BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELIZABETH GRASER-LINDSEY,
Petitioner,

vs.

CITY OF OREGON CITY,
Respondent,

and

BEAVERCREEK ROAD, LLC,
Intervenor-Respondent.

LUBA No. 2015-013

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Elizabeth Graser-Lindsay, Beavercreek, filed the petition for review and argued on her own behalf.

Carrie A. Richter, Portland, filed a joint response brief and argued on behalf of respondent. With her on the brief was Garvey Schubert & Barer.

Steven P. Hultberg, Portland, filed a joint response brief and argued on behalf of interveror-respondent. With him on the brief were Allison J. Reynolds and Radler White Parks & Alexander LLP.

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

AFFIRMED 08/06/2015

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city commission decision that grants site plan and design review approval for 121 rental apartments and 59 live-work units on 9.7 acres located on the eastern edge of Oregon City, across Beavercreek Road from Oregon City High School.

INTRODUCTION

The subject 9.7 acres were included in a 122-acre annexation in 2007. Petitioner filed an appeal to LUBA to challenge that annexation. LUBA affirmed that annexation ordinance. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008) (*Graser-Lindsey I*). In 2008, the city adopted the Beavercreek Road Concept Plan (BRCP) for a 453-acre area that includes the 9.7 acres. Petitioner appealed that decision to LUBA, and LUBA remanded the BRCP decision. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009) (*Graser-Lindsey II*). The city has not yet re-adopted the BRCP.

The overarching issue in this appeal is whether the city erred by granting site plan and design review approval for the proposed development, before it has re-adopted the BRCP. Petitioner contends the BRCP is the document that must guide planning and zoning within the BRCP area, as well as the document that guides extension of the sewer, water and transportation facilities that will be necessary to serve urban development of that 453-acre area. Petitioner contends the city's decision to grant site plan and design review approval for the proposed development of the 9.7 acres before the city has an adopted BRCP in place violates applicable law. The city and intervenor-respondent (respondents) take the position that many of the "applicable laws" that petitioner relies on are not applicable to limited land use decisions like the

1 decision in this appeal, or do not apply for other reasons. Respondents also
2 take the position that when the 9.7 acres were rezoned in 2010, that 2010
3 rezoning decision, which was not appealed, specifically provided that the
4 subject property could be developed before the BRCP was re-adopted.

5 In our decision in *Graser-Lindsey II*, we discussed in some detail the
6 planning that Title 11 of Metro's Urban Growth Management Functional Plan
7 (UGMFP) requires of local governments when Metro expands the urban
8 growth boundary (UGB) to include formerly rural lands. *Graser-Lindsey II*, 59
9 Or LUBA 395-400. We do not repeat that detail here. For the current appeal it
10 suffices to note that Title 11 requires cities to prepare and adopt concept plans
11 to ensure that city plans and land use regulations are consistent with the
12 "design types" that have been applied to lands within the UGB by the Metro
13 2040 Growth Concept and Regional Framework Plan. There does not appear to
14 be any dispute that any lands within the 453-acre BRCP area that were first
15 included within the UGB *after* adoption of Title 11 are subject to Metro's Title
16 11 concept planning requirements.

17 LUBA's decision in *Graser-Lindsey I* states that all 122 acres that were
18 annexed to the city in 2007 were included in the UGB by Metro in 2002.[1] 56
19 Or LUBA at 507. Since Title 11 was adopted before 2002, our decision in
20 *Graser-Lindsey I* assumed that all 122 acres would be subject to Title 11
21 planning requirements, including the requirement for adoption of a concept
22 plan prior to approval of urban development on those 122 acres. Apparently
23 that is a correct assumption for most of the 122 acres, but the 9.7 acres at issue
24 in this appeal were included in the UGB in 1979, *before* Metro's Title 11

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[1] The city represented that this was the case in *Graser-Lindsey I*.

planning requirements took effect. Because the 9.7 acres were included in the UGB before Metro's Title 11 planning took effect, respondents now take the position that Metro's Title 11 planning, and in particular the requirement under Title 11 that concept plans precede approval of urban development, does not apply to the 9.7 acres. Petitioner disputes that position and contends that the Oregon City Comprehensive Plan (OCCP) and Oregon City Municipal Code (OCMC) require that a concept plan must be adopted prior to development of the 9.7 acres, even if Metro Title 11 does not.

