BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BARBARA RENKEN, RAY RENKEN,
and GREGORY PATRICK STONE,
Petitioners,

vs.

CITY OF OREGON CITY,
Respondent,

and

HIDDEN FALLS DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2018-092

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

James J. Nicita, Oregon City, filed the petition for review and argued on behalf of petitioners.

Carrie A. Richter, Portland, filed a joint response brief and argued on behalf of respondent. With her on the brief was Bateman Seidel, P.C., and Schwabe, Williamson & Wyatt, P.C.

Michael C. Robinson, Portland filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were Garrett H. Stephenson and Schwabe, Williamson & Wyatt, P.C., and Bateman Seidel, P.C.

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

AFFIRMED 01/24/2019

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city decision approving the annexation and rezoning of 92 acres for urban development.

MOTION TO WITHDRAW

Intervenors-petitioners Lisa Novak and Robert La Salle move to withdraw as parties in this appeal. The motion is granted.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address four alleged "new matters" raised in the joint response brief.[1] Intervenor-respondent Hidden Falls Development, LLC (intervenor) filed a motion to strike portions of the reply brief and a response to other portions. Petitioners filed a response to the motion to strike. Intervenor opposes sections two and four of the reply brief, arguing that these sections do not respond to "new matters" within the meaning of OAR 661-010-0039 (2017). Section two addresses a response arguing that inadequacies in certain findings are, essentially, harmless error. Section four

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[1] OAR 661-010-0039 (2017) provided, as relevant:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies within seven days of the date the respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief, state agency brief, or amicus brief. * * *"

addresses a response that one of petitioners' arguments is a collateral attack on the city's comprehensive plan. Responses that assignments of error should be denied because the alleged error is harmless or the assignment constitutes a collateral attack are appropriate subjects for a reply brief. The reply brief is allowed, and the motion to strike is denied.

We note that in its motion to strike and response, intervenor also offers a rebuttal to sections one and three of the reply brief. Our rules do not provide for written rebuttals to the otherwise permissible substance of reply briefs. Accordingly, we do not consider that portion of intervenor's pleading for any purpose in this appeal.

FACTS

The subject property is a 92-acre area that is subject to the Park Place Concept Plan (Concept Plan), adopted by the city in 2007 after the subject property and other properties were included in Metro's urban growth boundary (UGB), and in 2008 acknowledged by the Department of Land Conservation and Development (DLCD). The Concept Plan is adopted as an ancillary plan to the city's comprehensive plan, and contemplates that the subject property will be developed with a mix of low-density residential, medium-density residential, and neighborhood commercial uses. As described in a city staff report, the Concept Plan

> "provides a foundation for urbanization of the Park Place area brought into the City's Urban Growth Boundary (UGB) in 2002. The Park Place Concept Plan addresses annexation, urban services,

> residential density and design, housing, commercial and employment uses, transportation, natural resources, public facilities and services, schools, roads, and developable and unbuildable lands." Record 130.

To implement the Concept Plan, the city amended its comprehensive plan map to designate the appropriate portions of the subject property Low-Density Residential (LDR), Medium Density Residential (MR) and Mixed Use Corridor (MUC). The county also zoned the property Future Urban 10-acre (FU-10), a rural zone that is intended to preclude development inconsistent with the property's later urbanization. A portion of the subject property includes sections of Livesay, Newell and Abernathy Creeks, which are designated natural resources that are protected by the city Natural Resources Overlay District (NROD).

In 2018, the owners of property within the subject area applied to the city to annex their properties and rezone them from the county's FU-10 to city zones that implement the LDR, MR and MUC plan designations, specifically the R-6, R-10 and NC (Neighborhood Commercial) zone districts. The planning commission and city commission conducted a total of four public hearings. On July 5, 2018, the city commission approved the proposed annexation and rezoning. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Oregon City Municipal Code (OCMC) 14.04.050(E) lists the submittal requirements for an application to annex territory, and requires in relevant part that the application include a "[s]tatement of availability, capacity and status of

existing water [facilities]."[2] OCMC 14.04.060 lists a number of "factors" to be considered in approving an annexation, including "[a]dequacy and availability of public facilities and services to service potential development."[3] Under OCMC 14.04.080, the city must find that the proposed annexation is "consistent with a positive balance of the factors set forth in" OCMC 14.04.060.

