BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELIZABETH GRASER-LINDSEY,
CHRISTINE KOSINSKI and PAUL EDGAR,
Petitioners,

and

JAMES J. NICITA,
Intervenor-Petitioner,

vs.

CITY OF OREGON CITY,
Respondent.

LUBA No. 2016-044

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Elizabeth Graser-Lindsey, Christine Kosinski, and Paul Edgar, Beavercreek, filed a petition for review and argued on their own behalf.

James J. Nicita, Oregon City, filed a petition for review and argued on his own behalf.

Carrie A. Richter, Portland, filed the response brief and argued on behalf of respondent. With her on the brief were William K. Kabeiseman and Garvey Schubert Barer.

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

AFFIRMED 11/22/2016

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a city ordinance that adopts a concept plan, the Beavercreek Road Concept Plan (BRCP), for a 453-acre area of the city.

REPLY BRIEFS

Petitioners move for permission to file a reply brief. A reply brief is allowed to respond to "new matters" raised in the response brief. The city objects, arguing that petitioners have not identified any "new matters" raised in the response brief. Petitioners reply that the reply brief responds to alleged "new matters," and attempt to detail those new matters.

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

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

We also have explained that where arguments in a reply brief respond to arguments raised in the response brief that could not have been reasonably

anticipated in the petition for review, we will generally allow the reply brief. *Wal-mart Stores, Inc. v. City of Gresham*, 54 Or LUBA at 20; *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 527 (1999), *aff'd* 165 Or App 1, 994 P2d 1205 (2000)."

While we tend to agree with the city that the reply brief does not address "new matters," but rather seeks to introduce surrebuttal arguments to the city's arguments in the response brief and to restate arguments already set out in the petition for review, explaining why would lengthen an already lengthy opinion. Further, rejecting the reply brief would not affect our resolution of any assignment of error. We allow petitioners' reply brief.

Intervenor-petitioner James Nicita (intervenor) also moves for permission to file a reply brief. The city does not object to intervenor's reply brief, and it is allowed.

MOTION TO STRIKE APPENDICES/MOTION TO TAKE EVIDENCE/MOTION TO TAKE OFFICIAL NOTICE

LUBA's review is generally limited to the record compiled by the local government that issued the decision on appeal. ORS 197.835(2)(a). Petitioners attach to their petition for review an appendix that contains 29 separate items and more than 500 pages of material. The city moves to strike many of the appendices because, according to the city, those appendices are not included in the local record.

A. Motion to Take Official Notice

Under Oregon Evidence Code (OEC) 202(7), the Board may take official notice of "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state[.]" According to the city, the following appendices include documents that are included that are not part of the local record, and not subject to official notice under OEC 202: Appendices 15, 16, 18, 22, 23, 24, 25, 26, 27, 28, and 29.[1] The city moves to strike those appendices.

Appendix 16 is a portion of a concept plan that is included in the OCCP. Appendix 18 is a copy of a county tax map. We take official notice of Appendices 16 and 18.[2]

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[1] Appendix is a copy of the challenged decision. Appendix 2 is an excerpt of the city charter. Appendices 3 through 14 and 17 are portions of the Oregon City Comprehensive Plan (OCCP) or the Oregon City Municipal Code (OCMC). Appendices 20 and 21 are portions of the Metro Code (MC). We take official notice of appendices 1 through 14, 17, 20, and 21.

[2] Appendix 19 is a portion of a staff report that was apparently prepared in conjunction with Metro's adoption of Metro Ordinance 10-1244B in 2010.We cannot tell from the appendix or petitioners' description of the staff report whether it was included as an attachment to Metro Ordinance 10-1244B. A staff report that is not included with or incorporated as part of an ordinance is not an "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom." However, because the city does not object to Appendix 19, we allow it.

Appendix 26 includes copies of two pages that are included in the 2008 Record, which is included in the record of these proceedings.[3] The city's motion to strike Appendix 26 is denied.

OAR 661-010-0030(5) provides that a petition for review may include appendices that contain "verbatim transcripts of relevant portions of media recordings that are part of the record." Appendices 23 and 24 are partial transcripts of a planning commission and a city commission hearing on the BRCP. The city argues that the transcripts include editorial comments and arguments that cause them to fail to be "verbatim" transcripts, and that are best viewed as additional argument that should have been included in the 50-page petition for review. We agree with the city that the first page of Appendix 23 at 23-1 and the first paragraph of Appendix 24 at Appendix 24-1 are not "verbatim transcript[s]" of meetings at all. Rather, those sections contain argument regarding the merits of petitioners' appeal. Appendix 23-1 and the first paragraph of Appendix 24-1 are stricken. The remainder of Appendices 23 and 24 are allowed under OAR 661-010-0030(5).

Petitioners move for LUBA to take official notice of Appendices 15, 22, and 28. Appendix 15 is a copy of the conditions of approval that are attached to a city commission decision on an appeal of a limited land use decision for an

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[3] In this opinion we refer to the record of the local proceedings in *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009) (*Graser-Lindsey I*) as "2008 Record xxx" and the record of the local proceedings in the current appeal as "Record xxx."

apartment complex located on Beavercreek Road in the city. Petitioners have not established that the included pages are an "ordinance, comprehensive plan or enactment" of the city. The city's motion to strike Appendix 15 is granted.

Appendix 28 an affidavit of petitioner Kosinski and three maps that petitioners describe as "GIS DOGAMI Lidar Landslide Maps on the Oregon City website[.]" Appendix 28, Affidavit of Christine Kosinski. Petitioners have not established that the maps are "[a]n ordinance, comprehensive plan or enactment of" the city. The city's motion to strike Appendix 28 is granted.

Appendix 22 is the petition for review filed by petitioners in *Graser-Lindsey I* and some of the appendices that were attached to that petition for review.Appendix 25 is one of the appendices that were attached to the petition for review in *Graser-Lindsey I.* The petition for review filed by petitioners in *Graser-Lindsey I* is not subject to official notice under OEC 202(7) because it is not an "ordinance * * * or enactment" of the city or a county.

B. Motion to Take Evidence

Petitioners move for LUBA to consider Appendices 22, 27 and 29 as evidence not in the record under ORS 197.835(2)(b) and OAR 661-010-0045, which authorizes LUBA to consider extra-record evidence in some circumstances:

> "In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or

> remand, the board may take evidence and make findings of fact on those allegations."

Appendix 22, as noted, is the petition for review submitted by petitioners in *Graser-Lindsey I*. Petitioners argue that LUBA can consider Appendix 22 because

> "[t]he city had defined the extent of its re-adoption process of the [BRCP] in terms of its interpretation of the breadth of petitioners' arguments in [*Graser-Lindsey I*]. Petitioners raise some procedural and other issues that relate to the breadth of those arguments. Resolving those issues requires considering the breadth of the 2008 Petitioner's arguments presented in this Petitioner's brief." Petitioners' Precautionary Motion 2.

We do not understand petitioners' argument. Neither of petitioners' procedural assignments of error that we address below alleges that the city failed to consider issues that were raised, but that LUBA declined to resolve, in *Graser-Lindsey I*. Neither does the city argue that under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992) petitioners are precluded from raising any issues because they failed to raise them in *Graser-Lindsey I*. Petitioners have not satisfied their burden of establishing any basis under OAR 661-010-0045 for LUBA to consider the petition for review in *Graser-Lindsey I*.

Appendix 27 is an email to petitioner Kosinski titled "Underwriter response on request for landslide insurance." Petitioners have not established any basis for LUBA to consider that document under OAR 661-010-0045.

Appendix 29 is an affidavit from petitioner Graser-Lindsey that avers that she failed to re-introduce evidence into the record of the current

proceeding that she had previously introduced into the record in *Graser-Lindsey I*. We understand the affidavit to be offered to support petitioner Graser-Lindsey's first assignment of error that argues that she was substantially prejudiced by alleged procedural irregularities committed by the city. That is a permissible reason for LUBA to consider evidence not in the record under OAR 661-010-0045(1). Appendix 29 is allowed.

FACTS

This is the second time that an ordinance adopting the BRCP, a concept plan for the Beavercreek Road area of the city, has been appealed. In *Graser-Lindsey I*, we set out the facts:

> "Metro amended the Metro UGB in 2002 to include 245 acres of land next to Oregon City. Metro amended the UGB again in 2004 to include 63 additional adjoining acres, for a total of 308 acres. Those 308 acres have been included on Metro's Employment and Industrial Lands Map, and have been designated for Industrial use. Sometime before those UGB amendments, Metro applied Employment or Outer Neighborhood map designations to another 145 acres in the same general area. Altogether, this area includes 453 acres designated Industrial, Employment or Outer Neighborhood. The city concept plan that is before us in this appeal applies to this 453-acre area. That concept plan calls for a 175-acre North Employment Campus to satisfy the city's planning obligations for the 308-acre Industrial area. The balance of the concept plan calls for a variety of mixed employment, commercial and residential development. According to petitioner, the concept plan is inconsistent with Metro's designation of the 308 acres for Industrial use, and is also inconsistent with city comprehensive

> plan policies that encourage industrial development."[4] 59 Or LUBA at 392 (footnote in original omitted.)

After we remanded the BRCP, in 2010 Metro adopted Ordinance No. 10-1244B (2010 Ordinance). That ordinance amended Metro's Employment and Industrial Areas (E&IAs) Map (sometimes referred to as the Title 4 Map) to designate approximately 175 gross or 121 net acres of industrial land in the location of the North Employment Campus shown on the 2008 BRCP map (generally north of Loder Road). The designation aligns with the city's original proposed BRCP that was remanded in 2008. Metro's 2010 Ordinance was appealed to the court of appeals.

As we explain in more detail in our resolution of the first assignment of error, the city began work on addressing the issues remanded in *Grasey-Lindsey I* in 2011, but suspended that work during the pendency of the appeal of the 2010 Metro Ordinance. That appeal was dismissed for reasons that are complicated and not relevant to this appeal, and the 2010 Metro Ordinance became final in 2014.

The city was not idle during the pendency of the appeal of the 2010 Metro Ordinance, however. Between 2012 and 2015, the city adopted a new Transportation System Plan (2013 TSP), a Sewer Master Plan (Sewer Plan), a Water Master Plan (Water Plan), and Stormwater and Erosion Control Manual

[4] The concept plan included approximately 120 net acres of land designated for industrial uses.

and Design Standards (Stormwater Standards), all of which are incorporated into the Oregon City Comprehensive Plan (OCCP). We discuss elements of these plans in more detail below.

In 2015, the city restarted proceedings to adopt the BRCP, and in 2016 adopted the challenged ordinance, Ordinance 15-1016, which re-adopted the BRCP with new findings. Petitioners appealed Ordinance 15-1016 and intervenor moved to intervene on the side of petitioners.

THIRD ASSIGNMENT OF ERROR

Petitioners' third assignment of error includes three subassignments of error.

A. First Subassignment of Error

As explained above, in 2010, Metro adopted the 2010 Ordinance that amended its E&IAs Map to reduce the amount of industrial designated land in the BRCP area to 121 net acres. 78 of those acres are located in the areas that were added to the UGB in 2002 and 2004. Metro Code (MC) 3.07.1120(c)(1) governs initial planning for areas added to the Metro UGB, and requires comprehensive plan provisions for the area to include "[s]pecific plan designation boundaries derived from and generally consistent with the boundaries of design type designations assigned by the Metro Council *in the ordinance adding the area to the UGB*[.]" (Emphasis added.)

In their third assignment of error, petitioners argue that designating only 78 acres of the lands that were added to the UGB in 2002 and 2004 as

industrial is not "derived from and generally consistent with the boundaries * * * assigned by the Metro Council in the [2002 and 2004] ordinances," because those ordinances added 308 acres of land to the UGB and designated that 308 acres for industrial use.

The city responds that MC 3.07.1120(c)(1) must be read in context with the provisions of MC 3.07.450, the Title 4 requirements that apply to areas that are subject to the Industrial or Employment design types. First, MC 3.07.450(A) provides that the E&IAs Map "is the official depiction of the boundaries of Regionally Significant Industrial Areas, Industrial Areas, and Employment Areas." Second, MC 3.07.450(g) allows Metro to amend the E&IAs Map at any time "to better achieve the policies of the Regional Framework Plan." The city explains that Metro amended the E&IAs Map in 2010 to change the assigned design type designations for land in the BRCP area to more accurately reflect a reduction in the employment and industrial land needs due to an economic recession that occurred after the land was added in 2002 and 2004, and an increased demand for residential lands. The city argues that MC 3.07.1120(c)(1) cannot be interpreted to now require the city to designate more land than the amended E&IAs Map now designates as industrial, or the city would be required to adopt a plan that is inconsistent with the "official depiction of the boundaries of the" industrial areas depicted on the amended E&IAs Map. Stated differently, we understand the city to argue, the better reading of the phrase in MC 3.07.1120(c)(1) that requires the city's plan

to be "derived from and generally consistent with the boundaries of design type designations assigned by the Metro Council in the ordinance adding the area to the UGB" is that "the ordinance adding the area to the UGB" includes subsequent ordinances that amend the design type designations originally assigned by Metro.

We agree with the city that MC 3.07.450 provides context for interpreting MC 3.07.1120(c)(1). MC 3.07.450 gives Metro authority to amend its original designations, and having amended the original designation by adopting the amended E&IAs Map, the city does not have the authority to vary broadly from the amended map by designating more lands as industrial than the E&IAs Map designates. Stated differently, the city's plan designations must be "derived from and generally consistent with" the original ordinance adding the area to the UGB, as that ordinance is amended by Metro pursuant to MC 3.07.450.

The first subassignment of error is denied.

B. Second Subassignment of Error

The BRCP provides for 121 net acres of industrial land. Record 45. The city concluded that the BRCP meets the city's need for industrial lands. Record 44-45, 53-54.

In their second subassignment of error, petitioners argue that the city failed to provide an adequate supply of industrial lands, and that substantial evidence in the record requires the city to designate more land in the BRCP as

industrial. In support of their argument, petitioners cite or quote portions of Statewide Planning Goal 9 (Economic Development) and various OCCP provisions, but do not explain the relevance of those provisions. Petitioners also cite general statements in the findings that more employment lands are needed in the city. Record 43; Petitioners' Petition for Review 43-44.

The city responds, and we agree, that petitioners have not explained why Goal 9 or any of the cited OCCP provisions require the city to reevaluate, on a city-wide basis, whether the city's industrial land projections are adequate and to designate more land than the revised E&IAs map calls for, if that is indeed what petitioners are arguing. We also disagree with petitioners' assertion that the record demonstrates that more industrial land is needed in the city or in the BRCP. According to the findings, in 2009 Metro conducted an updated employment assessment in preparation for revising the E&IAs Map in 2010, and concluded that "there is adequate capacity inside the current UGB to accommodate the next 20 years of general employment and general industrial job growth even at the high end of the employment forecast range." Record 229c. The findings explain that that 2009 employment assessment concluded that 121 net acres of industrial land in the BRCP is adequate to accommodate employment growth. Petitioners challenge the city's reliance on the Metro 2009 employment assessment and argue that "it did not look specifically at the Oregon City area," but offer no support in the record for their assertion. The Metro 2009 employment assessment is substantial evidence that a reasonable

person would rely on to conclude that 121 net acres of employment land is sufficient to accommodate employment growth.

The second subassignment of error is denied.

C. Third Subassignment of Error

In their third subassignment of error, petitioners take the position that the map included in the BRCP that shows industrial and employment designated lands is not consistent with the amended E&IAs Map because the BRCP does not depict property lines. Petitioners' Petition for Review 47. The amended E&IAs Map is located at Record 420-21 and the BRCP map is at Record 91.

The city disputes that the two maps do not cover the same property. The city also responds that MC 3.07.450(b) contemplates some deviation between a concept plan map and the E&IAs Map, and that such a deviation is not error at all.[5] We agree. Petitioners have not explained why, under LUBA's standard of review applicable to decisions amending the city's comprehensive plan at ORS 197.835(6) and (9), the BRCP map's lack of depiction of property lines is error.

The final part of petitioners' third subassignment of error is a single page list of what petitioners characterize as "many erroneous passages" in the BRCP. Petition for Review 48. Petitioners' list has the look and feel of a "whiff of grapeshot." *Neuberger v. City of Portland*, 37 Or App 13, 26, 586

[5] MC 3.07.450(b) directs the Metro Chief Operating Officer to conform Metro's mapping to the local government's mapping at the end of the Title 11 planning process.

P2d 351 (1978). We will not detail them here, because even if we assume only for purposes of this subassignment of error that there are factually questionable or even inaccurate statements in the BRCP, petitioners have failed to explain why such factual inaccuracies require reversal or remand.

The third assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The city must adopt the BRCP in compliance with the statewide planning goals. ORS 197.175(2)(a). The BRCP must also be consistent with the OCCP, which includes the 2013 TSP, the Sewer Plan, the Water Plan and the Stormwater Standards. ORS 197.175(2)(d).

Petitioners' second assignment of error challenges the BRCP's compliance with Statewide Planning Goal 12 (Transportation Planning), Goal 11 (Public Facilities), and various cited provisions of the OCCP and the MC. We address related challenges together, and we address the challenges under Goal 12 first.

A. Goal 12, the Transportation Planning Rule, and the 2013 TSP

Compliance with Goal 12 is established through compliance with the applicable provisions of the Transportation Planning Rule (TPR) at OAR 660-012-0000 *et seq*. As relevant here, the TPR provides that if a comprehensive plan amendment would "significantly affect" a transportation facility within the meaning of the administrative rule, then the local government must put in place one or more of the measures set forth in OAR 660-012-0060(2)(a) through (e).

OAR 660–012–0060(1). The full text of the applicable TPR provisions are set out as an appendix at the end of this opinion.

Two roads are the subject of petitioners' second assignment of error. The first is Beavercreek Road, at its intersection with Oregon Highway 213 (Beavercreek/213), which is located to the northwest of the concept plan area. The second is Holly Lane, a collector road that runs to the east of and parallel to Beavercreek Road. Some portions of Holly Lane are located within the UGB and a portion is located in the county. Record 64.

The 2013 TSP estimated trips by assuming full build out of the BRCP area, and concluded that the Beavercreek/213 intersection would exceed applicable volume to capacity (v/c) mobility standards established in the Oregon Highway Plan (OHP) by the end of the planning period. Record 65-66.[6] The prior version of the city's TSP called for a grade-separated interchange at that intersection, but the 2013 TSP determined that building the grade-separated interchange was not feasible due to its significant cost. Instead, the 2013 TSP determined to address the intersection's performance in two ways.

First, the 2013 TSP decided to address future congestion at that intersection by adopting alternative mobility measures in a future refinement

[6] The prior version of the city's transportation system plan forecasted future traffic levels would cause the intersection to exceed the applicable level of service (LOS) standards. The 2013 TSP determined that OHP mobility standards are the applicable mobility standards. Changing from a LOS standard to a v/c standard allows a greater level of non-performance at the intersection.

plan to relieve some of that congestion.[7] Record 65-66. OHP Action 1F.3 allows the city and ODOT to establish different "target levels, methodologies and measures for assessing mobility and consider adopting alternative mobility targets" for a state transportation facility. Response Brief App 57. In short, the OHP allows the city and ODOT to agree to allow levels of congestion at the intersection that exceed adopted mobility standards by adopting different mobility standards and strategies for reducing traffic at the intersection. The 2013 TSP and the Oregon City Municipal Code (OCMC) prohibit plan amendments that would facilitate development under the BRCP until those alternative mobility measures are put in place.[8]

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[7] Those alternative mobility measures include reducing reliance on single occupancy vehicles by considering alternative modes of transportation, and improving public transportation in the area. Record 65.

[8] OCMC 12.04.205(D) provides:

> "Until the city adopts new performance measures that identify alternative mobility targets, the city shall exempt proposed development that is permitted, either conditionally, outright, or through detailed development master plan approval, from compliance with the above-referenced mobility standards for the following state-owned facilities:
>
> "I-205/OR 99E Interchange
>
> "I-205/OR 213 Interchange
>
> "OR 213/Beavercreek Road

Second, the 2013 TSP plans for future improvements to Holly Lane south of its intersection with Maple Road to alleviate some of the projected congestion at the Beavercreek Road/Highway 213 intersection. The 2013 TSP identified projects to improve and extend Holly Lane in the "likely to be funded" category. Record 64-66.

The city's findings summarize the elements of the 2013 TSP that address congestion at the Beavercreek/213 intersection. The findings conclude that

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> "State intersections located within or on the Regional Center Boundaries
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> "1. In the case of conceptual development approval for a master plan that impacts the above references intersections:
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> "a. The form of mitigation will be determined at the time of the detailed development plan review for subsequent phases utilizing the Code in place at the time the detailed development plan is submitted; and
>
> "b. Only those trips approved by a detailed development plan review are vested.
>
> "2. Development which does not comply with the mobility standards for the intersections identified in [Section] 12.04.205.D shall provide for the improvements identified in the Transportation System Plan (TSP) in an effort to improve intersection mobility as necessary to offset the impact caused by development. Where required by other provisions of the Code, the applicant shall provide a traffic impact study that includes an assessment of the development's impact on the intersections identified in this exemption and shall construct the intersection improvements listed in the TSP or required by the Code."

adopting the BRCP will not "significantly affect" that intersection, because the 2013 TSP already includes estimates of trips resulting from full build out under the BRCP in its evaluation and selection of "alternative measures," consistent with OAR 660-012-0060(2)(c) and (e). The city found in relevant part that "[t]he adopted TSP includes all of the degradation expected to result from the development of the BRCP area * * * therefore the adoption of the BRCP will not cause further degradation than what is already accounted for in the [2013] TSP." Record 67. The city further found that the BRCP will not significantly affect the intersection because development authorized by the BRCP will not be allowed and the BRCP will not even take effect until (1) the city adopts alternative mobility standards in a refinement plan that identifies financially feasible solutions to address congestion at the intersection, and (2) the city then adopts zoning designations for the area. Record 67.

C. Subassignments 2A and 2E

In subassignment 2A, we understand petitioners to argue that traffic resulting from development authorized by the BRCP will "significantly affect" the Beavercreek/213 intersection within the meaning of OAR 660-012-0060(1), because traffic at the intersection that will exceed the currently applicable OHP mobility standards before the end of the planning period. Petition for Review 13. We also understand petitioners to argue that the city is precluded from adopting the BRCP because the alternative mobility standards that will address some of the congestion at the intersection have not been adopted. Also in

subassignment 2A, petitioners argue that the BRCP does not comply with Statewide Planning Goal 7 (Areas Subject to Natural Hazards) because Holly Lane is prone to landslides, and therefore the city may not rely on the improvements to Holly Lane included in the 2013 TSP to find that the TPR is satisfied.[9] Petition for Review 16-18.

In subassignment 2E, petitioners argue that (1) the 2013 TSP underestimated the amount of traffic that will be generated by full build out under the BRCP, and (2) the city must establish the BRCP's compliance with the TPR without reliance on the 2013 TSP.

The city responds that the 2013 TSP both included and correctly estimated traffic from development under the BRCP in its calculations. Response Brief App 66-71. More importantly, the city argues, because the 2013 TSP is acknowledged to comply with Goal 12, as implemented through the TPR, petitioners' arguments provide no basis for reversal or remand of the decision to adopt the BRCP. The city responds that petitioners' arguments that challenge the 2013 TSP's calculations of traffic to be generated by development under the BRCP and that include improvements for Holly Lane are an impermissible collateral attack on the adopted and acknowledged 2013 TSP. The city argues that not only may the city rely on the 2013 TSP, but that it

[9] Petitioners cite Goal 7, Section A1, which provides that "Local governments shall adopt comprehensive plans * * * to reduce risk to people and property from natural hazards."

is required to rely on the 2013 TSP for future planning purposes, such as adopting a concept plan for an area added to the city, and that adopting a concept plan that addresses congestion at the intersection in a way that is inconsistent with the 2013 TSP would violate ORS 197.175(2)(d). *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 124 P3d 1249 (2005) (city errs in relying on a final, unadopted study of housing inventory rather than the inventory in the city's acknowledged comprehensive plan). The city further responds that in any event, adopting the BRCP does not "significantly affect" the Beavercreek/213 intersection or Holly Lane because no development that implements the BRCP can occur until the alternative mobility measures and implementing zone changes are adopted.

We agree with the city. Petitioners' fundamental disagreement is with the city's decision, made when it adopted the 2013 TSP, to allow congestion at the Beavercreek/213 intersection that exceeds the current mobility standards, and to rely on alternative mobility standards and improvements to Holly Lane to alleviate some of the traffic pressure on Beavercreek Road rather than improving the intersection. But that fundamental disagreement does not address or attempt to challenge the city's findings adopted in support of the BRCP that explain that the city has adopted a TSP that has been acknowledged to be consistent with Goal 12 and its implementing rules, and that the city's decision is entirely consistent with the 2013 TSP. The findings explain that the 2013 TSP decided to address congestion at an intersection that is included in

the BRCP area by adopting alternative mobility standards and other measures to reduce traffic at that intersection, and by planning improvements to Holly Lane to reduce some traffic on Beavercreek Road. Petitioners have failed to explain why, having addressed the Beavercreek/213 intersection and Holly Lane in the 2013 TSP, the city must evaluate the intersection and Holly Lane again, or make a decision that differs from and is inconsistent with the 2013 TSP. We also agree with the city that petitioners' arguments that challenge the estimates of traffic in the 2013 TSP and that challenge the TSP's decisions regarding Holly Lane are collateral attacks on the 2013 TSP. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25, 34-35 (2015); *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).

Finally, the city adopted two pages of single-spaced findings that explain why the city concluded that the BRCP complies with Goal 7, and addressing petitioners' arguments about Holly Lane. Record 51-52. Petitioners do not address the findings or explain why they are inadequate to demonstrate that the BRCP complies with Goal 7.

D. Subassignment 2B

The BRCP must be consistent with the OCCP, which includes the 2013 TSP. ORS 197.175(2)(d). In this subassignment of error, petitioners argue that the BRCP is inconsistent with the 2013 TSP. According to petitioners, the

BRCP plans Beavercreek Road as a three-lane road while the 2013 TSP identifies Beavercreek Road as a major arterial. Petitioners argue that OCMC 12.04.180 requires major arterials to be five lanes, and therefore the BRCP's three-lane Beavercreek Road is inconsistent with the 2013 TSP's and OCMC's five required lanes.[10]

The city first disputes that the 2013 TSP categorically identifies the section of Beavercreek Road located in the BRCP area as a five-lane road, and argues that the 2013 TSP identifies a "financially-constrained" road widening project on Beavercreek Road, south of Clackamas Community College, that includes widening to four lanes, with sidewalks and bike lanes. Response Brief 22. The city also takes the position that, in any event, the 2013 TSP and the cited OCMC provision do not require major arterials to be five lanes, but rather state that five lanes is a maximum and that alternative plans with reduced streets, such as the one proposed in the BRCP, are allowed.

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[10] OCMC 12.04.180 provides:

> "All development regulated by this chapter shall provide street improvements in compliance with the standards in Figure 12.04.180 depending on the street classification set forth in the Transportation System Plan and the Comprehensive Plan designation of the adjacent property, unless an alternative plan has been adopted. The standards provided below are maximum design standards and may be reduced with an alternative street design which may be approved based on the modification criteria in [Section] 12.04.007. The steps for reducing the maximum design below are found in the Transportation System Plan."

We agree with the city that the BRCP is not inconsistent with the 2013 TSP, where the 2013 TSP and OCMC 12.04.180 do not require a five-lane road, and where the OCMC provision relied on by petitioners allows alternative plans with reduced street widths.

E. Subassignment 2C

In this subassignment of error, petitioners argue that the BRCP is inconsistent with the 2013 TSP because the BRCP establishes an alternative mode-split ratio of 10% and petitioners argue the 2013 TSP requires an alternative mode-split ratio of 50%. An alternative mode-split ratio establishes the number of trips that should occur by alternatives to single vehicle occupancy trips. They include biking, walking, public transportation, and carpooling.

The city responds that the 2013 TSP does not establish a mode-split standard that the BRCP must satisfy. The city takes the position that the 2013 TSP establishes overall mode-split measures throughout the entire city, and then evaluates how the TSP will result in a plan that achieves the goals.

We agree with the city that the 2013 TSP does not establish a mode-split standard that the BRCP area must satisfy, but rather aims for city-wide mode split ratio of 50%.

This subassignment of error is denied.

F. Subassignment 2D

In this subassignment of error, petitioners largely repeat arguments made elsewhere in their petition for review. However, we understand petitioners to introduce the new argument that the BRCP is not supported by substantial evidence in the record, because according to petitioners the record does not include an "up-to-date traffic study[]" and "[t]he 2013 TSP does not substitute for an up-to-date BRCP transportation study." Petition for Review 23-24. We understand petitioners to argue that the city should not have relied on the 2008 traffic study that is included in the record of the previous decision to adopt the BRCP that we remanded in *Graser-Lindsey I*.

The city responds that substantial evidence in the record supports the city's adoption of the BRCP, and that there is no requirement that the city prepare a new transportation study to support the BRCP. We agree. *Setniker v. Polk County*, 63 Or LUBA 38, 49-50 (2011). The city also responds that it was appropriate and required that the city rely on the 2013 TSP. Again, we agree.

G. Subassignment 2F

In this subassignment of error, petitioners argue that the city has failed to demonstrate that the BRCP complies with MC 3.07.1120(c)(8), which requires the BRCP to include "provision for the financing of local and state public facilities and services."[11] The city adopted five pages of single-spaced findings

[11] Petitioners cite and partially or fully quote Statewide Planning Goal 11 (Public Facilities), LCDC administrative rules, OCCP provisions, and Metro

that explain that the city relied on the 2013 TSP, the Sewer Plan adopted in 2014, the Water Plan adopted in 2014, and the city's Stormwater Standards adopted in 2015. Record 55-60. The findings explain that the master plans evaluated public facility demand that will result from build out under the BRCP, and include public facility improvements and estimated costs for improvements in the BRCP area. Petitioners argue that the master plans do not provide the assessments of needed public facilities or financing for them, and therefore the city may not rely on the master plans in determining compliance with MC 3.07.1120(c)(8).