In our decision in *Graser-Lindsey I*, we rejected petitioner's arguments that a number of OCCP and OCMC standards required that the city adopt the BRCP before the 122 acres could be annexed. We also rejected petitioner's arguments that OCCP policies and OCMC standards regarding extension and funding of public facilities must be found to be satisfied before the requested annexation could be approved. The city argued that LUBA should reject those arguments, in part, because the county FU-10 zoning that would continue to apply to the annexed properties would operate as a holding zone to preclude urban development of the 122 acres while in place, and that the FU-10 zone would remain in place on those properties until the BRCP was adopted. After the BRCP is adopted, the properties would be planned and zoned for urban development. The city argued that county FU-10 zoning would preclude urban development, which might require urban services, until the BRCP was adopted. The city also argued that it would address OCCP and OCMC standards governing extension and funding of public facilities in the BRCP. Based in large part on these city arguments, LUBA rejected petitioner's arguments that the city must demonstrate the 2007 annexation decision complied with a number of OCCP and OCMC requirements, and affirmed the city's annexation

decision that deferred consideration of those requirements to the concept plan, which was under consideration at the time of the 2007 annexation.

MOTIONS

A. Motion to File Overlength Petition for Review

Under LUBA's rules, a petition for review may not exceed 50 pages unless LUBA allows additional pages. OAR 661-010-0030(2)(b). Petitioner filed a 53-page petition for review and requested permission to file a petition for review that exceeds the 50 page limit by three pages.[2] Petitioner does not argue the complexity of this case warrants a longer petition for review and petitioner easily could have made the arguments she makes in support of her three assignments of error in a petition for review that complies with the OAR 661-010-0030(2)(b) 50 page limit. Petitioner's motion to allow an overlength petition for review is denied. We do not consider the arguments that appear at Petition for Review Appendix 22.

B. Request to Allow a Reply Brief and Motion to Strike the Reply Brief

LUBA's rules authorize a petitioner to file a reply brief, but require that "[a] reply brief shall be confined solely to new matters raised in the respondent's brief * * *," and "not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board." OAR 661-010-039. Petitioner filed a motion to allow a reply brief. The reply brief is five pages long, with a five-page appendix.

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[2] The three extra pages are attached to the petition for review as Appendix 22 of the petition for review and those pages are referenced on page 44 of the petition for review.

1 Intervenor opposes the reply brief. We agree with intervenor that the
2 five-page appendix is more accurately described as additional argument. The
3 proposed reply brief is ten pages long. Intervenor contends that with one
4 exception, the reply brief does not respond to new issues and moves to strike
5 the reply brief. The exception identified by intervenor is on page 5, lines 11-
6 19, where petitioner responds to a waiver argument in the response brief.
7 A portion of petitioner's reply brief challenges the summary of material
8 facts in the response brief. Reply Brief 2, lines 2-5. In addition to the response
9 to respondents' waiver argument that appears at page 5, lines 11-19, the reply
10 brief includes a separate response to respondents' contention that petitioner
11 failed to raise the procedural error that petitioner alleges under subassignment
12 of error E under her first assignment of error. Reply Brief 4, lines 9-12. We
13 agree with petitioner that these three parts of the reply brief respond to new
14 issues in respondents' response brief, and those portions of the reply brief are
15 allowed.
16 The balance of the reply brief is not limited to new issues in the response
17 brief, and we grant intervenor's motion to strike those portions of the reply
18 brief.

19 **C. Respondent's Motion to Take Official Notice**

20 The record includes a partial copy of Ordinance No. 10-1020, the 2010
21 city ordinance that rezones the subject 9.7 acres. Record 398-402. Petitioner
22 and respondents disagree about the significance of that ordinance in their
23 arguments under the first assignment of error, which we discuss below. The
24 partial copy of the ordinance that is included in the record does not include the
25 land use findings that were adopted in support of that ordinance. Following
26 oral argument, the city filed a motion requesting that LUBA take official notice

of a complete copy of Ordinance 10-1020 that includes the findings, citing ORS 40.090(7) and Oregon Evidence Code 202(7). ORS 40.090(7) and Oregon Evidence Code 202(7) make city "ordinance[s]" and other "enactment[s]" subject to judicial notice. The city contends that since the findings were adopted as exhibits to the ordinance they are part of the ordinance and subject to official notice by LUBA. We agree with the city and take official notice of the complete 2010 rezoning ordinance.

While we grant the city's motion to take official notice, the city's motion to take official notice includes additional argument in support of the city's view that the 2010 rezoning adequately addressed any applicable concept planning requirements. Petitioner objects to this additional argument and in that objection petitioner includes additional argument on the merits to rebut the city's additional arguments.