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[2] OCMC 14.04.050(E) provides in relevant part:

> "Contents of Application. An applicant seeking to annex land to the city shall file with the city the appropriate application form approved by the city manager. The application shall include the following:
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> "* * * * *
>
> "7. A narrative statement explaining the conditions surrounding the proposal and addressing the factors contained in the ordinance codified in this chapter, as relevant, including:
>
> "a. Statement of availability, capacity and status of existing water, sewer, drainage, transportation, park and school facilities[.]"

[3] OCMC 14.04.060(A) provides, as relevant:

> "When reviewing a proposed annexation, the commission shall consider the following factors, as relevant:
>
> "* * * * *
>
> "2. Conformity of the proposal with the city's comprehensive plan;
>
> "3. Adequacy and availability of public facilities and services to service potential development[.]"

In a February 5, 2018 staff report that the city commission adopted as part of its findings, the city found that the majority of development on the site will be served by the city water system, based on an existing 16-inch water main in Holcomb Boulevard, which fronts a northern portion of the subject property, and an existing 4-inch water line in Livesay Road along the southern boundary of the property. Record 273. To serve the interior of the property, the city found that a new 12-inch water main will be required in a future collector street from Holcomb Boulevard to Livesay Road, which will require a new pressure-reducing station and removal of an existing water pump station. The city's findings note that the costs for these interior improvements are not included in the city's capital improvement program (CIP), but that the "applicant will be seeking to have the CIP amended prior to development to include these regional costs." *Id.* The city also found that the northwest portion of the subject property, which is above 450 feet in elevation and which is currently served by the Clackamas River Water district (CRW), will continue to be served by CRW after development. The city found that both the city's water system and the CRW have adequate storage capacity to serve the proposed annexation area. Record 274. Finally, the city imposed Condition of Approval 4 (Condition 4), which restricts development to that allowed under the county FU-10 zone until the applicant obtains both general and detailed development plan approval, which must be consistent with the city's public facilities plans with regard to water and other public facilities.

A. Adequacy of Findings Regarding City Water Infrastructure

Petitioners first argue that the findings regarding the adequacy of the city water facilities erroneously focus on whether the city's water system will have the *future* ability to serve future development under the R-10, R-6 and NC zones, instead of focusing on whether the city's water system is adequate *at the time of annexation* to handle development potentially allowed under the R-10, R-6 and NC zones. However, we disagree with petitioners' understanding of OCMC 14.04.060(A)(3). Nothing cited to us in OCMC 14.04.060(A)(3) or elsewhere expressly limits the city's consideration to the existing infrastructure at the time of annexation. OCMC 14.04.060(A)(3) does not expressly or implicitly preclude the city from considering future availability of infrastructure improvements needed to support development of the annexed territory.

Petitioners next argue that because the city did not require the applicants to directly pay for the 12-inch water main necessary to serve urban development within the annexed territory, and because that future necessary facility will require an amendment of the city's CIP, the city can find that the OCMC 14.04.060(A)(3) factor is positive only if the city ensures that the CIP will be amended prior to development to include the project, making city funds for the improvements potentially available. Petitioners contend that the city failed to impose a condition of approval requiring a future amendment to the CIP and therefore that amendment may never occur. To the extent Condition 4

is intended to provide assurance that the CIP will be amended, petitioners argue that Condition 4 falls short.

The city and intervenor (together, respondents) respond by citing to related findings adopted by the city addressing how the required new water main will be paid for, at Record 284 and 136. Those findings state that the developer will be wholly responsible for the cost of public improvements, but also lay out various alternatives such as system development charges or local improvement districts if some public financing is necessary. Intervenor argues that petitioners have not demonstrated that OCMC 14.04.060(A)(3) or any other criterion or factor requires that the city identify in the annexation decision exactly how the new water main will be paid for, or by whom, or even requires that the CIP be amended to include the project in the list of public facility projects that could be funded under the CIP.

We agree with respondents. Nothing cited to us in the OCMC or elsewhere requires that the city identify exactly how infrastructure will be paid for, or by whom, as part of this annexation decision. The findings suggest that the CIP will be amended at some point prior to any development, in order to list the new water main as a public facility, but the city apparently does not intend to rely upon the CIP as a source of funding or authority for the new water main. Instead, the city anticipates that the applicant will pay for the improvement, perhaps in combination with public financing through system development charges or a local improvement district. Petitioners have not established that a

CIP amendment must be required as a condition of approval in this decision, or that the city otherwise erred in evaluating and assigning a positive value to the OCMC 14.04.060(A)(3) factor.

B. Adequacy of CRW Capacity

Petitioners argue that the city failed to adopt adequate findings to address CRW's capacity to provide water. Respondents argue, initially, that no issue was raised below regarding CRW's capacity. Petitioners contend that the issue was raised by intervenor, in the application materials. In its application materials, intervenor stated:

> "At the most recent pre-application conference (PA-16-40), information was presented by [CRW] indicating that they have *an issue in meeting the required fire flow standard of 1,000 gallons per minute*. That issue is expected to be resolved with system upgrades that include replacing approximately 4,000 lineal feet of substandard water main within S Bradley Road with a 12-inch pipe. This improvement will be provided in conjunction with the construction of the Abernathy Landing subdivision (TP 16-0001). Contact with [a CRW engineer] on November 6, 2017, indicates that the plans for that project are on schedule. CRW has an existing 12[-inch] water line in Holcomb Blvd. that is capable of providing for service to the portion of the subject property that is within [CRW's service area. The CRW engineer] indicated that CRW has adequate storage capacity." Record 6130 (emphasis added).

OAR 661-010-0030(4)(d) requires that each assignment of error must demonstrate that the issue raised in the assignment was preserved during the proceedings below. In the petition for review, we understand petitioners to cite to the italicized statement in the above-quoted application materials, and argue

that the applicant itself raised the issue below of whether CRW has adequate capacity to serve the portion of the subject property within its service area. Respondents argue that the above-quoted passage does not preserve any "issue" regarding capacity, for purposes of ORS 197.763(1), and therefore the issues presented under this subassignment of error regarding CRW's ability and capacity to service the subject property are waived.[4]

In the reply brief, petitioners cite to Record 188-89 to argue that opponents below raised issues regarding CRW "water capacity," which petitioners argue were sufficient to preserve the issue raised in this subassignment of error. Reply Brief 4. However, we see nothing at Record 188-89 that mentions CRW or raises any issue regarding its ability or capacity to service development on the subject property. We also agree with respondents that the above-quoted application materials were insufficient to raise an "issue" regarding CRW's ability or capacity to service the subject property. The application materials noted that there is currently inadequate fire

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[4] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

flow to service full development of the property, but that that inadequacy will be resolved by improvements required under a different land use decision that are "on schedule." Record 6130. Such statements do not raise an "issue" that a reasonable decision-maker or other participant would recognize as requiring a response. We agree with respondents that petitioners have not demonstrated that the issue presented under this subassignment of error regarding the ability or capacity of CRW to service the subject property has been preserved, as required by ORS 197.763(1). That issue is waived, and therefore beyond LUBA's scope of review. ORS 197.835(3).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, the city rezoned a portion of the property that is designated MUC (Mixed Use Corridor) on the city's comprehensive plan, from FU-10 to NC (Neighborhood Commercial). On appeal, petitioners argue that application of the NC zone to land that is designated MUC is inconsistent with Oregon City Comprehensive Plan (OCCP) Section 2 (Land Use), Goal 2.3 (Corridors). Goal 2.3 directs the city to "Focus transit-oriented, higher intensity, mixed-use development along selected transit corridors." