's decision locates the Trail alignment, other than the TIG RSIA.⁶
4 Absent a more focused argument, petitioners' arguments under the third assignment of error
5 do not provide a basis to reverse or remand the city's decision.

6 The third assignment of error is denied.

7 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

8 OAR 660-012-0060 is part of the Transportation Planning Rule (TPR), which
9 implements Statewide Planning Goal 12 (Transportation). OAR 660-012-0060 requires in
10 relevant part that plan amendments that have a significant effect on a transportation facility
11 comply with the further requirements of the rule. Petitioners argue that the city failed to
12 consider whether allowing a new non-industrial use in industrial areas, including the TIG
13 RSIA, will significantly affect transportation facilities needed for freight mobility, and the
14 city's ability to comply with the TPR requirement at OAR 660-012-0030(1)(c) to identify
15 "[n]eeds for movement of goods and services to support industrial and commercial
16 development," and RTP provisions governing freight mobility.

17 Again, our conclusion under the second assignment of error that the Trail alignment is
18 prohibited in the TIG RSIA, and by extension any other RSIA, would appear to obviate much
19 of this assignment of error.

20 Petitioners' arguments can be read more broadly, however, to argue that the city failed
21 to consider the impact of constructing the Trail on industrial freight mobility in the larger

⁶ The city's response includes a citation to the city's industrial lands inventory, updated in 2011, which appears to show that the city has an ample amount of vacant land zoned for industrial use, in excess of the city's planned needs. Given this oversupply, the city argues that the minimal acreage occupied by the Trail would likely not result in the city's failure to provide an "adequate supply" of industrial lands for purposes of Goal 9. The record of this decision does not conduct such an analysis, and we cannot confirm the city's argument. But we tend to agree with the city that it is unlikely that the relatively small amount of acreage occupied by the Trail in non-RSIA industrial areas, if any, would cause the city to violate the Goal 9 requirement to maintain an "adequate supply" of industrial lands.

1 area surrounding the TIG RSIA, even if the Trail alignment and nearby trailheads are located
2 outside the TIG RSIA. We understand petitioners to argue that any Trail alignment will
3 necessarily cross streets that connect the TIG RSIA and nearby industrial areas to the regional
4 transportation system, causing conflicts and delays that might affect freight mobility, and that
5 locating a trailhead in the area would necessarily attract users and create additional traffic in
6 the larger industrial area. Petitioners argue that nothing in the record indicates that the city
7 considered how approval of the Trail alignment through this area of the city might affect
8 freight mobility and the city’s compliance with TPR and RTP standards.

9 The city responds that petitioners have not established that OAR 660-012-0060
10 applies to the challenged decision adopting a new TSP. We agree with the city that OAR
11 660-012-0060 does not apply to a decision that adopts a new TSP. OAR 660-012-0060
12 applies to an “amendment to a * * * comprehensive plan * * *” that “significantly effects” a
13 transportation facility in one of the particular ways specified in the rule.⁷ The TPR

⁷ OAR 660-012-0060(1) provides:

“If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. 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) Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.
 - “(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;

1 provisions that govern the adoption of a TSP and its required contents are set out in OAR
2 660-012-0015, 660-012-0020, and elsewhere in the TPR. It is the TSP that determines the
3 functional classification of transportation facilities, adopts standards for implementing that
4 functional classification system, and adopts the performance standards for transportation
5 facilities, among other things. It is the TSP that establishes the baseline against which
6 subsequent plan and land use regulation amendments must be measured to determine if they
7 “significantly affect” a transportation facility within the meaning of OAR 660-012-0060(1).
8 While adoption of a new TSP could be viewed as an “amendment” to an acknowledged
9 comprehensive plan, it is difficult to imagine how OAR 660-012-0060 could be meaningfully
10 applied to a decision that adopts a new TSP. For example, it makes no sense to (1) say that a
11 TSP that determines the functional classification of transportation facilities has “changed” the
12 functional classification of a transportation facility for purposes of OAR 660-012-0060(1)(a),
13 (2) conclude that the TSP therefore is an “amendment” that has “significantly affected” that
14 transportation facility, and (3) the TSP decision thus must apply the mitigation and other
15 requirements of OAR 660-012-0060(2) to offset those significant effects. In our view, an
16 “amendment” for purposes of OAR 660-012-0060(1) is just that: an amendment to a
17 functional plan, acknowledged comprehensive plan or land use regulation that changes the
18 baseline established in the acknowledged TSP in one of the ways specified in OAR 660-012-
19 0060(1)(a) through (c). The TSP adopted in the present decision is not an “amendment”
20 within the meaning of OAR 660-012-0060(1).

“(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or

“(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.”

1 As to the standards elsewhere in the TPR that clearly *do* apply to adoption of a TSP,
2 petitioners have not demonstrated that the city’s TSP fails to satisfy those standards. The
3 city cites to portions of the TSP that address freight mobility in the area that includes the TIG
4 RSIA, concluding that with planned road and rail projects that the transportation
5 infrastructure will serve the area’s mobility needs throughout the planning period. According
6 to the city, the TSP also discusses multi-modal opportunities to transport workers to
7 industrial lands in the area, including bicycle and pedestrian facilities, and concludes that the
8 Tonquin Trail would help fill gaps in the city’s network of multi-use paths. Petitioners have
9 not demonstrated that more is required to satisfy the TPR or other standards that govern the
10 content or adoption of a TSP.

11 The fourth and fifth assignments of error are denied.

12 **SIXTH ASSIGNMENT OF ERROR**

13 The Trail alignment adopted in the TSP appears to pass through several areas that are
14 included in the city’s inventory of significant Statewide Planning Goal 5 (Natural Resources,
15 Scenic and Historic Areas, and Open Spaces) resources. Specifically, petitioners note that the
16 Trail alignment passes through a protected glacial pond area and a wetland area located north
17 of the TIG RSIA. Petitioners argue that the TSP introduces a new conflicting use, the Trail,
18 to these inventoried resource areas, and thus must address the requirements of Goal 5 and the
19 Goal 5 rule at OAR chapter 660, division 023. *See* OAR 660-023-250(3)(b) (local
20 governments must apply Goal 5 to plan amendments that “allows new uses that could be
21 conflicting uses” with inventoried Goal 5 resources).

22 The city responds that it conducted a general Goal 5 analysis in adopting the TSP, and
23 concluded that the TSP is consistent with Goal 5. The city argues that the Trail is not a
24 “conflicting use” within the meaning of OAR 660-023-0250(3)(b) with respect to the two
25 identified resource areas. According to the city, both areas are protected under the city’s
26 Wetland Protection and Natural Resource Protection Overlay districts, at TDC chapters 71

1 and 72. The city argues that, in both districts, “trails” and “public bicycle or pedestrian
2 ways” are permitted uses, subject to provisions intended to minimize intrusion into riparian
3 areas.

4 The Wetland Protection and Natural Resources Protection Overlay districts are
5 apparently part of the city’s Goal 5 program to protect these two inventoried resources. We
6 agree with the city that because the city’s program to protect these inventoried resources
7 expressly allows trails or public bicycle and pedestrian ways within the resources areas, that
8 the TSP does not authorize a new “conflicting use” for purposes of OAR 660-023-
9 00250(3)(b). Petitioners have not demonstrated that adoption of the TSP requires additional
10 analysis under Goal 5 or the Goal 5 rule.

11 The sixth assignment of error is denied.

12 **SEVENTH ASSIGNMENT OF ERROR**

13 Statewide Planning Goal 8 (Parks and Recreation) requires local governments to
14 “satisfy the recreational needs” of citizens and visitors. Goal 8 further states that the
15 “requirements for meeting such [recreational] needs * * * shall be planned for by
16 governmental agencies * * * in coordination with private enterprise[.]” The city’s findings
17 cite the adoption of the Trail alignment and other Trail provisions as part of its conclusion
18 that the TSP complies with Goal 8.

19 Petitioners argue that the city failed to comply with Goal 8, because it made no
20 attempt to plan for the Trail “in coordination with private enterprise,” specifically petitioners,
21 before adopting a Trail alignment through the TIG RSIA.

22 Our conclusion under the second assignment of error that the Trail is a “park” that is
23 prohibited in the TIG RSIA appears to moot this assignment of error. To the extent it is
24 necessary to reach the merits, the city cites hundreds of pages in the record indicating an
25 extensive public outreach with industrial groups and others leading to adoption of the TSP.
26 Petitioners do not explain why they could not have participated in such efforts. We do not

1 believe that the requirement for “coordination with private enterprise” in planning how to
2 meet recreational needs means local governments must, prior to planning for a park or
3 recreational facility, engage in specific negotiations with business owners whose property
4 may ultimately be affected by the facility.⁸

5 The seventh assignment of error is denied.

6 **EIGHTH ASSIGNMENT OF ERROR**

7 Petitioners argue that the TSP violates seven city policies that are codified in the
8 TDC.⁹ For six of the seven cited policies, petitioners contend that locating the Trail
9 alignment within the TIG RSIA is inconsistent with those six policies. Our conclusion under
10 the second assignment of error that the Trail is prohibited within the TIG RSIA appears to
11 moot those arguments. We therefore address only the one policy that petitioners argue is
12 violated based on concerns other than the proposal to locate the Trail within the TIG RSIA.

13 TDC 15.020(9) requires the city to link the city’s park and recreation system with a
14 system of greenways and bicycle/pedestrian facilities. The city’s findings state that the Trail
15 is the “major project” proposed in the TSP to help provide the kind of connected system
16 required by TDC 15.020(9). Record 771. However, the findings go on to note that the
17 “proposed alignment is under review at this time and the Ice Age Tonquin Trail Master Plan
18 is not yet adopted.” *Id.*

19 We understand petitioners to argue that the above findings are inconsistent and not
20 supported by an adequate factual base, and that the city cannot rely on the Trail to satisfy the
21 connectivity required by TDC 15.020(9), without also fully and expressly adopting and
22 implementing the TTMP.

⁸ Indeed, the Goal 8 requirement to coordinate with “private enterprise” is probably intended to refer to private enterprises that provide recreational services or facilities, not general business or industrial enterprises.

⁹ The city has a unified comprehensive plan and development code, so the TDC policies are, in effect, comprehensive plan policies.

1 The above findings were undoubtedly accurate when written at some point prior to
2 adoption of the TSP on February 25, 2013. But they were no longer entirely accurate as of
3 the date the city adopted the TSP. The TSP itself adopts a general Trail alignment, although
4 the specific alignment has not yet been selected, at least in the TIG RSIA area. Further, on
5 the same date the city council adopted the TSP it “approved” the TTMP by resolution, which
6 initiated or furthered a series of legislative processes to implement relevant portions of the
7 TTMP into the city’s legislation. Regardless, petitioners have not demonstrated that any
8 inaccuracy in the above findings warrants reversal or remand. Petitioners have not identified
9 any legal requirement for the city to fully adopt the TTMP or to identify a specific alignment,
10 as a condition precedent to adopting the TSP provisions that partially implement the TTMP.
11 The TSP is not inconsistent with TDC 15.029(9).

12 The eighth assignment of error is denied.

13 The city’s decision is remanded.