We agree with petitioner that given the ultimate significance of the 2010 rezoning ordinance, it would have been far more appropriate in this case for the city to have included the entire 2010 ordinance in the record that it transmitted to LUBA and the parties, or asked that LUBA take official notice of the complete ordinance at that time, so that it would have been available to all parties before the briefs were prepared and filed. We also agree with petitioner that the city's additional argument in the motion to take official notice, which was filed after oral argument in this matter, was inappropriate. However, the city's argument is short, a little over one-half page. In that short argument, the city generally asserts without any specific reference to the 2010 ordinance findings, that those findings are adequate to address OCCP policies governing adequacy and financing of utilities such that those policies need not be applied in granting site plan and design review approval. Petitioner's objection to the

motion to take official notice includes over five pages of argument in which petitioner challenges the city's brief one-half page argument on the merits.

We have considered all of the parties' additional arguments on the merits, although those arguments are ultimately not particularly relevant to our disposition of this appeal.

D. Petitioner's Motion to Take Official Notice

Following oral argument petitioner filed a motion requesting that LUBA take official notice of a June 24, 2015 newspaper article about Clackamas River Water District, which will supply water to the proposed development. That article explains that the district has advised its customers of the potential for water shortages due to the lack of a winter snow pack this season.

The city objects that petitioner identifies no authority that would permit LUBA to take official notice of the newspaper article. It is unclear to us why petitioner wants LUBA to take official notice of the article. However, in any event, without some authority for taking official notice of the newspaper article, we cannot take official notice. Petitioner's motion to take official notice is denied.

FIRST ASSIGNMENT OF ERROR

As already noted, in her first assignment of error, petitioner argues the city erred by granting site plan and design review approval to allow urban development of the 9.7 acres without first re-adopting the BRCP or adopting some other concept plan for the area. In support of that assignment of error petitioner presents a number of different arguments under five sub-assignments of error. In sub-assignment of error A, petitioner cites a number of OCCP plan goals and policies as well as OCMC requirements that petitioner believes require concept planning before development approval. Petitioner also points

out that in *Graser-Lindsey I*, LUBA affirmed the city's annexation decision after relying on the city's representation that the BRCP would be adopted before urban development of the 122 annexed acres could be approved, and that the BRCP would address OCCP and OCMC public facility planning and financing requirements. In sub-assignment of error B, petitioner contends that the 2010 rezoning does not obviate the need for concept planning before approval of urban development of the 9.7 acres. We return to that argument below. In sub-assignment of error C, petitioner contends that approval of development of the 9.7 acres before adoption of the BRCP will complicate resolution of the issues that must be resolved to respond to LUBA's remand. In sub-assignment of error D petitioner contends approval of development of the 9.7 acres before concept planning will complicate planning for public infrastructure development and financing in the BRCP. Finally, petitioner argues the city's decision to grant site plan and design review for development of the 9.7 acres in advance of re-adoption of the BRCP is a procedural error that prejudiced petitioner's substantial rights.

Petitioner is correct that the city argued in *Graser-Lindsey I* that the FU-10 zone that applied to the 122 acres at the time of annexation precluded urban development and that the BRCP would be adopted for a 453-acre area that includes the 122 acres before those 122 acres could be developed for urban uses that would in turn require urban facilities. In addition, as an abstract proposition, petitioner is also undoubtedly correct that allowing the 9.7 acres to develop in advance of re-adoption of the BRCP could complicate responding to the issues raised in LUBA's remand and could complicate concept planning for development of the 453 acres, as well as planning for and financing of infrastructure. However, as we explain below, the city's decision to allow

urban development of the 9.7 acres prior to re-adoption of the BCRP was made in the 2010 rezoning decision, not in the decision that is before us in this appeal.

Because the 2010 rezoning decision is not before us in this appeal, the question of whether the city *correctly* determined that development of the 9.7 acres could be allowed to proceed prior to re-adoption of the BRCP is not before us in this appeal. We emphasize that we may not and do not address that question here. The relevant question is simply whether the 2010 rezoning decision included a decision to allow site plan and design review approval for development of the 9.7 acres to precede re-adoption of the BRCP. There can be no question that it did.

The 2010 rezoning findings address a number of comprehensive plan requirements for concept planning, and the city expressly found that site plan and design review approval for development of the 9.7 acres was not legally required to await re-adoption of the BRCP. One example is set out below:

> "**Policy 2.6.8**
>
> "*Require lands east of Clackamas Community College that are designated as Future Urban Holding to be the subject of concept plans, which if approved as an amendment to the Comprehensive Plan, would guide zoning designations. The majority of these lands should be designated in a manner that encourages family-wage jobs in order to generate new jobs and move towards meeting the city's employment goals.*[[3]]
>
> **Finding**: The subject property is not identified as employment land on Metro's 2040 Map and was not brought into the Urban

[3] The subject Future Urban Holding designated property is located east of Clackamas Community College.

> Growth boundary to meet regional employment needs. The applicant indicates that the subject property was brought into the UGB in 1979 and annexed into the City of Oregon City in 2008. The current holding zone is County FU-10 Future Urban, which has a 10-acre minimum lot size. The property was included as part of the Beavercreek Road Concept Plan, however it was brought into the UGB prior to the Title 11 concept planning requirement and therefore may be considered for rezoning irrespective of the status of the Beavercreek Road Concept Plan[.] The requested zone of MUC-1 would allow for a variety of uses that will add employment opportunities to the area and meet the goals of the Beavercreek Road Concept Plan. Many of the permitted uses in the MUC zone, such as professional services, dental services, and veterinary clinics are family-wage jobs. **The applicant has adequately demonstrated compliance with this policy**. Ordinance No. 10-1020, page 16 (boldface in original).[4]

The conditions of approval for the 2010 rezoning decision made it clear that if the BRCP was re-adopted prior to development of the 9.7 acres, in seeking site plan and design review for the 9.7 acres the applicant would be required to comply with the BRCP. But those conditions also expressly provided that site plan and design review approval could be granted *before* the BRCP was re-adopted, and set out requirements that would have to be addressed if site plan and design review approval was sought before re-adoption of the BRCP:

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[4] In her objection to the city's motion to take official notice, petitioner argues that there are other plan policies that the city failed to address in its 2010 rezoning decision. That argument challenges the merits of the 2010 rezoning decision and therefore is outside of the scope of our review of the challenged site plan and design review decision. That argument also has nothing to do with whether the 2010 decision in fact authorized site plan and design review approval before re-adoption of the BRCP.

> "5. If the Beavercreek Road Concept Plan (BRCP) is formally adopted subsequent to approval of the proposed rezoning, as part of any subsequent site plan design review approval, master plan, phased development review, or other appropriate review, the development shall comply with the BRCP, and any design and performance standards adopted thereto.
>
> "6. If the Beavercreek Road Concept Plan is not yet adopted at the time the applicant seeks development approval, the applicant's proposal shall be consistent with the intent and purpose of the Mixed Employment Village, which is to provide retail, office, civic and residential uses in an urban, pedestrian friendly and mixed use setting that is transit supportive in its use, density and design. Development shall create an active urban environment that incorporates pedestrian friendly amenities, urban building design consistent with the Beavercreek Road Concept Plan and cost effective green development practices. At a minimum, the overall development site shall achieve an average minimum floor area ratio (FAR) of 0.25 and a minimum building height of thirty-four feet except for accessory structures or buildings under one thousand square feet. The applicant may seek to modify these standards through the master plan adjustment or variance process with city approval." Record 402.

For purposes of petitioner's first assignment of error, the 2010 rezoning decision did three significant things. First, the decision removed the Future Urban plan and Future Urban-10 zoning designations that prevented urban development of the properties. Second, the decision replaced those designations with a Mixed Use Corridor OCCP designation and Mixed Use Corridor-1 zoning, which do permit urban development. Third, the decision's conditions of approval expressly anticipated that development may proceed before the BRCP is adopted, and imposed standards that must be met if development precedes re-adoption of the BRCP.

If the city erroneously decided that development of the 9.7 acres can proceed in advance of re-adoption of the BRCP, a timely appeal of the 2010 rezoning decision was the appropriate place to assign error to that decision. Petitioner's first assignment of error is an improper collateral attack on that unappealed decision. *Olson v. City of Springfield*, 56 Or LUBA 229, 233 (2008); *Lockwood v. City of Salem*, 51 Or LUBA 334, 344 (2006); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 52 (1987). Because the decision to allow the 9.7 acres to develop in advance of the city's re-adoption of the BRCP was made in the 2010 rezoning decision, not in the decision that is before us in this appeal, petitioner's first assignment of error provides no basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In her second assignment of error, petitioner argues it was error for the city to rely on the remanded BRCP in the challenged decision, because it has not been re-adopted by the city following LUBA's remand.

It is reasonably clear in the findings supporting the site plan and design review decision that the city did not view the remanded BRCP as establishing legal standards for this site plan and design review decision: "the BRCP was remanded by LUBA, is not effective and imposes no standards on the present application." Record 31. Condition 6 of the 2010 rezoning decision, which was quoted in full above in our discussion of the first assignment of error, does require that the proposed development must be "consistent with the intent and purpose of the Mixed Employment Village" designation in the remanded BRCP. Record 402. That requirement presumably was imposed to improve the chances that any development approved for the 9.7 acres would be

1 consistent with the BRCP when it is re-adopted. Respondents contend that it
2 was not error for the city to refer to and to take steps to ensure that
3 development on of the 9.7 acres will be consistent with the yet-to-be re-adopted
4 BRCP. We agree. And again, any errors the city may have committed in
5 deciding to proceed prior to re-adoption of the BRCP could have been raised in
6 an appeal of the 2010 rezoning decision and are not cognizable in this appeal.
7 The second assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 The site plan and design review "[s]tandards" are set out at OCMC
10 17.62.050. OCMC 17.62.050(14) and (15) set out the standards for water and
11 sanitary sewer facilities and transportation improvements:

12 "14. Adequate public water and sanitary sewer facilities
13 sufficient to serve the proposed or permitted level of
14 development shall be provided. The applicant shall
15 demonstrate that adequate facilities and services are
16 presently available or can be made available concurrent with
17 development. Service providers shall be presumed correct
18 in the evidence, which they submit. All facilities shall be
19 designated to city standards as set out in the city's facility
20 master plans and public works design standards. A
21 development may be required to modify or replace existing
22 offsite systems if necessary to provide adequate public
23 facilities. The city may require over sizing of facilities
24 where necessary to meet standards in the city's facility
25 master plan or to allow for the orderly and efficient
26 provision of public facilities and services. Where over
27 sizing is required, the developer may request reimbursement
28 from the city for over sizing based on the city's
29 reimbursement policy and fund availability, or provide for
30 recovery of costs from intervening properties as they
31 develop.

32 "15. Adequate right-of-way and improvements to streets,
33 pedestrian ways, bike routes and bikeways, and transit

facilities shall be provided and be consistent with the city's transportation master plan and design standards and this title. Consideration shall be given to the need for street widening and other improvements in the area of the proposed development impacted by traffic generated by the proposed development. This shall include, but not be limited to, improvements to the right-of-way, such as installation of lighting, signalization, turn lanes, median and parking strips, traffic islands, paving, curbs and gutters, sidewalks, bikeways, street drainage facilities and other facilities needed because of anticipated vehicular and pedestrian traffic generation. Compliance with [Chapter] 12.04, Streets, Sidewalks and Public Places shall be sufficient to achieve right-of-way and improvement adequacy."

Petitioner contends the sanitary sewer, water and transportation facilities proposed for the disputed development are inadequate and inconsistent with the applicable city master plans.

A. Sanitary Sewer (Subassignments of Error A-1 and B-1)

1. The Sanitary Sewer Master Plan (SSMP)

The SSMP that was in effect when intervenor's application became final was the 2003 SSMP. But there apparently is no dispute that the 2003 SSMP and the current 2014 SSMP both call for the BRCP area to be served by future improvements to the sewer line in Beavercreek Road, located in the Beavercreek Sanitary Sewer Basin. According to the city engineer, the 2014 SSMP calls for "3,700 feet of 12-inch and 15-inch gravity sewer pipeline * * * to be constructed in Beavercreek Road[.]" Record 183.

The city's findings explain that installing a 15-inch sewer line in Beavercreek Road now would likely result in maintenance and operational problems for that 15-inch sewer line, because flows would be too low due to the current lack of development in the BRCP area. The findings also explain

1 that, as conditioned, the applicant will be required to design a temporary cross-
2 basin connection with adjacent Glen Oaks Sanitary Sewer Basin so that that
3 connection can be terminated when the 15-inch sewer line is available in
4 Beavercreek Road, and the subject property can be connected to the
5 Beavercreek sewer main. The city findings take the position that because the
6 subject property will ultimately be connected to the Beavercreek sewer main,
7 and nothing in the 2003 or 2014 SSMPs prohibits such temporary solutions to
8 avoid operational problems, the proposal is consistent with both SSMPs.[5]

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[5] The city's findings are set out below:

> "Opponents have alleged that the conditions of approval permitting the applicant to connect to the Glen Oak Basin sewer system [are] not consistent with the Sewer Master Plan. Both the 2003 and 2014 Sanitary Sewer Master Plans anticipate that the subject property will drain into the Beavercreek Sewer Basin. There is, however, no prohibition in either the 2003 or 2014 Sanitary Sewer Master Plans from directing flows from the subject property into the Glen Oak Basin. As explained in more detail in the November 5, 2014 City Engineer memorandum, the planned 15-inch pipe planned to serve the subject property is unlikely to be constructed within the next 10 years. The City has determined that it is not financially feasible to construct the 15-inch line at the present time, especially given the fact that due to very low flows within the 15-inch line due to a lack of development in the Beavercreek Basin, the City anticipates significant maintenance and operational problems with the line. Consequently, as an alternative to construction of the new 15-inch line, the City has agreed to a cross-basin connection into the Glen Oaks Basin. This connection is specifically identified as "Routing Alternative C" in the 2014 Sanitary Sewer Master Plan. The 2003 Sanitary Sewer Master Plan provided no specificity regarding the required sewer improvements necessary to serve areas within the BRCP area. Consequently, a cross-basin connection is not inconsistent with

1 Petitioner never really acknowledges these findings and makes no direct
2 attempt to explain why the city commission's explanation for allowing the
3 temporary cross-basin connection is inadequate or founded on interpretations
4 of the SSMP that are implausible under the deferential standard of review that
5 we must apply to the city commission's interpretations of the SSMPs under
6 *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010).
7 Although this subassignment of error alleges an inconsistency with the
8 2003 SSMP, petitioner also argues that OCCP Policy 14.3.4 "requires that the
9 cost [of constructing the Beavercreek Road 15-inch sewer line] be borne by this
10 developer."[6] Petitioner cites a condition of approval that requires the applicant

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> the 2003 Sanitary Sewer Master Plan. Although the City adopted the 2014 Sanitary Sewer Master Plan after submission of the current application, the City has used it for guidance and evidence to support the connection to the Glen Oaks Basin. Moreover, conditions of approval require the applicant to construct improvements, which will allow the subject property to re-route sanitary flows into the Beavercreek Basin when the Beavercreek Basin improvements are eventually constructed. Thus, to the extent that either the 2003 or 2014 Sanitary Sewer Master Plans require a connection to the Beavercreek Road Basin, the requirement to connect in the future meets this requirement. For these reasons, the City Commission finds that the proposal to temporarily connect into the Glen Oaks Basin, together with the requirement that the applicant make the improvements required under the conditions of approval and through payment of the required fee-in-lieu payments, is consistent with and not prohibited by either the 2003 or 2014 Sanitary Sewer Master Plans. * * *" Record 32.

[6] OCCP Policy 14.3.4 provides:

> "Ensure the cost of providing new public services and improvements to existing public services resulting from new development are borne by the entity responsible for the new

1 to pay a fee to fund improvements made necessary by the cross-basin
2 connection but provides that the subject property will be excluded from any
3 future local improvement district to fund the Beavercreek 15-inch sewer main.
4 Record 71. Although petitioner does not develop the argument, we understand
5 petitioner to contend that the local improvement district exclusion violates
6 OCCP Policy 14.3.4. We reject the argument. Overlooking the fact that OCCP
7 Policy 14.3.4 is concerned with systems development charges, not local
8 improvement districts, intervenor is being required to pay a fee toward the cost
9 of sewer system improvements in conjunction with the cross-basin connection
10 and petitioner makes no attempt to explain why she thinks that fee is
11 inadequate to comply with OCCP Policy 14.3.4. As the condition explains, the
12 exclusion from the possible future local improvement district for the
13 Beavercreek Road sewer main improvements was to avoid requiring intervenor
14 to fund improvements in two sanitary sewer basins. Record 71.

15 Petitioner's arguments based on inconsistency with the SSMP provide no
16 basis for reversal or remand. This subassignment of error is denied.

17 **2. Adequacy of Sanitary Sewer Facilities**

18 OCMC 17.62.050, quoted in full above, requires in part that "[t]he
19 applicant shall demonstrate that adequate facilities and services are presently
20 available or can be made available concurrent with development." Petitioner
21 argues the cross-basin connection with the Glen Oak Road basin will leave that
22 basin with inadequate sewer capacity. The city adopted the following findings
23 to reject that argument:

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development to the maximum extent allowed under state law for Systems Development Charges."

> Opponents have raised a number of issues regarding the provision of sewer service, however, the City Council finds that many of the arguments are general in nature and do not specifically identify how the proposal fails to meet the above standard. The record includes, and this decision has incorporated by reference as additional findings, two Public Works memoranda dated November 5, 2014 and February 9, 2015. The memoranda conclude that with the improvements required to be constructed by the applicant concurrent with construction of the approved project, the existing Glen Oak Road sanitary system (to which the development will connect) has the capacity to accommodate the Beavercreek Road Apartment flows without the need to construct capacity improvements. No opponent has provided any evidence to counter this conclusion. Consequently, the City Commission finds that, based on all the evidence in the record, but in particular, the two City Engineer memoranda, the applicant has demonstrated that adequate sewer facilities are available concurrent with development." Record 30.

The February 9, 2015 memorandum, cited in the findings, addresses the capacity of the Glen Oak Road basin facilities to satisfy existing Glen Oak Road Basin demands as well as intervenor's proposed cross-basin connection (Scenario 1). The memorandum also addresses three additional scenarios which cumulatively increase the flow into the Glen Oak Road facilities by adding service to Three Mountains subdivision (Scenario 2); future Glen Oak Road Basin flows (Scenario 3); and an additional portion of the BRCP area (Scenario 4). The memorandum concludes that the Glen Oak Road system is adequate to provide service to Scenarios 1 and 2, but will require improvements to provide adequate service under Scenarios 3 and 4:

> "Today, the existing Glen Oak Rd sanitary sewer collection system has the capacity to accommodate the Beavercreek Rd Apartments flow plus the Three Mountains flow without the need to construct capacity improvements, Scenario 1 and Scenario 2. Capacity improvements are recommended prior to conveying the total

1 additional wastewater flows that are estimated from the complete
2 buildout of the areas described in Scenario 3, the Glen Oak Rd
3 basin, the Three Mountains subdivision, and the Beavercreek Rd
4 Apartments.

5 "When the complete buildout of the Glen Oak Rd basin as
6 identified in the SSMP develops to the full zoning density, the
7 Three Mountains subdivision and Beavercreek Rd Apartments
8 connect to the Glen Oak Rd basin, portions of the sewer system
9 are inadequate to convey the buildout flows and there will need to
10 be capacity improvements made downstream of the Glen Oak Rd
11 basin collection system to provide for adequate sanitary sewer
12 service. The capacity improvements will need to eliminate the
13 predicted surcharging condition(s) and sanitary sewer overflow(s),
14 SSOs, as may be applicable." Record 68-69.

15 The memorandum then continues with a discussion of how the city
16 engineer believes a combination of "upsizing sewer pipes, rehabilitating and
17 replacing sewer facilities, and an infiltration/inflow (I/I) abatement program"
18 will be adequate to maintain an adequate system in the Glen Oak Road Basin.
19 Record 69. The I/I abatement program will be funded in part by the $545,000
20 fee to be paid by intervenor. Petitioner disagrees with the city engineer's
21 conclusions, but that disagreement is not sufficient to establish that the city
22 engineer's memorandum is not substantial evidence that the city commission
23 was entitled to rely on in assessing the possible impacts on the Glen Oak Road
24 Basin sewer facilities. Or more precisely, that disagreement is not sufficient to
25 establish that the city engineer's memorandum is not substantial evidence that
26 supports the city commissions finding under OCMC 17.62.050, that "adequate
27 [sewer] facilities and services are presently available or can be made available
28 concurrent with development."

29 This subassignment of error is denied.

B. Water (Subassignments of Error A-2 and B-2)

1. The Water Distribution System Master Plan

The city water system has inadequate water pressure at the development site. Apparently the ultimate solution identified in the Water Distribution System Master Plan to resolve the water pressure problem is to construct a two million gallon reservoir at a cost of $8.7 million with additional piping, which will cost several million more dollars. As we explain in more detail below, rather than require construction of the new reservoir now, the city required that water service to the 9.7 acres be provided by Clackamas River Water District.

Petitioner contends the city's failure to require that intervenor construct the reservoir is inconsistent with the Water Distribution System Master Plan. But the only language from that plan that petitioner cites is general language that says "the timing of future system improvements will be triggered by specific developments and increase in system demands." City of Oregon City Water Distribution System Master Plan 8-6; Petition for Review Appendix 16-15. Petitioner makes no attempt to explain why it was error for the city not to conclude that intervenor's proposed development must be viewed as the development that triggers a requirement to construct the reservoir at this time.

This subassignment of error is denied.

2. Adequacy of Water Service

The city adopted the following findings to address the adequacy of the water service:

> "The City's existing water distribution system along Beavercreek Road does not have sufficient water pressure to serve the apartment project. The City has, therefore, required water service to be provided to the City by Clackamas River Water ('CRW') pursuant to an intergovernmental agreement between CRW and

1 the City. The record includes correspondence from CRW
2 indicating that the Beavercreek Road Pressure Zone (which would
3 serve the project) has the capability to provide both the necessary
4 volume and pressure to serve the project. The CRW
5 correspondence goes on to explain that service would be
6 predicated on the applicant and the City meeting certain
7 conditions, including, an execution of an intergovernmental
8 agreement between the City and CRW permitting CRW to furnish
9 water to the property. This would essentially be a wholesale water
10 agreement between the City and CRW. There was testimony from
11 staff at the January 21, 2015 hearing which indicated that the City
12 and CRW are parties to a number of similar agreements and that,
13 given the past cooperation between the City and CRW, staff did
14 not see any obstacles to entering into such an agreement with
15 CRW. In terms of capacity, CRW further testified as follows:

16 "Utilizing a hydraulic model, CRW analyzed current
17 and forecasted future demands (including proposed
18 Application SP 14-01 development) to determine the
19 CRW system's capacity. The results indicated that
20 demands can be supplied without exposing the
21 District customers to water shortages while
22 maintaining the wholesale agreement with Oregon
23 City.

24 "City Commission finds that the record contains sufficient
25 evidence to demonstrate that the provision of water by CRW as
26 described by Condition No. 7 is feasible. Through compliance
27 with Conditions Nos. 4 through 7, the City Commission finds that
28 adequate public water sufficient to serve the proposed
29 development will be provided. Through compliance with
30 Conditions Nos. 4-7, the applicant has demonstrated that adequate
31 water facilities and services can be made available concurrent with
32 development." Record 30-31.[7]

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[7] Conditions four through seven set out detailed requirements for the water system connection.

1 Petitioner does not directly address the above findings. Petitioner does
2 argue that the required intergovernmental agree has not yet been executed
3 between the city and CRW. But petitioner does not acknowledge or challenge
4 the city's findings that it has entered such intergovernmental agreements with
5 CRW in the past and "did not see any obstacles to entering into such an
6 agreement with CRW." Record 30.

7 This subassignment of error is denied.

8 **C. Transportation (Subassignment of Error A-3)**

9 Petitioner contends the city's Transportation System Plan designates
10 Beavercreek Road as a major arterial and under the OCMC is required to have
11 a right of way 116 to 126 feet, which permits construction of five travel lanes.
12 The parties dispute whether petitioner adequately identified the city's TSP as
13 the legal authority that supported her arguments that intervenor should be
14 required to dedicate sufficient right of way to expand Beavercreek Road to a
15 five-lane facility. Respondents contend petitioner relied below on the
16 remanded BRCP.

17 We need not resolve the parties' waiver arguments. The issue of whether
18 intervenor should be required to expand Beavercreek Road to a five-lane
19 facility was recognized and addressed by the city commission, with the city
20 commission ultimately concluding that the five lanes should not be required for
21 a number of reasons.

22 Respondents first point out that OCMC 12.04.005 addresses
23 circumstances where city rights of way are regulated by the county, which is
24 the case with Beavercreek Road where it adjoins intervenor's property.[8]

[8] OCMC 12.04.005(A) provides:

1 Respondents also point out the city adopted fairly detailed findings addressing
2 petitioner's argument for requiring a five-lane expansion of Beavercreek Road:

3 "As explained in the November 14, 2014 Staff Report and the
4 November 4, 2014 Clackamas County Memorandum, both of
5 which have been specifically incorporated into these findings, the
6 Beavercreek Road right of way is under Clackamas County
7 jurisdiction and subject to current county standards. Clackamas
8 County has designated Beavercreek Road a three-lane major
9 arterial roadway. Clackamas County has adopted roadway
10 standards that pertain to the structural section, right-of-way width,
11 construction characteristics, and access standards for arterial
12 roadways. Developments adjacent to existing roadways are
13 required to improve the roadway to current standards. As a result,
14 the City has adopted Condition No. 24, which requires the
15 applicant to dedicate additional right-of-way and to construct
16 Beavercreek Road to the identified 3-lane standard. The City
17 Commission also finds that there are not sufficient warrants [to]
18 require * * * a 5-lane section on Beavercreek Road, nor is there
19 any basis for the City to require additional dedication of right of
20 way beyond what is required by Condition No. 24. Any exaction
21 in excess of what is required would not be proportional to the
22 impacts created by this project. Under OCMC 12.04.007, the City
23 is permitted to modify applicable transportation standards for a
24 number of reasons, including constitutional limitations and the
25 presence of other adopted plans. The City Commission finds that
26 a dedication in excess of what is required would not be

"The city has jurisdiction and exercises regulatory management over all public rights-of-way within the city under authority of the City Charter and state law by issuing separate public works right-of-way permits or permits as part of issued public infrastructure construction plans. No work in the public right-of-way shall be done without the proper permit. *Some public rights-of-way within the city are regulated by the State of Oregon Department of Transportation (ODOT) or Clackamas County and as such, any work in these streets shall conform to their respective permitting requirements.*" (Emphasis added.)

> proportional and warrants modification under OCMC 12.04.007. Further, the testimony from the City's traffic engineer indicates that retaining a three-lane section will allow for the safe and efficient movement of motor vehicles." Record 31.

Petitioner neither recognizes nor directly challenges the above findings. Those findings take the position that because the section of Beavercreek Road that adjoins the subject property is within Clackamas County's jurisdiction, it is subject to the county standards which only require three lanes. The findings also conclude that existing traffic warrants would not justify requiring a five-lane roadway at this time and that because requiring a five-lane improvement would exceed constitutional proportionality requirements, a modification under OCMC 12.04.007 is warranted.[9] Petitioner does not challenge any of the city's reasoning.

This subassignment of error is denied.

The third assignment of error is denied.

The city's decision is affirmed.

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[9] OCMC 12.04.007 authorizes the city to modify roadway improvement standards "resulting from constitutional limitations restricting the city's ability to require the dedication of property or for any other reason" if certain criteria are met.