The city responds that all of the master plans included the BRCP area in evaluating public facility needs and financing, and petitioners' arguments amount to collateral attacks on the adopted master plans. We agree with the city that because the master plans include the BRCP area in evaluating public facility needs and financing, the city was entitled to rely on those master plans in in order to satisfy the MC 3.07.1120(c)(8) requirement that the BRCP include "provision for the financing of local and state public facilities and services." Petitioners' arguments mainly quibble with provisions and

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Code provisions that generally require the BRCP to discuss and identify needed public facilities to serve development in the BRCP area and funding mechanisms for public facilities, but do not develop any argument that we can understand under any of the cited provisions except for MC 3.07.1120(c)(8). Petition for Review 31-33.

evaluations that are part of the various master plans that are adopted and acknowledged, but the arguments do not establish that the decision to adopt the BRCP must be reversed or remanded.

This subassignment of error is denied.

H. Subassignment 2G

In this subassignment, petitioners again argue that the BRCP fails to comply with Goal 11 and Goal 12, for the reason that the BRCP fails to ensure that the Beavercreek/213 intersection is safe. The city adopted findings that explained that the 2013 TSP includes safety improvements to reduce accident rates, including adaptive signal timing and an advanced warning system to automatically detect traffic lines and warn motorists. Record 68. Petitioners argue that there is no evidence in the record that the safety improvements will reduce crash rates. However, the city responds, and we agree, that the city's findings are adequate to explain that the city relied on safety improvements included in the 2013 TSP to satisfy any obligation the city had to determine whether the affected transportation facilities are "safe."

This subassignment of error is denied.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

In 2011, the city commission remanded the BRCP to the planning commission in order for the planning commission to (1) "address[] the protection of industrial lands, transportation, utility and service adequacy," and

(2) "add reconsideration of the yellow areas for greater cottage manufacturing in those zones."[12] Record 7057. As explained above, the remand proceedings were delayed during the pendency of challenges to the 2010 Ordinance.

In its 2015 remand proceedings, the city provided the notice required by OCMC 17.50.090(C) and ORS 227.186(3)-(5).[13] Record 7165-66, 7197-98. During the proceedings before the planning commission on remand, the planning commission accepted testimony from petitioners and others regarding

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[12] The "yellow areas" are the areas shown on the map at Record 104 as the West and East End Mixed Use Neighborhoods. The term "cottage manufacturing" is not defined in the OCMC or the OCCP, but as we understand petitioners' use of the term, it means an expanded home occupation "resulting in commodities" or "products," rather than only allowing home occupations that do not create products. Petition for Review 3; Record 7056.

[13] The notice described the purpose of the hearing:

> "Oregon City is proposing to re-adopt the Beavercreek Road Concept Plan that will impose new comprehensive plan designations to comply with the Metro Urban Growth Management Functional Plan." Record 7165.

The notice also provided in relevant part:

> "Any interested party may testify at the hearing or submit written comments on the proposal at or prior to the hearing. The hearing procedures in OCMC 17.50.170 will be subject to the following evidence limitations. The Planning Commission and City Commission will re-open the record to consider new evidence relating solely to the Metro Title 4 requirements for industrial lands and transportation, utility and service issues. The submittal of any new evidence that does not relate to these limited issues may be rejected and not considered by the hearings body." Record 7166.

whether the text of the BRCP should specifically allow cottage manufacturing in the west and east mixed use residential zones. Record 282-83, 785. At the conclusion of the city commission proceedings, the city commission voted to adopt the BRCP, unchanged from the language and maps that had been adopted in 2008. The findings the city commission adopted in support of the BRCP addressed petitioners' testimony regarding "cottage manufacturing" and concluded in relevant part:

> "[L]ive-work units and home occupations, that may include cottage industries, are supported by the mixed-use approach. Adoption of the BRCP does not preclude the provision of cottage manufacturing or a greater variety of home occupations within the mixed use and residential areas. The proposed land use mix, combined with the improved transportation network, will guide the future development of the area in a manner that supports this policy. Finally, as part of creating the implementing zoning for the BRCP, the City Commission directs staff to further analyze the issue of allowing expanded home occupation uses, also known as cottage manufacturing, within the mixed use and residential areas." Record 46.

In their first assignment of error, we understand petitioners to argue that the city committed two procedural errors.[14] First, we understand petitioners to argue that the city committed a procedural error by failing to include in the notices of hearing a statement that the city would consider whether to allow "cottage manufacturing" uses in the West and East Mixed Use Neighborhoods.

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[14] ORS 197.835(9)(a)(B) requires LUBA to remand a decision when the local government commits a procedural error that prejudices the substantial rights of the petitioner.

See n 13. According to petitioners, the 2011 city commission remand instructions to the planning commission required the notice to include that language. Petitioners also argue that "the Notice of Public Hearing by its mis-information about the appropriate topics of the concept plan hearing violated the public and petitioners' right to a fair hearing on the concept plan." Petition for Review 4.

The city responds that the city's notices of the remand hearing did not contain "mis-information" simply because the notices did not specifically include a reference to the "cottage manufacturing" issue, and accordingly no procedural error occurred. The city also responds that merely alleging prejudice to the rights of "the public" is insufficient to establish that reversal or remand is warranted under ORS 197.835(9)(a)(B), which requires petitioners to establish that a procedural error occurred that prejudiced the substantial rights of "the petitioner." Finally, the city also responds that petitioners have failed to demonstrate that their substantial rights were prejudiced by any alleged procedural error and that petitioners were allowed to and did present testimony and evidence regarding the "cottage manufacturing" issue. Accordingly, the city argues, petitioners' arguments provide no basis for reversal or remand of the decision.

We agree with the city. Petitioners fail to establish that any alleged procedural error in the hearing notices prejudiced their substantial rights. The record demonstrates that petitioners were allowed to and did submit testimony

during the remand proceedings that urged the city to amend the text of the BRCP to specifically allow "cottage manufacturing" in the west and east mixed use zones. Record 282-83, 785.

Second, we also understand petitioners to argue that the city committed a procedural error that prejudiced petitioners' substantial rights in adopting the BRCP without including specific text allowing "cottage manufacturing" in the west and east mixed use zones. The city responds that the record and findings demonstrate that the city accepted testimony and argument on the issue, and ultimately decided to address the issue through future amendments to the OCMC. Record 46.

We agree. The fact that the city commission ultimately declined to include petitioners' preferred language in the BRCP, and instead directed the city's planning staff to address the issue through zoning code amendments, does not amount to a procedural error. In addition, petitioners have failed to establish any prejudice to their substantial rights where the record demonstrates that the city accepted testimony regarding whether to specifically include "cottage manufacturing" as a use in the mixed use zones.

Finally, petitioners challenge the city's finding, quoted above, that "the BRCP does not the preclude provision of cottage manufacturing * * *" and argue that the quoted portion of the finding "is inaccurate." Petition for Review 6-7. That is so, according to petitioners, because the definition of "home

occupation" at OCMC 17.04.580 "excludes light industry."[15] Petition for Review 3, n 2. We reject the argument. The findings accurately characterize the adopted BRCP, which does not preclude cottage manufacturing.

Petitioners' first assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In their fourth assignment of error, we understand petitioners to argue that the city committed a procedural error that violated Statewide Planning Goal 1 (Citizen Involvement) and a provision of the OCCP because, according to petitioners, the city "did not properly involve the public (or even the City

[15] OCMC 17.04.580 defines "home occupation" to mean "an occupation carried on solely by the resident or residents of a dwelling unit as a secondary use, in connection with which no assistants are employed, other than residents of the home, no commodities are sold other than services, no sounds are heard beyond the premises, and there is no display, advertisement or sign board except such signs as by this title may be permitted in the district where the home or occupation is situated, including such occupations as lawyer, public accountant, artist, writer, teacher, musician, home office of a physician, dentist or other practitioner of any of the healing arts, or practices of any art or craft of a nature to be conveniently, unobstructively and inoffensively pursued in a residential dwelling or accessory building of a residence, and not more than one-half of the square-footage is devoted to such use. The business may have off-site employees or partners provided that they do not report for work at the subject residence. No outdoor storage of materials or commercial vehicles associated with the business shall occur on-site."

Commissioners) in the decision on how to handle the BRCP remand."[16] Petition for Review 49.

The city responds that petitioners' arguments provide no basis for reversal or remand for lack of compliance with Goal 1 where the BRCP does not amend or affect the city's acknowledged Citizen Involvement Program (CIP). We agree. *Stevens v. Clackamas County*, 68 Or LUBA 490 (2013); *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 284 (1998). The BRCP does not amend the city's existing CIP, and therefore petitioners' arguments provide no basis for reversal or remand.

Petitioners also repeat their argument that we addressed in the first assignment of error, that the failure of the notices of public hearing to specifically refer to the city's 2011 vote to allow consideration of "cottage manufacturing" was a procedural error that prejudiced petitioners' substantial rights. For the reasons explained in the first assignment of error, we reject that argument.

Finally, petitioners also challenge findings adopted by the city that citizens have been "largely positive and supportive" of the BRCP, and that the BRCP reflects "community desires" and argue that the finding is not supported

[16] Petitioners cite "OCCP Section 2 p. 16 bullet 3 et al." Petition for Review 49. We are unable to locate on the version of the OCCP located on the city's website that section according to petitioners' citation.

by substantial evidence in the record. Record 39, 44. Petitioners point to evidence in the record that demonstrates that some citizens opposed the BRCP.

The city responds by citing to evidence in the record of support for the BRCP, and argues that in any event petitioners' argument provides no basis for reversal or remand of the decision where the finding is unrelated to any applicable approval criterion. Again, we agree with the city.

The fourth assignment of error is denied.

INTERVENOR-PETITIONER'S ASSIGNMENT OF ERROR

As noted, ORS 197.175(2)(a) requires the city to adopt the BRCP "in compliance with the goals." Intervenor's assignment of error is that the city's decision to adopt the BRCP fails to comply with Statewide Planning Goal 6. Goal 6 is to "[t]o maintain and improve the quality of the air, water and land resources of the state."[17] The city adopted findings that the BRCP complies with Goal 6:

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[17] Goal 6 provides, in relevant part:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources."

> "Existing Comprehensive Plan policies that apply to the concept plan require development practices to comply with regional, state, and federal standards for air and water quality, to protect water quality from erosion and sediment, to minimize the effects of noise, and to protect mineral resources.
>
> "All development within the BRCP will meet these federal, state and regional standards through compliance with the City's recently amended Storm Water and Low Impact Development Storm Water and Erosion Control standards, which have been deemed to comply with the Oregon Department of Environmental Quality National Pollutant Discharge Elimination System (NPDES) and Clean Water Act requirements. All storm water discharge from developed sites will meet applicable local, federal and state standards. Further, these goals and policies are implemented through the City's grading and erosion control ordinances, water quality resource protection regulations, development standards, and nuisance laws." Record 51.

Intervenor's assignment of error is a challenge to understand. We quote intervenor's explanation of his assignment of error:

> "The core of [intervenor's] arguments regarding Statewide Planning Goal 6 is that the BRCP must include the directive that future plans and ordinances it will control must specifically incorporate the state water quality standards in OAR 340, Division [41] as standards and criteria for future proceedings that will establish standards and criteria/approval criteria for development decisions, to 'assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings.' *Davenport* [*v. City of Tigard*, 121 Or App 135, 140, 854 P2d 483 (1993)]. *See also, Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Commission*, 16 Or App 63, 69-72 (1973). ORS 227.173(1)." Intervenor's Petition for Review 9.

The crux of intervenor's assignment of error, as we understand it, is that the BRCP is not in compliance with Goal 6 because it (1) fails to expressly require stormwater discharge in the Beavercreek Road area to satisfy the water quality standards in OAR 340, Division 41, and (2) fails to expressly require that future area plans and zoning ordinances that the city adopts to implement the BRCP will also include a requirement that all future stormwater discharges satisfy the applicable water quality standards. Stated differently, we understand intervenor to allege that the BRCP and future plans and ordinances must incorporate the water quality standards at OAR Chapter 340, Division 41 as standards that the city will apply to an application for development in the BRCP area.

One source of that alleged requirement, we understand intervenor to argue, is ORS 468B.025, which provides:

> "(1) Except as provided in ORS 468B.050 or 468B.053, no person shall:
>
> > "(a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.
> >
> > "(b) Discharge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Environmental Quality Commission.
>
> "(2) No person shall violate the conditions of any waste discharge permit issued under ORS 468B.050.

"(3) Violation of subsection (1) or (2) of this section is a public nuisance."[18]

The other source of that alleged requirement, we understand intervenor to argue, is Goal 6 itself.

Relatedly, intervenor challenges the city's findings that the BRCP complies with Goal 6 because development within the BRCP will comply with a Municipal Separate Storm Sewer System (MS4) Permit that DEQ has issued to the city, and with the Stormwater Standards, discussed in more detail below.[19]

The city responds, initially, that intervenor is precluded by the law of the case principle set out in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), from raising the issue raised in his assignment of error, because the issue was not raised in *Graser-Lindsey I*. We disagree. *Hatley v. Umatilla County*, 256 Or App 91, 112, 301 P3d 920, *rev den*, 353 Or 867, 306 P3d 639 (2013) (the law of the case doctrine is not applicable in cases involving legislative land use decisions).

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[18] ORS 468B.050 authorizes DEQ to issue permits and sets out circumstances in which a permit is required.

[19] The MS4 Permit is a National Pollutant Discharge Elimination System (NPDES) permit, issued by DEQ as part of the state's implementation of the federal Clean Water Act. The MS4 Permit allocates wasteloads from the waterbodies listed in the permit into the Willametter River. The MS4 Permit covers all existing and future discharges of stormwater from the city's municipal system into the Willamette River. The MS4 Permit is attached to Intervenor's Petition for Review at Appendix A 1-48.

On the merits, the city responds that nothing in Goal 6 requires the BRCP to require that stormwater discharges from development within the BRCP area will comply with the OAR Chapter 340 Division 41 standards, or to require that future area plans and zoning ordinances that implement the BRCP contain similar language. The city responds that the city's findings are adequate to explain why the BRCP complies with Goal 6: because it requires compliance with the MS4 Permit and with the city's stormwater management plans, as well as requiring "[a]ll storm water discharge from developed sites [to] meet applicable local, federal and state standards."

We agree with the city. In *Friends of the Applegate Watershed v. Josephine County*, 44 Or LUBA 786, 802 (2003), we held that at the post acknowledgment plan amendment stage, a local government only need show it is reasonable to expect that applicable state and federal environmental quality standards can be met. *See also Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 583 (1995) (same). Intervenor does not point to anything in the record that demonstrates that it is unreasonable for the city to expect that applicable state and federal environmental quality standards can be met.

The city also responds that ORS 468B.025(1)(b) does not require the BRCP to expressly require compliance with the OAR Chapter 340, Division 41 water quality standards. Moreover, the city disputes that ORS 468.025(1)(b)

even requires compliance with those standards.[20] Intervenor's Petition for Review Appendix 1-2. The city explains that the city has adopted a stormwater management plan that, together with the MS4 Permit terms, DEQ has determined establishes compliance with the "to the maximum extent practicable" (MEP) standard set in the MS4 Permit. The MS4 Permit specifies that the city will comply with the city's storm water management plans.[21] The city argues that since DEQ has issued the city a MS4 Permit that requires the

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[20] The statute prohibits the city from causing pollution or discharging wastes into waters of the state "except as provided in ORS 468B.050 or 468B.053." In *Tualatin Riverkeeper v. DEQ*, 235 Or App 132, 139-40, 230 P3d 559, *rev den* 349 Or 173, 243 P3d 468 (2010), the court of appeals explained ORS 468B.025:

> "ORS 468B.025 does not set forth standards for the issuance of permits or describe what conditions a permit must contain. Instead, it lists several activities that 'no person shall' engage in. Those are (1) violating the conditions of a permit issued pursuant to ORS 468B.050; (2) except as provided in ORS 468B.050 or ORS 468B.053, causing pollution of the waters of the state, or causing waste to be placed in a location where it is likely to enter the waters of the state; and (3) except as provided in ORS 468B.050 or ORS 468B.053, discharging waste into the waters of the state if the discharge reduces the quality of those waters below state water quality standards.* * *." 235 Or App at 139.

Accordingly, the statute prohibits any person from discharging wastes into the waters of the state if those discharges would reduce the quality of that water below the state's water quality standards *unless* the person has a permit from DEQ specifically authorizing the discharge at issue.

[21] The city's plan is the Stormwater and Low Impact Storm Water and Erosion Control Standards.

city to reduce the discharge of pollutants from its municipal storm sewer "to the maximum extent practicable (MEP)" and in compliance with the city's stormwater management plans, the MEP standard and the standards in the stormwater management plans are the "applicable standards" that must not be violated.

We need not resolve the parties' apparent dispute over whether the OAR 340, Division 41 standards or the MS4 Permit standards and the city's stormwater management plan standards are "the water quality standards established by rule for such waters by the Environmental Quality Commission" within the meaning of ORS 468B.025(1)(b), because we reject intervenor's theory that ORS 468B.025(1)(b) requires the BRCP to expressly require compliance with the OAR 340, Division 41 standards, or specify any water quality standards. The statute is a prohibitory statute, and applies whether or not the BRCP or any area plan or zoning ordinance expressly includes the prohibition. Failing to include that prohibition in the BRCP does not mean that the BRCP fails to comply with Goal 6 or require reversal or remand of the city's decision.

Finally, intervenor speculates that development within the BRCP area could result in discharges that are not regulated or authorized by the city's MS4 Permit. Intervenor's Petition for Review 15-16. However, that speculation does not change the conclusion that the BRCP need not expressly require

compliance with the OAR 340, Division 41 standards, because the statute applies whether or not the BRCP expressly mentions it.

Intervenor's assignment of error is denied.

The city's decision is affirmed.

Plan and Land Use Regulation Amendments

(1) 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;

(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.

(2) If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion.

(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

(b) Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.

(c) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.

(d) Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. Local governments shall, as part of the amendment, specify when measures or improvements provided pursuant to this subsection will be provided.

(e) Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if the provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards.