BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES J. NICITA,
Petitioner,

and

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

vs.

CITY OF OREGON CITY,
Respondent,

and

HISTORIC PROPERTIES, LLC,
Intervenor-Respondent.

LUBA No. 2016-045

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

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

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

Carrie A. Richter, Portland, filed the response brief and argued on behalf

of respondent. With her on the brief was Bateman Seidel P.C.

Michael C. Robinson and Seth J. King, Portland, filed a response brief, and Seth J. King argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

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

REMANDED 01/25/2017

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner Nicita (hereafter Nicita) and intervenors-petitioners Graser-Lindsey, *et al.* (hereafter Graser-Lindsey) appeal Ordinance 16-1003, which approves comprehensive plan and zoning map amendments[1] for intervenor-respondent's (hereafter intervenor's) property located in the northeast quadrant of the intersection of Highway 213 and Beavercreek Road in Oregon City.

MOTION TO FILE REPLY BRIEFS

Petitioners move for permission to file reply briefs. The motions are granted.

MOTION TO TAKE OFFICIAL NOTICE

Under Oregon Evidence Code Rule 202, LUBA may take official notice of certain laws, including the following:

> "(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States.
>
> "(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom.* * *"

Nicita requests that LUBA take official notice of eight documents:

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[1] For brevity, in this opinion we will generally refer to these as "map amendments."

A. Metro Resolution No. 94-2040-C and excerpts from Metro's 2040 Urban Growth Concept text.

B. The current Metro 2040 Growth Concept Map.

C. Maps showing Tri-Met Transit Routes

D. Oregon City Willamette Basin Total Maximum Daily Load Implementation Plan.

E. The National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System (MS4) Discharge Permit issued to a number of jurisdictions, including Oregon City.

F. Oregon City Storm Water and Grading and Design Standards.

G. Oregon City Ordinance 15-1006.

H. Section 6 of the Oregon City Comprehensive Plan.

There is no dispute that items A, B, F, G and H are proper subjects for official notice, and Nicita's motion is granted as to those items. In addition, although intervenor objects to items D and E, we believe each qualifies as an official act for which official notice is appropriate. However, to the extent Nicita asks that we take official notice of those documents to provide evidentiary support for disputed facts for which there is no evidentiary support in the record, the motion is denied. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103-04 (2005); *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995).

Nicita's request that we take official notice of the Tri-Met Transit Route Maps is to establish evidentiary support for his position that the subject

property is not adequately served by transit. Therefore, the request that we take official notice of the Tri-Met Route Maps for their evidentiary value is denied. *Id*.

MOTION TO CONSIDER EXTRA-RECORD EVIDENCE

LUBA review is generally limited to the evidentiary record submitted by the respondent in a LUBA appeal, but under OAR 661-010-0045(1), LUBA may consider extra-record evidence in certain specified circumstances.[2] Nicita includes a motion in his petition for review asking that LUBA consider (1) an e-mail message from the city to petitioner requiring that he make an official public records request if he wishes the city to provide him with a copy of its Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) inventory and (2) a computer screen shot that establishes that a search of the Clackamas County library data base disclosed that the libraries do not have a copy of the city's Goal 5 inventory on file.

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[2] OAR 661-010-0045(1) provides:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

Intervenor objects that the request is improper because there is no factual dispute that the city required that petitioner file a public records request for the Goal 5 inventory or that there is no city Goal 5 inventory on file in the Clackamas County Library system. With that understanding of the undisputed facts, the motion to consider extra-record evidence is denied.

FACTS

The challenged decision changes the existing Low Density Residential and Medium Density Residential comprehensive plan map designations for a number of intervenor's properties to the Mixed Use Corridor (MUC) comprehensive plan map designation. The challenged decision also changes the existing R-3.5 Dwelling District, and R-6 and R-10 Single-Family Dwelling District zoning designations to the MUC-2 Mixed Use Corridor District zoning designation. A map from the record showing affected properties and nearby streets is included on the next page.[3] Additional facts are set out in our discussion of petitioner's assignments of error.

NICITA FIRST ASSIGNMENT OF ERROR

Oregon City Comprehensive Plan (OCCP) Goal 2.3 provides:

"Goal 2.3 Corridors

> "Focus transit-oriented, higher intensity, mixed-use development *along* selected transit corridors." (Emphasis added.)

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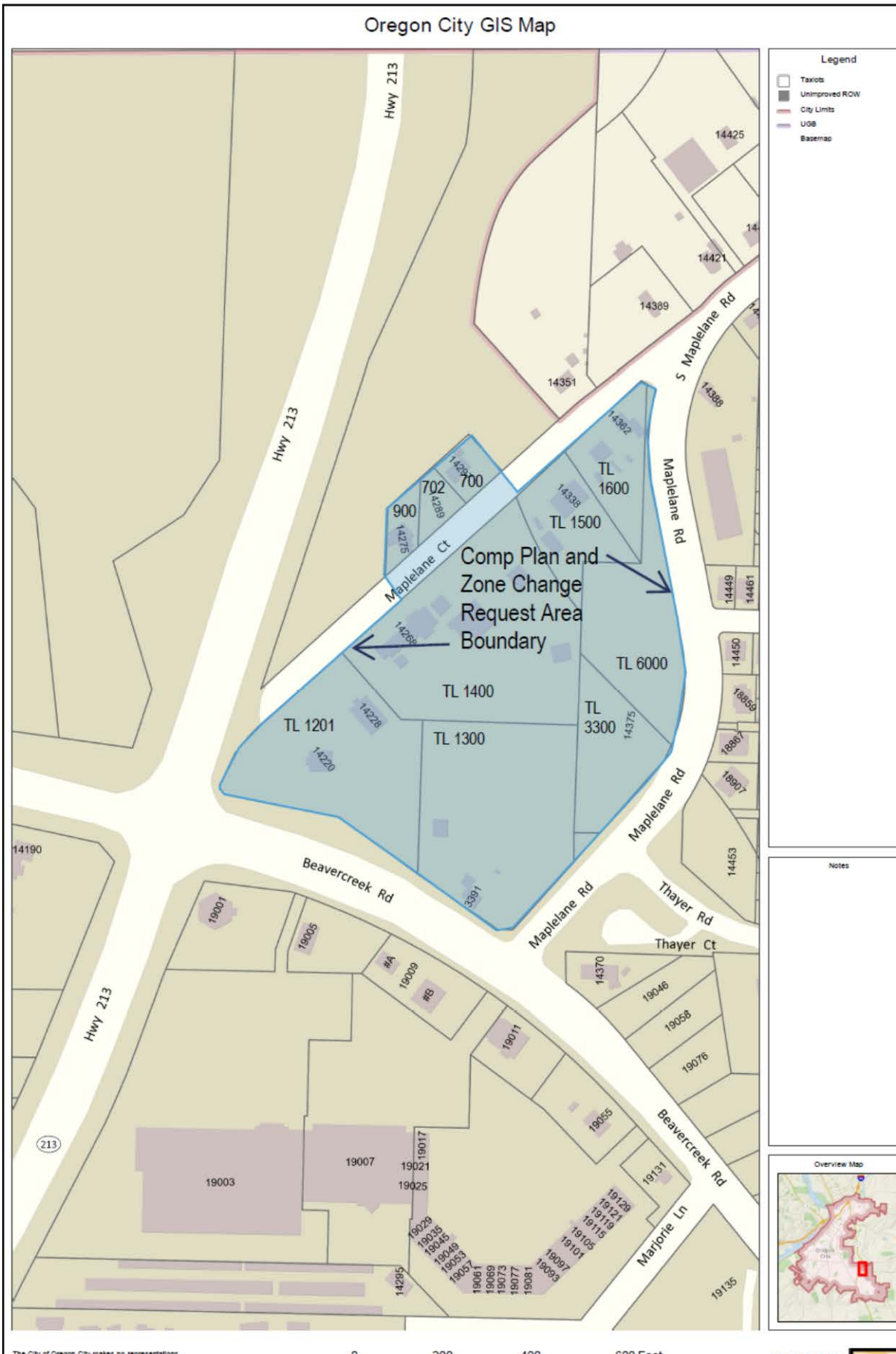
[3] The city submitted two records, an Original Record and a Replacement Record. All "Record" citations in this opinion are to the Replacement Record.



CPA-ZC Boundary Area and Tax Lot Numbers of Parcels Involved

To address OCCP Goal 2.3, the city council adopted the following finding:

> "The subject site abuts a state Highway (OR 213), an arterial (Beavercreek Road), and is located *near* a transit stop.[4] The proposed zoning designation is designed to be transit-oriented and focused *near* transportation corridors such as Beavercreek Road as identified in OCMC 17.29.010.[5] This goal is met." Record 20 (emphases added).

The minutes of the March 2, 2016 City Commission meeting indicate that Nicita raised the following issue concerning OCCP Goal 2.3:

> "James Nicita… did not think the application met Goal 2.3 of the City's Comprehensive Plan as the mixed use corridor only applied to the parcels that had convenient transit along the property. This property did not have transit along Beavercreek Road or Maple Lane Road and did not qualify to be mixed use corridor." Record 2300.

In his first assignment of error, Nicita contends the city's finding that the subject property is *near* a transit stop and transit corridor is insufficient to

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[4] At oral argument LUBA was informed the transit stop the property is "near" is located a short distance south of the Highway 213/Beavercreek Road intersection, on the west side of Highway 213. *See* graphic, *supra*.

[5] Oregon City Municipal Code (OCMC) 17.29.010 describes the MUC zoning district and provides in part:

> "The Mixed-Use Corridor (MUC) District is designed to apply along selected sections of transportation corridors such as Molalla Avenue, 7th Street and Beavercreek Road, and along Warner-Milne Road. Land uses are characterized by high-volume establishments such as retail, service, office, multi-family residential, lodging, recreation and meeting facilities, or a similar use as defined by the community development director."

establish that it is *along* a transit corridor and transportation corridor, as required by OCCP Goal 2.3 and OCMC 17.29.010.

Neither the OCCP nor the OCMC define the terms "along" and "near."[6] Although dictionary definitions of "along" frequently suggest adjacency, the term is sufficiently subjective that we cannot say the city commission's implicit interpretation that the subject property is sufficiently *near* the transit corridor to the northwest to satisfy OCCP Goal 2.3 is "implausible" under the deferential standard of review that LUBA is required to apply to city commission's interpretations of its comprehensive plan under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

Petitioner cites a potpourri of OCCP language, Metro Code language and language from Metro's 2040 Urban Growth Concept to advance an additional argument under his first assignment of error. Petition for Review 8-11. Metro's 2040 Growth Concept Map identifies a number of different Design Types. One of those 2040 Growth Concept Design Types is titled "Corridors." The city's MUC plan designation and MUC-1 and MUC-2 zoning map

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[6] The similar term "nearby" is defined at OCMP 17.04.795:

> "'Nearby,' when used in connection with pedestrian or bicycle access, means uses within one-quarter mile distance which can reasonably be expected to be used by pedestrians, and uses within two miles distance which can reasonably be expected to be used by bicyclists."

Apparently most of the subject property is within ¼ mile of the transit corridor and transit stop located to the northwest of the property. Record 258.

designations were adopted to implement and be consistent with Metro's 2040 Growth Concept Map designations. It is undisputed that the properties with the Corridors Design Type designation on the Metro 2040 Growth Concept Map do not include the subject property. Petitioner contends the city's action to amend its plan and zoning to designate the subject property MUC and zone it MUC-2 is inconsistent with the Metro 2040 Growth Concept Map and Urban Growth Management Functional Plan and therefore violates city, Metro, Statewide Planning Goal and statutory requirements that the city's planning and zoning be consistent with Metro's regional planning.

The parties disagree regarding whether the just identified issue was preserved for LUBA review. Rather than attempt to resolve that disagreement we turn directly to the merits. While it might well be inconsistent to fail to apply the city's MUC plan designation and either the MUC-1 or MUC-2 zones to properties that Metro *has* designated with the Metro Corridor Design Type, none of the authorities cited by petitioner clearly preclude applying the MUC plan designation and MUC-1 or MUC-2 zoning designations to additional properties that do not carry the Metro Corridor Design Type. Petitioner does not identify the Metro 2040 Design Type that applies to the subject property and the map that petitioner asks LUBA to take official notice of is at such a large scale it is not possible to determine what that Design Type is. Without a more developed argument from petitioner, we cannot say the MUC plan

designation and MUC-2 zoning designation are inconsistent with the Metro 2040 Design Type.

The first assignment of error is denied.

NICITA SECOND ASSIGNMENT OF ERROR

Nicita's third assignment of error concerns Statewide Planning Goal 5, and we address that Goal 5 assignment of error on the merits below. In his second assignment of error, Nicita contends he asked the city where he could find the city's Goal 5 inventory, presumably so that he could determine whether the proposal is consistent with applicable Goal 5 requirements. According to petitioner, the city ignored his inquiry and that failure to respond to his inquiry violates Goal 1 (Citizen Participation). [7] Petitioner contends the city's failure to respond to his inquiry also violated the city's adopted citizen participation program.[8]

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[7] Goal 1 requires that a local government citizen participation program must include a number of "components." The fourth required component is set out below:

> "**4. Technical Information -- To assure that technical information is available in an understandable form.**
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> "Information necessary to reach policy decisions shall be available in a simplified, understandable form. Assistance shall be provided to interpret and effectively use technical information. A copy of all technical information shall be available at a local public library or other location open to the public."

[8] OCCP Goal 1.4 states:

The city published notice of this quasi-judicial application for map amendments on September 10, 2015. A planning commission hearing was held on November 9, 2015 at which Nicita appeared and testified. On December 2, 2015, petitioner sent an e-mail message to a city planner with the following text:

> "Hi Laura,
>
> "Hope you had a nice Thanksgiving holiday.
>
> "Hey, where can I review Oregon City's Goal 5 inventory? I can't * * * find any such thing on the City's website.
>
> "Thanks,
>
> "Jim Nicita" Record 1262.

Petitioner did not receive a response to his December 2, 2015 e-mail message before the end of December, 2015, and in his written comments to the planning commission on January 10, 2016, he included the following:

> As will be seen below, statewide planning Goal 5, and section 5 of the Oregon City Comprehensive Plan, are both important criteria for this land use application, as there is a substantial Goal 5 overlay on a part of the site. However, staff has not made the Goal 5 inventory a part of this file, and ignored an inquiry regarding how to obtain and review the Goal 5 inventory. This prejudices the substantial rights of citizens to make informed comment on this land use application. Therefore this application should either be denied or set over until staff makes the Goal 5 inventory public." Record 1246 (citations omitted).

> "Provide complete information for individuals, groups, and communities to participate in public policy planning and implementation of policies."

The planning commission rejected petitioner's argument and closed the record on January 11, 2016. Three days later, the city responded to Nicita's e-mail via e-mail:

> "Thank you for your email. I apologize you have not received a response sooner. Please complete a public records request found on the city's website here and submit the request to our City Recorder at recorder@orcity.org. Please be sure to specify the specific information you are interested [in].We do have several historic inventories and an abundance of information on the Natural Resources Overlay Districts, much of which can be found on our website. Thank you[.]" Nicita Petition for Review, App I.

Nicita and the city dispute a number of points that we need not resolve to dispose of this assignment of error. For purposes of this opinion, we will assume without deciding that Goal 1, component 4 imposes some continuing direct obligation on the city to respond to requests for Goal 5 inventory information when those requests are made during the course of a quasi-judicial post-acknowledgment map amendment proceeding. We will also assume without deciding that OCCP Goal 1.4 imposes a similar obligation.

Although the city does not explain why the city did not respond more promptly to petitioner's December 2, 2015 e-mail request, the city does point out, correctly, that petitioner's December 2, 2015 request does not mention this quasi-judicial proceeding and does not request a response by any particular deadline or convey any particular sense of urgency. The city also contends that the city's ultimate response, which asked that the request be made via a public records request, shows the city was uncertain about the breadth of the request.

Given the casual, broadly stated nature of petitioner's December 2, 2015 inquiry, and petitioner's failure to expressly tie his request to this map amendment proceeding, we do not agree with petitioner that the city's slow response to that inquiry and ultimate response that the inquiry should be made via a more specific public records request violates Goal 1 or OCCP Goal 1.4.

The second assignment of error is denied.

NICITA THIRD ASSIGNMENT OF ERROR

As noted earlier, Goal 5 requires the county to inventory and apply a planning process to protect "Natural Resources, Scenic and Historic Areas, and Open Spaces." Under ORS 197.175(2)(a), comprehensive plan amendments must comply with the statewide planning goals. LUBA is required to reverse or remand a comprehensive plan or land use regulation amendment if it does not comply with the statewide planning goals. ORS 197.835(6); 197.835(7).[9] However, under OAR 660-023-0250(3), the city was not required to apply Goal 5 to the disputed post-acknowledgment comprehensive plan map amendment and zoning map amendment (PAPA) "unless the PAPA affects a Goal 5 resource."[10] Under OAR 660-023-0250(3)(b), the disputed "PAPA affects a

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[9] Under ORS 197.835(7)(b), the statewide planning goals do not apply directly to acknowledged land use regulation amendments, so long as the comprehensive plan has "specific policies or other provisions which provide the basis for the regulation[.]" Respondents do not argue that ORS 197.835(7)(b) applies here.

[10] OAR 660-023-0250(3) provides:

Goal 5 resource" if it "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list."[11]

Apparently the city's acknowledged Goal 5 resource lists, or inventories, for the subject property are not in the record and no party has provided LUBA with copies of the relevant acknowledged Goal 5 resource lists and asked that LUBA take official notice of them.[12] However, it appears to be undisputed the portion of Newell Creek that crosses the southern portion of the property is included on the city's Goal 5 "acknowledged resource list," within the meaning

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> "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
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> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or
>
> (c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area."

[11] In this opinion we assume the terms "Goal 5 resource list" and "Goal 5 inventory" mean approximately the same thing.

[12] As noted in our discussion of Nicita's second assignment of error, he asked the city where he could review "Oregon City's Goal 5 inventory."

of OAR 660-023-0250(3). Following oral argument, the city provided LUBA with maps that show a Natural Resource Overlay District applied to the southern part of the property where Newell Creek is located. Response to Request for Additional Documents. Those maps also show a small portion of the property adjacent to Maple Lane Ct. is subject to a Geologic Hazards and Natural Resources Overlay District which suggests there are inventoried geologic hazards on or near the subject property. Response to Request for Additional Documents.

Petitioner contends that the disputed PAPA authorizes commercial uses that are not allowed under the existing residential map designations and allows significantly higher density development. Petitioner contends that by authorizing these commercial and higher intensity uses, "[t]he PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site," and under OAR 660-023-0250(3)(b) the city must apply Goal 5 in approving the PAPA. However, the city found that Goal 5 does not apply to the PAPA:

> "**Goal 5 – Open Spaces, Scenic and Historic Areas, and Natural Resources**
>
> "**Finding: Not Applicable.** The Oregon City Municipal Code implements the principles of protecting fish and wildlife habitat as well as scenic vistas though the Natural Resource Overlay District as well as the Geologic Hazards Overlay District, which includes protection of sensitive lands. Portions of the subject site are within each overlay district which will be addressed upon submittal of a future application for development of the site. The development proposal does not include construction onsite. Future development

> will include a public review process to verify compliance with all applicable standards within the Oregon City Municipal Code. There are no historic structures or resources located on or adjacent to the subject site. This goal is not applicable." Record 21 (bold type in original).

Nicita contends that because the disputed PAPA authorizes uses "that could be conflicting uses" with Newell Creek and any other inventoried Goal 5 resources on the site, the city erred in finding that Goal 5 does not apply. We agree with Nicita.

In a nutshell, the city's error was in assuming that because no particular development plan has been submitted for approval at this time, and because the Geologic Hazards and Natural Resources Overlay districts have been applied to the property to protect inventoried Goal 5 resources, the city can assume that the Goal 5 resources those overlay districts presumably were applied to protect from the lower density residential uses allowed under the previously applied map designations will be adequately protected from the commercial, higher density development that is now possible by virtue of the PAPA. That may well turn out to be the case. But the city may not simply *assume* that is the case, because OAR 660-023-0250(3)(b) requires that the city conduct an initial inquiry to determine whether new uses allowed under the PAPA "could" conflict with Goal 5 resources. Only if the answer to that question is "no" may the city conclude that Goal 5 does not apply. As part of that initial inquiry, the city could consider whether the city's existing program to protect the inventoried resources from the lower density residential development allowed

under the prior map designations is also adequate to ensure that new more intensive uses will not conflict with protected resources. If a finding to that effect, supported by substantial evidence, can be made, then no further inquiry is needed. However, if the city's initial inquiry cannot eliminate the possibility of conflicts from the new uses allowed by the new map designations, the city must repeat any of the steps in the Goal 5 planning process that are necessary to ensure that the city's Goal 5 obligations with respect to protected resources continue to be met.[13]

We also note that in its brief, intervenor disputes petitioner's contention that the commercial, higher density uses made possible by the new map designations will result in an increased volume and velocity of stormwater and that the storm water will have increased levels of contaminants. However, the challenged decision does not address that question and there is nothing in the record cited to us that would allow us to question petitioner's contention that the commercial, higher density development made possible by the map amendments "could be conflicting uses" with inventoried Goal 5 resources on the property.

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[13] The Goal 5 planning process is set out in significant detail at OAR chapter 660, division 23. OAR 660-023-0040 requires, among other things, identification of uses that may conflict with inventoried significant Goal 5 resources and analysis of the consequences of allowing, limiting or prohibiting those conflicting uses. OAR 660-023-0050 then requires the city to use that analysis of consequences to adopt a program to achieve the goal of protecting Goal 5 resources.

The third assignment of error is sustained.

NICITA FOURTH ASSIGNMENT OF ERROR

Nicita argues that the city's decision does not comply with Statewide Planning Goal 6 (Air, Water, and Land Resources Quality). Goal 6 requires in relevant part that "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."[14] LUBA is required to remand or reverse a comprehensive plan amendment if it is not in compliance with the Statewide Planning Goals. ORS 197.835(6). Remand or reversal is also appropriate if the local government improperly construed the applicable law. ORS 197.835(9)(a)(D).

Petitioner's lengthy assignment of error contains several sub-assignments of error, although not clearly delineated as such, and many of

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[14] Goal 6 is "[t]o maintain and improve the quality of the air, water and land resources of the state" and 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."

petitioner's arguments blend together and at times are difficult to follow. We address each of petitioner's major propositions below as we understand them.

A. Burden of Proof and Relevant Goal 6 Inquiry

As we have already noted, the decision on appeal amends the city's comprehensive plan map from Low and Medium Density Residential to Mixed Use Corridor, and changes zoning map designations from Residential (R-3.5, R-6 and R-10) to Mixed Use Corridor (MUC-2). The previous map designations already allowed development on the subject property. The city's decision does not approve any specific development or authorize any associated stormwater discharges, although the amendment allows an increase in development density and allows some uses that are not allowed under existing designations. Petitioner's arguments under this assignment of error do not appear to appreciate that the city's acknowledged comprehensive plan and land use regulations already allow development of the subject property, so that the disputed amendments merely approve some changes in the nature and intensity of development that is already allowed on the property. Regarding Goal 6, the city commission found in relevant part:

> "Finding: Not Applicable. The development application does not include construction onsite. The proposed zone change and comprehensive plan amendment do not alter existing City protections provided by overlays for natural resources, stormwater rules, or other environmental protections which have been previously deemed consistent with Statewide Planning Goal 6. Goal 6 is satisfied where there is a reasonable expectation that the uses will be able to comply with applicable state and federal environmental regulations. As a result, the public comments[']

> unsubstantiated contention to the contrary misconstrues applicable law. There is a reasonable expectation that the proposed uses will be able to comply with applicable state and federal standards pertaining to stormwater. The City has implemented extensive measures in the [Oregon City Municipal Code] pertaining to stormwater management and erosion control, which will apply at the time of development of the subject property and ensure compliance with these state and federal standards." Record 38.

Based on those findings, we understand the city's position to be that so long as future development occurs in compliance with the Oregon City Municipal Code's [OCMC's] storm water management program, Goal 6 will be satisfied.

Petitioner argues broadly:

> "[r]espondent's findings in the proceeding below constitute legal error, because Respondent misconstrued the applicable law. Specifically, Respondent's implicit premise is that the Oregon's state water quality standards in OAR 340, Division 41 do not apply to the storm water discharges authorized by the Respondent in its approval of this comprehensive plan amendment and zone change." Petition for Review 28-29.

We understand most of petitioner's arguments to be based on his understanding of respondent's "implicit premise." Petitioner argues that notwithstanding the application of the city's storm water management program, the city misconstrued the applicable law by failing to apply the OAR chapter 340, division 41 state water quality standards when approving the disputed map amendments. Petitioner argues that based on Record 15, the shadow plat submitted by the applicant shows storm water drainage systems discharging

directly into Newell Creek.[15] The upper portion of Newell Creek crosses the site parallel to Beavercreek Road. Record 13. We understand petitioner to argue that Newell Creek flows into the Willamette River, and the Willamette River currently violates several OAR chapter 340, division 41 water quality standards.

Petitioner argues that it is the applicant's obligation to show that the application complies with all applicable criteria and, therefore, it is not petitioner's obligation to demonstrate that the decision is inconsistent with Goal 6. However, in *Home Builders Ass'n v. City of Eugene*, 59 Or LUBA 116, 146 (2009) LUBA held that a petitioner must establish "some minimal basis for suspecting that the land use regulation amendment will have impacts on [water] quality that would threaten to violate" applicable standards. According to petitioner, *Home Builders* should not apply in this case because OCMC 17.50.060 states that "[t]he applicant has the burden of demonstrating, with evidence, that all applicable approval criteria, are or can be, met." We understand petitioner to argue that under OCMC 17.50.060, it is incumbent on the applicant to have a consultant test water quality for any of the receiving

[15] We discuss the shadow plat in more detail later in this opinion. We have reviewed Record 15 and other graphics in the record, and it is not clear to us that the record necessarily supports petitioner's proposition that future development will result in direct discharges into Newell Creek. The challenged decision does not approve the shadow plat, or any other development, as the city's findings note.

waterbodies to determine if those waters currently violate water quality standards, and to show that future discharges would not violate applicable standards.

We need not fully address petitioner's contention that *Home Builders* should not apply in this case because, for purposes of OCMC 17.50.060, petitioner fails to explain how the federal Clean Water Act, the OAR chapter 340, division 41 state water quality standards or any other implementing state statutes or rules are directly applicable criteria for this application for map amendments. As explained below, petitioner has not demonstrated why the applicant has the burden to demonstrate that development in the future will strictly comply with federal and state environmental standards, as opposed to demonstrating that it is feasible for that future development to comply with any applicable federal and state environmental standards.

Intervenor argues, and we agree, that the relevant Goal 6 inquiry for a decision that amends comprehensive plan and zoning map designations, without approving any particular new development, is whether there is a reasonable expectation that applicable state and federal environmental quality standards can be met at the time the property is developed in the future. *See Friends of the Applegate Watershed v. Josephine County*, 44 Or LUBA 786, 802 (2003), (at the post-acknowledgment plan amendment stage, a local government need only 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 also cites to the city commission's adopted findings on Goal 6 at Record 38 quoted above. Intervenor argues that Goal 6 does not require the level of detailed analysis that petitioner would require, citing *Nicita v. City of Oregon City*, __ Or LUBA __ (LUBA No. 2016-047, August 15, 2016) (slip op at 15), where LUBA rejected nearly identical arguments regarding the need to demonstrate compliance with applicable state and federal environmental standards in order to satisfy Goal 6 for plan amendments.

We first reject petitioner's argument that the city implicitly adopted the position that Oregon's state water quality standards at OAR chapter 340, division 41 do not apply to the "storm water discharges authorized by [the city] in its approval of this comprehensive plan amendment and zone change." There are two problems with that argument: (1) the city simply did not adopt that position in this decision, and (2) the decision itself does not "authorize[]" any discharges. Accordingly, petitioner's major position does not provide a basis for remand. As explained below, we conclude that this LUBA appeal is not the correct forum to entertain petitioner's arguments about the applicability of particular water quality standards to storm water discharges associated with future development on the property or whether the city's current storm water management program complies with state and federal law.

B. Feasibility of Complying with State and Federal Environmental Standards

Petitioner also argues that the applicant cannot show that it is "reasonable to expect" that future development will comply with storm water standards. Petitioner states that the discharges that will be generated by that future development cannot comply with standards such as the narrative criteria at OAR 340-041-0007(3) (directive for new sources to prioritize alternatives to discharge into public waters).[16] Petitioner also asserts that under *Citizens for Florence v. City of Florence*, 35 Or LUBA 255, 280-282 (1998), where a local government's watershed is already in violation of applicable state or federal environmental standards, the local government cannot amend its plan to allow future development that will compound that violation without either finding that Goal 6 is satisfied or taking an exception to Goal 6. Petitioner argues that the Mid-Willamette Sub-basin of the Willamette River, which includes Newell Creek, currently violates water quality standards for temperature, bacteria, and mercury, and therefore any future discharge into Newell Creek from a new

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[16] OAR 340-041-0007 is entitled "Statewide Narrative Criteria" and provides in relevant part:

> "(3) For any new waste sources, alternatives that utilize reuse or disposal with no discharge to public waters must be given highest priority for use wherever practicable. New source discharges may be approved subject to the criteria in OAR 340-041-0004(9)."

source at the site would violate water quality standards and therefore violate Goal 6.

Intervenor responds that the city commission's findings sufficiently demonstrate that it is feasible for future development to satisfy applicable state and federal storm water standards, and petitioner fails to address or challenge those findings.

Petitioner reads too much into *Citizens for Florence.* In that case, the decision on appeal involved a comprehensive plan amendment to rezone a large parcel from residential to commercial to accommodate a new shopping mall. There, petitioner argued that because the city's existing sewer facilities violated water quality standards and the proposed shopping mall that was made possible by the disputed map amendments would significantly increase sewer flows, the proposed future development would violate or threaten to violate applicable state or federal environmental laws, and therefore, the decision did not comply with Goal 6.

There are two significant differences here that distinguish *Citizens for Florence.* The first significant difference is that petitioner has not explained how future development will violate state or federal environmental laws. The closest petitioner comes to doing that is his contention that the Middle Willamette Sub-basin currently violates three state water quality standards. But petitioner does not make an argument that we can understand, based on that fact, assuming it is a fact, that any additional storm water discharge from

the subject property in the future could not be issued any required state or federal permits or necessarily would constitute a violation of state or federal environmental standards. The second significant difference is that unlike *Citizens for Florence*, where the map amendments were approved to allow approval of a shopping center, in this case no specific development is proposed. A specific development of some sort presumably will be proposed in the future, but none is proposed now.

With regard to petitioner's argument concerning the narrative criteria at OAR 340-041-0007(3), petitioner essentially ignores the city's findings, and the possibility of using detention and infiltration for future storm water management. Petitioner asserts with little explanation that "the applicant's own submission establishes that there is no 'reasonable expectation' that a particular state water [quality standard can] be met, and therefore there is 'some minimal basis for suspecting that the land use regulation amendment will have impacts on'" water quality that would threaten to violate water quality standards. Petition for Review 38. Petitioner asserts that the applicant's consultant provided evidence that storm water runoff cannot be managed on site by infiltration, because the saturated ground could exacerbate the risk of landslide. Record 24, 358-360.

Record 358-360 is part of a technical memorandum from the applicant's consultant that, in contrast to petitioner's characterization, demonstrates that

compliance with state and federal environmental standards is indeed feasible.[17] The record pages cited by petitioner simply do not support his position. Rather,

[17] Record 24 quotes portions of Record 358-360, which provide in relevant part:

> "Our evaluation of localized landsliding found the potential for landsliding within the headscarp to be moderate. We found that the headscarp slope could experience local failures that could potentially adversely affect the site under two cases: very high groundwater conditions or a design seismic event. We consider this hazard to be moderate as it is only likely under extreme cases of these conditions. Groundwater would have to be very high from either prolonged and extreme precipitation and/or excessive on-site infiltration. Likewise seismic shaking would have to be from a substantial magnitude event, the design seismic event. Both of these conditions would occur very infrequently. Our analyses determined that the hazard to the site from such landsliding can be mitigated with setbacks from the headscarp slope and controls for on-site water infiltration. Specific final measures will be determined with additional geotechnical work as development plans are finalized and permitted.
>
> "Similar to the moderate hazard the headscarp slope poses to the proposed development, the development potentially poses a moderate hazard of causing localized landsliding within the headscarp slope if not properly designed. This hazard would occur if development increases groundwater levels within proximity of the slope. Increased groundwater levels could occur from stormwater and other sources of water infiltration that are altered by development. To mitigate for this hazard, potential sources of water infiltration will be controlled, largely by relying on stormwater detention, rather than infiltration. Provided these are adequately controlled, no other special measures to mitigate for adverse effects to the headscarp slope will be necessary. Specific

the consultant explains that with storm water detention and controls for infiltration, landslide hazards are mitigated. Moreover, the planning commission found that the applicant's technical memorandum "notes that mitigation in the form of control of stormwater through stormwater detention rather than infiltration is an appropriate means of mitigation." Record 24. The Planning Commission concluded that "mitigation measures are feasible to be achieved during the subsequent land division and development of the property with appropriate conditions of approval." *Id.*

Accordingly, petitioner has not demonstrated that it is infeasible for future development to comply with Goal 6. This argument does not provide a basis for remand or reversal.

C. Direct Application of State Water Quality Standards

1. ORS 468B.025

Petitioner argues that ORS 468B.025 applies directly to this decision, which generally prohibits discharges that result in water quality standard violations, with exceptions for *de minimis* discharges and certain permit holders.[18] Throughout his assignment of error, we understand petitioner to be

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design of the stormwater system will be completed as development plans are finalized and permitted." Record 359-360.

[18] ORS 468B.025 provides:

"(1) Except as provided in ORS 468B.050 or 468B.053, no person shall:

advocating for the direct application of more stringent state water quality standards notwithstanding separate federal requirements for Municipal Separate Storm Sewer System (MS4) permits, and protections offered under an MS4 permit. Specifically, we understand petitioner to repeat arguments that the Court of Appeals rejected in *Tualatin Riverkeepers v. Oregon Department of Environmental Quality*, 235 Or App 132, 230 P3d 559 , *rev den*, 349 Or 173, 243 P3d 468 (2010).[19] The Court of Appeals explained that basic NPDES

> "(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."

[19] In *Graser-Lindsey v. City of Oregon City*, __ Or LUBA __, (LUBA No. 2016-044, November 22, 2016) (slip op 40, n 20), we rejected this argument made by Petitioner Nicita (which is repeated in the instant appeal) and explained:

> "[ORS 468B.025] 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[s] v. DEQ*,

water quality standards do not apply to permitted municipal storm water permits:

> "Federal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards. 33 U.S.C. § 1311(b)(1)(C); *see Defenders of Wildlife* [*v. Browner*], 191 F.3d at 1163. However, under 33 U.S.C. section 1342(p)(3)(B), dischargers of municipal storm water are not subject to that requirement. *See Defenders of Wildlife*, 191 F.3d at 1165–66. Instead, federal law requires that NPDES permits relating to municipal storm water discharges require reduction of 'the discharge of pollutants to the maximum extent practicable.' 33 U.S.C. § 1342(p)(3)(B)(iii); *see Defenders of Wildlife*, 191 F.3d at 1165 ('§ 1342(p)(3)(B)(iii) creates a lesser standard than § 1311')." 235 Or App at 140, n 10.

> 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." (Emphasis in original.)

To the extent that petitioner argues that future discharges at the site under the city's MS4 permit must strictly comply with state water quality standards, that argument has already been rejected by the Court of Appeals in *Tualatin Riverkeepers*. The court found that storm water discharges regulated under an MS4 permit are subject to less exacting effluent limitations, which for storm water discharges, are controlled under best management practices to the "maximum extent practicable." *Tualatin Riverkeepers*, 235 Or App at 141; 40 CFR § 122.24-26.

Petitioner acknowledges that discharges that are permitted under an MS4 permit are excepted from ORS 468B.025, but asserts that certain instances of discharge are not covered by the protection of an MS4 permit, and therefore could lead to a violation of state and federal law (and prohibited by Goal 6), specifically noting non-point source pollution in the form of sheet flow; water pollution determined by a court to constitute a public nuisance; and "the case where a municipal government plans for development that will result in the discharge of wastes such as storm water." Petition for Review 32. Petitioner also asserts:

> "[n]either Respondent nor the applicant can claim compliance through Respondent's MS4 permit, which only permits Respondent's own stormwater discharges from its own publicly-owned municipal separate storm sewer system. There is no evidence in this proceeding whether the storm water system will be constructed by the applicant will be public or private." Petition for Review 35.

Even if we assume that petitioner made the *prima facie* case that it was reasonable to assume that the future development permitted under the amendment will lead to discharges into Newell Creek, petitioner has not demonstrated that such discharges would necessarily constitute a violation of Goal 6 or "threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards." The applicant could employ a number of storm water best management practices that ensure reductions of discharges to the maximum extent practicable. Petitioner's speculations about non-point source pollution and public nuisance pollution is presumably a function of development in the future that is not approved by this decision, and would not be covered by an MS4 permit. Petitioner fails to adequately develop this argument, and has not demonstrated a violation of Goal 6. Further, petitioner fails to adequately explain his broad position stated at Petition for Review 32 regarding "municipal government plans for development," and how any resulting storm water discharge would reasonably be expected to result in a violation of state or federal standards. Accordingly, this sub-assignment of error does not provide a basis for reversal or remand.

2. OAR Chapter 340

Petitioner asserts that OAR Chapter 340 applies directly to the challenged decision under ORS 197.225 and ORS 197.175(2)(a).[20] Those

[20] ORS 197.175(2)(a) requires that "Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall * * * [p]repare, adopt, amend and

statutes require that the city amend its comprehensive plan in compliance with the statewide planning goals, and that DLCD shall adopt goals and guidelines for the city to amend its comprehensive plan. Petitioner argues that the city cannot merely rely on the exception language of ORS 468B.025, and that the water quality standards in OAR 340, Division 41 apply directly to the challenged decision.

Petitioner's direct application argument is difficult to understand. As noted above, petitioner has failed to demonstrate that the decision approves or will directly result in any discharges that violate OAR 340, Division 41. To the extent that future development will result in storm water discharges, it is our assumption, based on the findings of the city, which petitioner does not address, that the storm water systems put in place at the time of development will ensure that any storm water discharges comply with the regulatory framework of the federal and state storm water programs. Petitioner has provided no reason for us to question the city's position that any future

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revise comprehensive plans in compliance with goals approved by the commission[.]"

ORS 197.225 provides:

> "The Department of Land Conservation and Development shall prepare and the Land Conservation and Development Commission shall adopt goals and guidelines for use by state agencies, local governments and special districts in preparing, adopting, amending and implementing existing and future comprehensive plans."

development and its storm water systems will adequately collect, detain, infiltrate and/or discharge storm water in compliance with state and federal law.

Accordingly, these arguments do not provide a basis for reversal or remand.

D. City's Comprehensive Plan and Zoning Ordinance Do not Comply with Goal 6, ORS 468B.025 and OAR 340, Division 41

In another sub-assignment of error, petitioner argues, that under *Department of Transportation v. Douglas County*, 157 Or App 18, 24-25, 967 P2d 901(1998), in a proceeding on a comprehensive plan amendment, a petitioner can challenge both the particular amendment and "those parts of the comprehensive plan or zoning ordinance that are not subject to the amendment for failure to comply with the Goals." Petition for Review 35-36. Petitioner then argues that petitioner may also challenge the city's entire comprehensive plan for failure to comply with state statutes, specifically ORS 468B.025(1). Petitioner argues that ORS 468B.025(1) "applies directly to a land use decision even if the comprehensive plan or zoning ordinance has never implemented the statute." Petition for Review 36. Petitioner argues:

> "* * * LUBA can not only remand this legislative decision for failure to comply with Goal 6, ORS 468B.025(1)(b), or OAR 340, Div. 41, but also require amendments to the OCCP (* * * Chapter 6 of the OCCP contains no provision pertaining to stormwater runoff as a waste discharge)[,] Title 17 of the Zoning Ordinance, Respondent's Storm Water and Grading Design Standards * * * and OCMC Chapter 13.12, Storm Water Management (because per its adopting Ordinance No, 15-1006, this latter code

> implements Goal 11, but does not implement Goal 6;* * * Compliance at this level would require, at a minimum, amendments incorporating the specific limitations of the water quality standards in OAR 340, Div. 41 as approval criteria for future comprehensive plan amendments, zone changes, and individual development permitting decisions[.]" Petition for Review 36-37.

Petitioner broadly misreads *Department of Transportation v. Douglas County*. In that case, the Court of Appeals held that LUBA had authority to review existing provisions in a local government's land use regulations that the local government did not change when it amended its land use regulations and comprehensive plan. The amendments at issue were adopted to achieve compliance with the Transportation Planning Rule (TPR). Below, LUBA had determined that it lacked authority to review any existing provisions that the local government did not change in its decision, but which petitioners asserted were contrary to the TPR in their unaltered form. The court distinguished the TPR-related amendment in *Department of Transportation* from the plan amendments in *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986). In *Urquhart*, the applicant sought a plan amendment to authorize a use on property that was not included on the county's Goal 5 inventory. The court in *Urquhart* determined that LUBA lacked authority to remand the decision for the county to consider whether the area in question should be added to the county's acknowledged Goal 5 inventory. *Department of Transportation*, 157 Or App at 22. The court explained that in *Urquhart*, the area had not been included in the previously acknowledged Goal 5 inventory,

that the area had been "excluded from the inventory before the [plan] amendment was enacted," and that "any reassessment of the area's omission from the inventory must occur during LCDC's periodic review of the locality's compliance with the goals rather than in the appeal from a particular land use decision[.]" *Id.* But the court concluded that when the land use decision on appeal is one that "expressly indicates that it was intended as an effort to achieve comprehensive compliance with the TPR," which was the case in *Department of Transportation*, it would be "illogical for the existing legislation to be beyond LUBA's scope of inquiry in an appeal from a local decision that purports to contain the enactments necessary to bring the local land use legislation into compliance with the TPR. *Id*. at 23-24.

In the present case, the challenged decision involves only a quasi-judicial plan amendment, and is not an attempt, as was the case in *Department of Transportation*, to bring the city's plan and code into compliance with ORS 468B.025(1) or any other statute or rule.

Petitioner makes other arguments under this subassignment of error that we reject without discussion.

Nicita's fourth assignment of error is denied.

NICITA FIFTH ASSIGNMENT OF ERROR

In this assignment of error, Nicita contends the city adopted inadequate findings regarding wildfire risks. The areas around Newell Creek are identified

in the OCCP as areas of wildfire risk. Goal 7 (Areas Subject to Natural Hazards) is set out in part below:

"**To protect people and property from natural hazards**.

"**A. NATURAL HAZARD PLANNING**

"1. Local governments shall adopt comprehensive plans (inventories, policies and implementing measures) to reduce risk to people and property from natural hazards.

"2. Natural hazards for purposes of this goal are: floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires. Local governments may identify and plan for other natural hazards." (Footnote omitted.)

To implement Goal 7, the city has adopted Policy 7.1.13, which provides:

"Minimize the risk of loss of life and damage to property from wildfires within the city and the Urban Growth Boundary."

The city adopted the following findings addressing Goal 7:

"**Finding: Not Applicable**. Portions of the subject site are within the Geologic Hazards Overlay District as well as the Natural Resources Overlay District, which will subject development to subsequent review to minimize landslide risk as well as to protect the natural resources onsite such as decreased density and vegetated corridors." Record 23.

"This goal is directed at local government obligations to adopt regulations to protect development from landslide and other natural areas. The development proposal does not include any construction onsite. An analysis of compliance with the overlay districts is performed upon submittal of a development application. Therefore, Goal 7 is not applicable. Finally, the various Plan passages quoted by a commenter regarding Newell Creek are descriptive in nature and do not establish any binding requirements." Record 25.

The city commission adopted the following finding to respond specifically to petitioner's wildfire arguments:

> "• The development does not comply with Goal 7 as it is close to many mature trees in an area which is susceptible to wildfires.
>
> "City Response: This goal is directed at local government obligations to adopt regulations to protect development from landslide and other natural areas. The development proposal does not include any construction onsite. An analysis of compliance with the overlay districts is performed upon submittal of a development application. Please refer to the analysis in Goal 7." Record 54.

Petitioner first argues the city erred by not adopting findings that specifically address OCCP Policy 7.1.13. But petitioner does not argue OCCP Policy 7.1.13 imposes any planning obligations beyond those imposed by Goal 7 itself and we do not see that it does. In that circumstance, the city's failure to adopt findings that separately address OCCP Policy 7.1.13 is not remandable error.

With regard to the adequacy of the city's findings under Goal 7 to address wildfire risks, the city's findings note that the property is already planned and zoned for development under its existing acknowledged comprehensive plan, and that under that acknowledged comprehensive plan any development is subject to overlay zones that impose development restrictions to address natural hazards, as required by Goal 7. Petitioner makes no attempt to explain why he believes those development restrictions will be insufficient to address wildfire concerns under the new MUC plan and MUC-2

zoning designations. Without such argument, this assignment of error is insufficiently developed to state a basis for remand.

Nicita's fifth assignment of error is denied.

NICITA SIXTH ASSIGNMENT OF ERROR; GRASER-LINDSEY FIRST ASSIGNMENT OF ERROR (SUBASSIGNMENTS OF ERROR B AND C)

Intervenor used a hypothetical subdivision plat or "shadow plat," to generate a worst case scenario for the traffic that would be generated by the subject property if it were subdivided and developed under the existing comprehensive plan and zoning map designations. Intervenor proposes to impose a limitation on site-generated auto trips (a "trip cap"), to limit development under the new MUC and MUC-2 map designations so that development under the new map designations will be suspended at the point at which additional development would generate traffic that exceeds the traffic that would be generated under the existing map designations' worst case scenario.[21] These measures were taken, in part, to demonstrate that the new designations would not "significantly affect an existing or planned transportation facility," within the meaning of OAR 660-012-0060 and thereby not trigger certain planning obligations and limitations imposed under the Land Conservation and Development Commission's (LCDC's) Transportation

[21] The trip cap presumably was imposed pursuant to the underscored language of OAR 660-012-0060(1)(c) set out below.

Planning Rule (TPR). The relevant TPR language appears at OAR 660-012-0060 and is set out in part below:

> "(1) If an amendment to * * * 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 * * *. A plan or land use regulation amendment significantly affects a transportation facility if it would:
>
> "* * * * *
>
> "(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, <u>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</u>.
>
> "(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." (Italics and underscoring added.)

Nicita also assigns error under a different subsection of the TPR, OAR 660-012-0035(3). We address Nicita's OAR 660-023-0035(3) arguments briefly below, before turning to petitioners' challenges to the shadow plat and trip cap.

A. OAR 660-023-0035(3)

OAR 660-012-0015(3) requires that cities adopt transportation system plans (TSPs). OAR 660-012-0016 requires that city TSPs be coordinated with federally mandated regional transportation plans. OAR 660-012-0025 sets out how TSPs are to address the statewide planning goals. OAR 660-012-0030 sets out how TSPs are to identify transportation needs. And finally, for purposes of this subassignment of error, OAR 660-012-0035(1) requires that a TSP must "be based upon evaluation of potential impacts of system alternatives that can reasonably be expected to meet the identified transportation needs," and OAR 660-012-0035(3) requires:

> "The following standards shall be used to evaluate and select alternatives:
>
> "* * * * *
>
> "(b) The transportation system shall be consistent with state and federal standards for protection of air, land and water quality including the State Implementation Plan under the Federal Clean Air Act and the State Water Quality Management Plan;

> "(c) The transportation system shall minimize adverse economic, social, environmental and energy consequences[.]"

Nicita contends the city was required to adopt findings demonstrating that the disputed map amendments comply with OAR 660-012-0035(3)(b) and (c). After quoting the above-quoted TPR language, Nicita's entire argument is set out below:

> "*See*, *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 403-408, *aff'd* 130 Or App 406 (1994). Petitioner raised this issue below. Rec. 1249, 1254. The applicant did not meet its burden of proof to provide initial evidence on this matter, and Respondent left this provision wholly unaddressed in its findings. Therefore, this decision should be reversed or remanded." Nicita Petition for Review 45.

Petitioner's argument concerning OAR 660-012-0035 to the city below was just as undeveloped as it is in his brief at LUBA. Without some attempt on petitioner's part to explain why he thinks the TSP planning obligations imposed by OAR 660-012-0035(3)(b) and (c) have any bearing on or relevance to a quasi-judicial comprehensive plan and zoning map amendment that makes no changes to the city's acknowledged TSP, we reject this subassignment of error. If petitioner believes the *North Plains* decision he cites stands for the proposition that all comprehensive plan amendments must adopt findings addressing OAR 660-012-0035(3)(b) and (c), petitioner is mistaken.

This subassignment of error is denied.

B. The Shadow Plat

The shadow plat that the city relied on was prepared by intervenor's engineering consultant, Lancaster Engineering. Record 342-51 (January 11, 2016 letter); Record 6016-24 (August 28, 2015 letter). The shadow plat itself appears at Record 347 and 6024. City staff reviewed the shadow plat and concluded that the shadow plat likely would comply with applicable subdivision approval criteria, based on information provided by intervenor's experts. Record 701-10. The staff review specifically found that the shadow subdivision likely would comply with the requirement of the Natural Resources Overlay District and the Geologic Hazards Overlay District, based on information provided by the applicant concerning the water way and geologic hazards located on the site. Record 710. The county's findings include the following summary of the applicant's civil engineer's explanation for why the shadow plat complies with subdivision approval standards:

> "Applicant submitted a shadow plat illustrating a development scenario under the proposed zoning. The shadow plat served two purposes. First, it established a worst-case trip generation scenario for purposes of completing the Transportation Planning Rule ('TPR') analysis. Second, it illustrated a reasonable development plan for the Property to allow the Planning Commission and members of the public a more detailed preview of potential development of the Property. Although opponents contend that the shadow plat was erroneous because it overstated the development potential for the Property, the City Commission denies this contention based upon the testimony of Applicant's civil engineer, Tom Sisul, to the Planning Commission. At the January 11, 2016, public hearing, Mr. Sisul explained that the shadow plat met all City standards applicable to subdivision development, including

> protecting resource buffers, lot sizes, dimensional requirements, and street and block dimensions. He explained that, although some of the lots extend into the buffer area, this is allowed by the OCMC so long as the homes themselves do not encroach into the buffer. Mr. Sisul also explained that the homes would not encroach into the buffer. Mr. Sisul also confirmed that the shadow plat did not include any impermissible flag lots. The City Commission finds that the shadow plat is an accurate illustration of conceptual development that meets the City's current standards and can be relied upon for purposes of calculating the worst-case scenario trip generation and related trip cap." Record 79.

Based on the shadow plat and the applicant's engineer's testimony, the city found:

> "[T]he worst-case scenario development of the site under existing map designations would generate 128 AM peak hour trips and 168 PM peak hour trips. Although Lancaster concluded that the worst-case scenario development under the proposed map designations, without conditions, would generate more trips than the existing map designations, Lancaster found that limiting uses under the proposed map designations to those that would generate no more than 128 AM peak hour and 168 PM peak hour trips would ensure that approval of the amendments would not result in increased traffic volumes in the vicinity of the site. Accordingly, Lancaster recommended that the City impose a trip cap of 128 AM peak hour trips and 168 PM peak hour trips on the site to ensure that the map amendments will not significantly affect any transportation facilities." Record 41.

1. Petitioners' Challenge to the Shadow Plat And Trip Generation Assumptions

a. Failure to Formally Approve the Shadow Plat

Simply stated, petitioners contend the shadow plat overstates the development and the resulting traffic generating potential of the subject property under existing map designations. Petitioners contend this

overstatement of the site's current traffic generating potential leaves the city's findings that the disputed amendments with the trip cap will not significantly affect existing and planned transportation facilities erroneous and unsupported by substantial evidence. Petitioners advance a number of challenges in this regard.

Nicita contends the shadow plat cannot be relied upon for purposes of establishing a trip cap unless an actual application for subdivision approval is submitted, and it is found to comply with all relevant approval standards and approved by the city. We have allowed use of an estimate of the worst case scenario traffic impact under existing planning and zoning in the past without requiring that an applicant formally seek approval of a development proposal under existing planning and zoning. *Willamette Oaks, LLC v. City of Eugene*, 63 Or LUBA 75, 82-85, *rev'd and rem'd on other grounds*, 245 Or App 47, 50, 261 P3d 85 (2011). Petitioners cite no authority for the proposition that for purposes of analysis under the TPR the local government must actually approve the worst-case development scenario in this appeal before it can be used to demonstrate the proposed map amendments will not significantly affect transportation facilities.

Graser-Lindsey asserts a variation on petitioner Nicitia's argument and contends the city should have required the applicant to prepare a traffic impact study, and required that the applicant display the Natural Resources and Geologic Hazards and Flood Management Overlay Districts on the shadow

plats and demonstrate that the shadow plat complies with all requirements imposed by those overlays, as well as any other requirements that must be satisfied to approve the shadow plat. We reject those arguments for the same reason we rejected Nicita's contention that a shadow plat that is submitted for purposes of demonstrating that proposed map amendments will not increase traffic impacts beyond the impacts already possible with development under existing planning and zoning must receive formal review and approval by the city. Intervenor is not seeking approval of the 107-lot development shown on the shadow plat; rather intervenor submitted the plat for a more limited purpose under the TPR.

The applicant explained why it believes the shadow plat accurately displays the worst-case scenario development under existing planning and zoning, notwithstanding the presence of Newell Creek, floodplains and geologic hazards on the site. The county staff similarly reviewed the shadow plat and concluded it likely could be approved under relevant subdivision and development standards. We agree with intervenor that petitioners have not established that a reasonable decision maker would not rely on the applicant's and staff's explanations to conclude that the shadow plat accurately depicts the worst case level of development possible under existing planning and zoning for purposes of traffic generation, notwithstanding the presence of natural, flood and geologic hazards on the site.

b. Trip Generation Assumptions

Graser-Lindsey also challenges several of intervenor's assumptions, for purposes of generating the worst-case traffic scenario for the subject property under the existing planning and zoning.

Graser-Lindsey first contends it was not realistic to assume an accessory dwelling would be constructed on each lot. Petitioner also argues that the shadow plat lots that are only 20 feet wide do not comply with OCMC 17.16.040(B), which requires a minimum lot width of 25 feet.

We are not certain which 20-foot-wide lots petitioner is referring to. Petitioner's entire argument is set out below:

> "The 20 ft wide lots (Rec. 42 bottom) don't comply with OCMC 17.16.040 B which specifies a minimum width of 25 ft. Appendix 8.5. Graser-Lindsey Petition for Review 21.

The map that is reproduced on Record 42 is at such a small scale that it is impossible to determine how wide the lots are. It appears from the oversized copy of the shadow plat that is included in the record that the smallest lots are at least 25 feet wide, or very close to it. Petitioner may be referring to the finding on Record 42 that "each proposed lot's street frontage is in excess of twenty feet." Record 42. If that is the basis for petitioner's argument that some of the lots are only 20 feet wide, she makes no attempt to explain why she thinks a finding that all lots have "*street frontage* * * * in excess of twenty feet" means some unspecified lots are only 20 feet *wide*. Street frontage and lot width are different things.

Petitioner's lot width argument it is not sufficiently developed for review. The city found that the shadow plat lots all comply with "minimum lot width, depth and applicable minimum lot sizes (including averaging identified in OCMC 16.12.050 and density transfers in OCMC 17.49.240)." Record 50. Petitioner's lot width arguments are not sufficient to demonstrate error in the city's finding that the lots comply with minimum lot width requirements.[22]

Intervenor responds that in computing a worst case traffic generation scenario under existing planning and zoning under the TPR, it is permissible for the city to assume development will take advantage of the full array of opportunities under existing regulations, which include accessory dwellings and lot size averaging. Petitioner does not argue the accessory dwellings are not authorized under the OCMC and has not established that the shadow plat proposed 20-foot wide lots. We agree with intervenor that petitioner has not established that the assumptions underlying the shadow plat, including

[22] Intervenor argues OCMC 16.12.050 authorizes lots to be "up to 20 percent less than the required minimum lot area of the applicable zoning designation provided the entire subdivision on average meets the minimum site area requirement of the underlying zone." Intervenor suggests the city may have been relying on OCMC 16.12.050 to approve 20-foot-wide lots. Intervenor misreads OCMC 16.12.050. OCMC 16.12.050 authorizes a 20 percent reduction in *lot size*, it does not authorize a 20 percent reduction in the minimum *lot width*. The shadow plat relies on OCMC 16.12.050 to show lots that are smaller than the required minimum lot size. However, as already explained, we do not understand the city to have relied on OCMC 16.12.050 to allow the shadow plat to show 20-foot-wide lots.

assumptions regarding the number of accessory dwellings, constitute remandable error.

Petitioner also challenges the assumption that accessory dwellings would generate traffic at half the rate of single-family dwellings. And finally, petitioner contends intervenor's assumptions should have taken into account the fact that the TSP calls for an increase in alternative modes of transportation and a reduction of single occupancy vehicle trips by the end of the planning horizon. Intervenor responds that its transportation engineer pointed out that the city calculates system development charges for accessory dwelling units at one half the rate charged for single family dwellings, and since system development charges are based on the impacts of uses that assumption is reasonable. Intervenor also contends that general statement in the TSP is not something intervenor was required to attempt to account for in its worst-case transportation impact scenario. We agree with intervenor on both points.[23]

C. The Trip Cap

As we have already explained, intervenor's engineer established that under the worst-case scenario development under existing planning and zoning, the subject property could be expected to "generate 128 AM peak hour trips and 168 PM peak hour trips." Record 41. The city imposed the trip cap

[23] Intervenor's engineer also testified that a higher trip rate would result if the accessory dwelling units were treated instead as apartments, making the one-half single-family dwelling rate more conservative. Record 343.

intervenor recommended as a condition of approval to limit the trips that would be generated under the approved map designations to no more than that number of AM and PM trips:

> "Future development on the site shall be limited to uses that in aggregate produce no more than 128 trips during the AM peak hour and no more than 168 trips during the PM peak hour. No development shall be permitted that exceeds either value. All applicants seeking to develop new or alter existing uses on the property shall submit an accounting of the trips generated through previously approved land use actions and business licenses for the entire subject site associated with the proposal and demonstrate that the proposal complies with both the maximum AM and PM peak hour trip caps. In order to keep an accurate tally of trips over time, the City will review this accounting either: (1) as part of the land use review required for the development, in cases where no business license is required; (2) as part of reviewing an application for a business license, in cases where no land use review is required; or (3) both, where a land use approval and a business license are required. * * *" Record 11.

Graser-Lindsey contends that under OAR 660-012-0060(1)(c) a trip cap is only acceptable to avoid a significant affect on an existing or planned transportation facility, if it is "an enforceable, ongoing requirement that would demonstrably limit traffic generation[.]" We understand petitioner to take the position, based in part on intervenor's statements below that it might seek an increased trip cap in the future, that the trip cap is not ongoing and enforceable.

Intervenor contends the above-quoted condition is an enforceable ongoing requirement, because it is a condition of the map amendment approval decision, and has no expiration date. We understand intervenor to contend that condition will be sufficient to "demonstrably limit traffic generation" so that

the stated trip cap trips will be enforced because the condition sets out how the necessary information regarding trips will be collected and accounted for to determine when development reaches the 128 AM and 168 PM trips and the condition itself stops further development at that point. Intervenor contends petitioner makes no attempt to explain why this procedure is inadequate to ensure compliance with the trip cap in the future. We agree with intervenor.

Nicita's sixth assignment of error, and subassignments of error B and C under Graser-Lindsey's first assignment of error, are denied.

SEVENTH ASSIGNMENT OF ERROR (NICITA)

In his seventh assignment of error, petitioner argues he was denied the impartial tribunal to which he is entitled in this quasi-judicial land use proceeding under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973). According to Nicita, *Fasano*'s impartial tribunal requirement is intended to protect land use decisions "against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government[.]" 264 Or at 588.

As we have noted earlier, intervenor is the applicant in this matter. Dan Fowler and his former wife Patricia Jennings are majority owners of intervenor's LLC. Petitioner contends Dan Fowler, Patricia Jennings and intervenor placed "irresistible pressure" in this matter on Mayor Dan Holladay and Oregon City Commission Members Brian Shaw and Carol Pauli to approve the disputed application.

In support of that contention Nicita contends intervenor owns a significant amount of real estate in the city and has purchased a number of properties outside formal bidding processes from Oregon City and the Oregon City School District, including a portion of the subject property. Nicita, a former City Commissioner, cites long running disputes between himself and Dan Fowler, which included petitioner's opposition to a different proposed land development, the Rivers Mall, following which Fowler and Jennings "engineered the recall of Petitioner from his [City] Commission seat." Nicita Petition for Review 49. Petitioner contends the organization formed to recall him from his city commission seat "morphed into a political organization called the Oregon City Business Alliance, whose headquarters address is the same as [intervenor] Historic Properties LLC." *Id.* Petitioner contends the election of the above-noted mayor and city commissioners is directly attributable to the efforts of Fowler, Jennings and the Oregon City Business Alliance. Nicita argues:

> "There is no way that this proposal would result in anything other than an approval. It is a casebook example of 'under the irresistible pressure asserted by private economic interests on a local government.' The tribunal was not impartial. The decision must be reversed or remanded, and decided with an independent hearings officer." Petition for Review 49-50.

As we explain briefly below, there are a number of problems with petitioner's seventh assignment of error.

Initially, since this is an application for amendments to the city's comprehensive plan and zoning maps, action by the City Commission would appear to be required to amend those documents, both of which are city legislation. Having this matter finally decided by a hearings officer as Nicita suggests does not appear to be an option, since we are aware of no authority for a city hearings officer take action to amend city land use legislation. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405, 415 (2016).

More importantly, petitioner misunderstands the high bar that is set for disqualifying bias under *Fasano*, particularly as recently clarified by the Oregon Court of Appeals in *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014). If petitioner is arguing that LUBA may conclude that the city decision to approve the map amendments in this case is a product of irresistible economic pressure by Fowler, Jennings and intervenor because they and an organization they support own property in Oregon City, some of that property was purchased from the city and school district, and Fowler and Jennings and an organization they created and belong to helped elect the mayor and city councilors, we reject the argument. We are aware of no case that even remotely provides support for such a sweeping proposition. To the contrary, the Court of Appeals has recognized that members of local governing bodies are routinely elected *because* they champion particular interests of the citizenry, and presumably rely at least in part on those interests to be elected. *Columbia Riverkeeper*, 267 Or App at 599; *Eastgate Theatre v.*

Bd. of County Comm'rs, 37 Or App 745, 752-53, 588 P2d 640 (1978). And as the city points out, contributing money to assist a candidate in an election is protected free speech under *Citizens United v. Federal Election Commission*, 558 US 310, 130 S Ct 876, 175 L Ed 2d 753 (2010). Therefore, it seems highly unlikely that contributing financial assistance to a candidate in an election, alone, could ever be found to constitute, or support an inference of, the kind of "irresistible pressure[] * * * asserted by private economic interests on local government" that could call into question the impartiality of that candidate as a member of a quasi-judicial land use tribunal.

If petitioner is making a broader argument that LUBA should also take into consideration petitioner's long running political disputes with Fowler, we reject that argument as well. In *Columbia Riverkeeper* the Court of Appeals reviewed a number of Oregon Appellate Court cases that explored the issue of disqualifying bias and explained:

> "All told, no single case in Oregon establishes what is necessary for a party to prove actual bias by an elected official in quasi-judicial land-use proceedings such as this one. Generally, we can glean the following. The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's 'intense involvement in the affairs of the community' or 'political predisposition' is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.

> "In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. First, the scope of the 'matter' and 'question at issue' is narrowly limited to the specific decision that is before the tribunal. Second, because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And third, the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented. *Beck v. City of Tillamook*, 113 Or App 660, 662–63, 833 P2d 1327 (1992) (adopting LUBA's statement of the standard for prejudgment bias)." 267 Or App at 602 (original italics omitted).

Petitioner has not come close to demonstrating disqualifying bias. It certainly appears that Fowler and Jennings (neither of whom is the decision maker in this appeal) are intensely involved "in the affairs of the community" and politically predisposed in ways that differ from petitioner. However, such involvement and predisposition, in and of itself is simply not a basis for finding bias, even if their involvement and predispositions could be imputed to the mayor and city councilors by virtue of Fowler's and Jenning's and the Oregon City Business Alliance's support for their election. But perhaps equally importantly, petitioner is inviting LUBA to doubly compound the mistake it made in *Oregon Pipeline Company LLC v. Clatsop County*, 69 Or LUBA 403, *rev'd and rem'd*, 267 Or App 578, 341 P3d 790 (2014) where LUBA took into consideration the course of actions taken by a county commissioner in opposing various liquefied natural gas proposals over a number of years in deciding whether the county commissioner should be disqualified for bias in an appeal of a particular liquefied natural gas facility, rather than limiting LUBA

review solely to actions taken in the "specific decision" for the particular liquefied natural gas facility that was before LUBA in that appeal. Here Nicita relies almost exclusively on actions that were taken by persons other than the decision makers, which have nothing to do with the disputed application for map amendments, and invites LUBA to infer from those unrelated actions that Fowler and Jennings exercise irresistible economic pressure on Mayor Holloway and City Councilors Shaw and Pauli. That invitation is flatly inconsistent with the Court of Appeals' decision in *Columbia Riverkeeper*, which requires that our focus be limited to the present matter, and for that reason we decline the invitation.

Nicita's seventh assignment of error is denied.

GRASER-LINDSEY FIRST ASSIGNMENT OF ERROR (SUBASSIGNMENTS OF ERROR A AND D).

We have already addressed subassignments of error B and C under Graser-Lindsey's first assignment of error in our discussion of Nicita's sixth assignment of error, *supra*. In subassignment of error A, Graser-Lindsey contends the city failed to demonstrate the disputed amendments comply with Statewide Planning Goals 11 (Public Facilities and Services) and 12 (Transportation) as well as a large number of comprehensive plan Goals that the city adopted to comply with and implement those goals. In subassignment of error D, Graser-Lindsey contends the disputed amendments violate the statewide planning goal, OCCP and OCMC requirements for adequate sewer facilities to support the disputed amendments.

A. Subassignment of Error A (Inadequate Transportation Facilities)

OCMC 17.68.020 sets out the following criteria for a zoning map amendment:

> "A. The proposal shall be consistent with the goals and policies of the comprehensive plan.
>
> "B. That public facilities and services (water, sewer, storm drainage, transportation, schools, police and fire protection) are presently capable of supporting the uses allowed by the zone, or can be made available prior to issuing a certificate of occupancy. Service shall be sufficient to support the range of uses and development allowed by the zone.
>
> "C. The land uses authorized by the proposal are consistent with the existing or planned function, capacity and level of service of the transportation system serving the proposed zoning district.
>
> "D. Statewide planning goals shall be addressed if the comprehensive plan does not contain specific policies or provisions which control the amendment."

Citing the OCMC 17.68.020(B) requirement for adequate public facilities, the Goal 11 and 12 requirements for adequate public facilities and transportation facilities, and a number of OCCP Goals that express the same requirements with additional requirements for safe transportation facilities, Graser-Lindsey contends the city failed to show the disputed rezoning complies with these statewide planning goal, OCMC and OCCP requirements. Graser-Lindsey Petition for Review 4-12.

The city's findings and Graser-Lindsey's arguments under this subassignment of error are not always easy to follow. But the simple response

to this subassignment of error is that the city relied in large part on the trip cap that we discussed earlier in this opinion. That trip cap will ensure that the traffic that will be generated under the approved map amendments will not exceed the traffic that would be possible without the disputed amendments, without further action by the city. Therefore, the disputed amendments will have no increased impact on transportation or other public facilities:

> "* * * The testimony from affected agencies that adequate public facilities and services are available to serve the proposed development supports this conclusion. These Goals are also satisfied for reasons set forth in response to OCMC 17.68.020.B in this report, which reasons are incorporated herein by reference. The amendment is accompanied by a trip cap that will directly affect the potential impact on the transportation system. It can be reasonably assumed that the cap placed on trip generation will have a similar limiting effect on all other elements of the public infrastructure. With the transportation trip cap and elimination of some of the permitted and conditional uses that would otherwise be permitted or considered, the Goals and their associated Policies will all be fully satisfied and fulfilled without any undue or significant impact on these facilities and services as a result of the proposed comprehensive plan amendment and zone change. For these reasons, the applications are consistent with Goal 11 and the applicable Plan provisions that implement Goal 11." Record 30.

The city adopted similar findings to address the Statewide Planning Goal 12, and the OCCP Goal 12 policies cited by petitioner. Record 32-34; 39.

Petitioner appears to argue that the OCCP Goals they cite must be applied literally and it was error on the city's part to assume that the cited statewide planning goals, OCMC requirements and OCCP goals and policies (which collectively call for adequate and safe transportation facilities) are

satisfied, simply because the trip cap means the map amendments will have no impact on transportation and other public facilities beyond the impact that existing map designations could have. We reject the argument. The city did not err by considering what the impact of the disputed amendments would be on transportation and other public facilities and determining that because there will be no impacts beyond the impacts that could result under existing map designations, the amendments are consistent with the cited statewide planning goals, OCMC requirements and OCCP Goals.

This subassignment of error is denied.

B. Subassignment of Error D (Inadequate Sewerage Facilities)

In this subassignment, Graser-Lindsey relies in part on OCMC 17.68.020(B), which was set out in our discussion of subassignment of error A above, and requires "[t]hat public facilities and services (water, sewer, storm drainage, transportation, schools, police and fire protection) are presently capable of supporting the uses allowed by the zone, or can be made available prior to issuing a certificate of occupancy. Service shall be sufficient to support the range of uses and development allowed by the zone." Graser-Lindsey also cites Statewide Planning Goal 11 and OCCP goals that similarly require adequate public facilities. In this subassignment of error, Graser-Lindsey

contends the records shows there is inadequate sewer capacity to serve the subject property.[24]

Intervenor cites the following finding that the city adopted to address OCMC 17.68.020.B:

> "This standard requires that public facilities and services are presently capable of supporting uses allowed by the zone, or can be made available prior to issuing a certificate of occupancy. The applicant has not proposed any development at this time. As demonstrated below, the range of uses within the 'MUC-2' Mixed Use Corridor 2 District may be served by public facilities and services.
>
> "* * * * *
>
> "Sewer: Sanitary sewer infrastructure is within nearby streets abutting the subject properties. This infrastructure is situated such that extension and upgrading of the system can reasonably be accomplished in conjunction with subsequent development applications.
>
> "* * * * *." Record 35.

Graser-Lindsey argues the city "does not provide data to demonstrate 'adequate' sanitary sewer is available."

The evidence cited by petitioner suggests there may be capacity and sewer surcharging concerns in the future if improvements are not made to the

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[24] Petitioner cites pages of the city's Sewer Master Plan that anticipate improvements will be needed to the sewer line in Beavercreek Road to address surcharging concerns. Petition for Review Appendix 13.5. Petitioner also cites Record 1181-1183 for the proposition that "[t]he sewer district itself is lacking the needed [sewer] capacity." It is not entirely clear to us what Record pages 1181-1183 show.

sewer system that the subject property will rely on. But the city found that the system can be upgraded to adequately serve the subject property. The applicant took the position in the application that the sewer system can be improved to adequately serve the subject property. Record 261, 263. While the application is admittedly short on details on how sewer facilities will be improved to adequately serve the subject property when it is developed in the future, we agree with intervenor that a reasonable decision maker could conclude from the record that adequate sewer facilities can be made available at the time they are needed, when development is proposed in the future.

This subassignment of error is denied.

Subassignments of error A and D under Graser-Lindsey's first assignment of error are denied.

GRASER-LINDSEY SECOND ASSIGNMENT OF ERROR

In this assignment of error, Graser-Lindsey argues the city commission erred by rejecting evidence that was submitted to the city commission at and prior to its March 2, 2016 public hearing in this matter and erred by not more clearly stating its evidentiary ruling.

A. Error to Reject New Evidence

The planning commission opened its public hearing in this matter on November 9, 2015 and accepted evidence from all parties. That public hearing was continued first to November 30, 2015 and then again until January 11, 2016. At that public hearing the planning commission accepted additional

evidence and then closed the public hearing and evidentiary record. The applicant was allowed until January 18, 2016 to submit final legal arguments. At its January 25, 2016 meeting to deliberate and adopt its recommendation to the city commission, the planning commission denied requests by petitioners Graser-Lindsey and Nicita to accept additional evidence. Record 73. The planning commission then voted on January 25, 2016 to recommend approval of the requested map amendments, with conditions.

At its March 2, 2016 public hearing, the city commission rejected a number of documents that were submitted after the planning commission closed the record on January 11, 2016.

> "[T]he City Commission considered whether the following pieces of written testimony, all received after the close of the Planning Commission record, should be accepted into the record:
>
> "■ February 22, 2016 letter from K. Browning
>
> "■ February 25, 2016 letter from P. Edgar
>
> "■ February 29, 2016 letter from P. Edgar
>
> "■ March 2, 2016 letter from P. Edgar
>
> "■ March 2, 2016 letter from C. Kosinski
>
> "The City Commission concluded that each of these items included new evidence and issues not raised before the Planning Commission. * * *. As a result, the City Commission approved a motion, 5-0, to reject these five items and not include them in the

record for this matter. No one objected to the City Commission's actions."[25] Record 76-77.

Although petitioner contends the city commission's rejection of that evidence violated Statewide Planning Goal 1 (Citizen Involvement), we agree that the general directives set out in Goal 1 do not apply in a quasi-judicial map amendment case like this one, where the city's adopted and acknowledged citizen involvement program is not being amended. Petitioner also relies on the notice of hearing that the city provided, which petitioner contends guaranteed parties a right to submit new evidence until the close of the public hearing conducted the by city commission on March 2, 2016. We set out below the text of the city's November 18, 2015 notice of hearing, in part:

> "On Monday, January 11, 2016, the City of Oregon City Planning Commission will conduct a public hearing at 7:00 p.m., and on Wednesday, February 17, 2016, the City of Oregon City – City Commission will conduct a public hearing * * * on the following Type IV Applications. Any interested party may testify at the public hearings or submit written testimony at or prior to the close of the City Commission hearing.
>
> "ZC 15-03: Zone Change from R-3.5 Dwelling District, R-6 Single-Family Dwelling District and R-10 Single-Family Dwelling District to 'MUC-2' Mixed Use Corridor-2
>
> "PZ 15-01: Comprehensive Plan Amendment from Low Density Residential and Medium Density Residential to Mixed Use Corridor
>
> "* * * * *

[25] Petitioner disputes the finding that no one objected to the city commission's action. We address that question later in this opinion.

> "Any interested party may testify at the public hearing and/or submit written testimony at or prior to the close of the City Commission hearing. * * * The public record will remain open until the City Commission closes the public hearing. Please be advised that any issue that is intended to provide a basis for appeal must be raised before the close of the City Commission hearing, in person or by letter, with sufficient specificity to afford the Commission and the parties an opportunity to respond to the issue. Failure to raise an issue with sufficient specificity will preclude any appeal on that issue. Parties with standing may appeal the decision of the City Commission to the Land Use Board of Appeals. *Any appeal will be based on the record. The procedures that govern the hearing will be posted at the hearing and are found in OCMC Chapter 17.50 and ORS 197.763*." Record 5754 (Original boldface omitted; underscoring and italics added).

We agree with Graser-Lindsey that a person reading the above notice could easily understand from the underlined text that he or she could submit new evidence any time before the close of the public hearing before the city commission.

In rejecting the proffered evidence at its March 2, 2016 public hearing, the city commission relied on OCMC Chapter 17.50, which is referenced at the end of the above notice in the italicized text, specifically OCMC 17.50.030(D).[26] The city apparently interprets the italicized text in OCMC

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[26] OCMC 17.50.030(D) provides:

> "Type IV decisions include only quasi-judicial plan amendments and zone changes. These applications involve the greatest amount of discretion and evaluation of subjective approval standards and must be heard by the city commission for final action. The process for these land use decisions is controlled by ORS 197.763. At the evidentiary hearing held before the planning commission, all

17.50.030(D) to limit the city commission's review of a planning commission recommendation on a Type IV quasi-judicial map amendment to the issues that were raised before the planning commission and to the evidentiary record compiled by the planning commission. The city points out that the February 11, 2016, January 4, 2016, and October 30, 2015, staff reports all set out the text of OCMC 17.50.030(D) and pointed out that the city commission public hearing would be limited to the planning commission record. Record 12, 4666, 5830. That point was made again in a planning staff power point presentation at the March 2, 2016 city commission meeting. Record 3313.

The city first raises a waiver defense, arguing petitioner failed to raise before the city the issue it raises in this assignment of error. The difficulty with the city's waiver defense, as stated, is that the city cites and relies on ORS

> issues are addressed. If the planning commission denies the application, any party with standing (i.e., anyone who appeared before the planning commission either in person or in writing within the comment period) may appeal the planning commission denial to the city commission. If the planning commission denies the application and no appeal has been received within fourteen days of the issuance of the final decision then the action of the planning commission becomes the final decision of the city. If the planning commission votes to approve the application, that decision is forwarded as a recommendation to the city commission for final consideration. *In either case, any review by the city commission is on the record and only issues raised before the planning commission may be raised before the city commission*. The city commission decision is the city's final decision and is subject to review by the land use board of appeals (LUBA) within twenty-one days of when it becomes final." (Emphasis added.)

197.763(1), which requires that parties raise issues "not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government." The city takes the position that the final evidentiary hearing occurred on January 11, 2016, and the planning commission closed the evidentiary record on that date. At that point, it is at least questionable whether the city's somewhat ambiguous notice of hearing and the planning staff reports were sufficient to require petitioners to raise the issue before planning commission. The city's position regarding whether the city commission would limit its review to the planning commission record did not really become clear until the city commission's March 2, 1016 public hearing, where the city's attorney so stated at the beginning of the hearing. Record 2298.

We reject the city's waiver defense and turn to the merits. Under our decision in *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5, 24-25 (2010), *aff'd* 240 Or App 738, 247 P3d 767, *rev den*, 350 Or 573, 258 P3d 1239 (2011), a city is obligated to allow a party to submit new evidence if (1) a party reasonably relies on its notice of hearing to believe that he or she is entitled to submit new evidence at that hearing, and (2) denying the party the right to submit new evidence could prejudice that party's substantial rights. To put it charitably, the city's notice of hearing, viewed by itself, does not state the city commission's public hearing would be limited to the evidentiary record compiled by the planning commission and does not appear to place any limits on the "testimony" that may be submitted to the city commission. But the

notice does include a reference to OCMC Chapter 17.50, and OCMC 17.50.030(D) makes it reasonably clear the city commission's public hearing is limited to the evidentiary record compiled by the planning commission. And the relevant text from OCMC 17.50.030(D) was set out in the planning staff reports that were issued prior to the planning commission hearings. Although the notice is ambiguous, we agree with the city that the notice of hearing does not clearly give petitioner a right to submit *new evidence* as part of his "testimony" to the city commission, after the planning commission closed the evidentiary record on January 11, 2016. The city therefore did not err in closing the evidentiary record on January 11, 2016, pursuant to OCMC 17.50.030(D), and refusing to accept new evidence submitted after that date.

Subassignment of error A is denied.

B. Lack of Clarity in its Evidentiary Ruling

We understand Graser-Lindsey to argue in this subassignment of error that the city commission was not clear in its evidentiary ruling on March 2, 2016 and may have only intended to reject "mere numbers or 'sentences', 'paragraphs' and 'portions" of a letter from the record." Graser-Lindsey Petition for Review 34.

The city commission's decision includes the following ruling: "[T]he City Commission approved a motion, 5-0, to reject these five items and not include them in the record for this matter." Record 77. The transcript attached to the petition for review shows that the commissioner making the motion

stated: "I would move not to consider any of this additional information." Graser-Lindsey Petition for Review, App 22-3. We agree that the city commission was sufficiently clear that it wished to reject the five documents in their entirety, because they raised new issues and contained new information, rather than attempt to redact those documents to adopt a more surgical rejection.

Subassignment of error B is denied.

Graser-Lindsey's second assignment of error is denied.

GRASER-LINDSEY THIRD ASSIGNMENT OF ERROR

In her third assignment of error, Graser-Lindsey argues the challenged decision to change the map designations of the subject properties from their existing residential designations to mixed use designations violates Statewide Planning Goal 10 (Housing).

The city findings addressing Goal 10 incorporate its findings addressing the similar housing planning requirements imposed by the city's comprehensive plan housing goals. Record 39 (incorporating the findings that appear at Record 25-27). Those incorporated findings explain that the city has taken a number of different actions over the years to expand its capacity for housing units to exceed the 6,075 units identified in the comprehensive plan as needed through 2017. Those findings also explain that the MUC designation and MUC-2 zoning allow assisted living facilities, for which there is a need, and allow multi-family housing, for which the city has increased its target to 25

percent of the total housing mix. Petitioner makes no attempt to explain why these findings are inadequate to demonstrate the decision complies with Goal 10, except to suggest the city should have relied on a more recent Metro Urban Growth Report. The city did not err by relying on information that is a part of its acknowledged comprehensive plan, and failing to take into consideration other information that is not part of the comprehensive plan. *D.S. Parklane Development, Inc. v. Metr*o, 165 Or App 1, 22, 994 P2d 1205 (2000); *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005); *DLCD v. City of Warrenton*, 40 Or LUBA 88, 98 (2001).

Graser-Lindsey's third assignment of error is denied.

The city's decision is remanded for the reasons set out in our discussion of Nicita's third assignment of error.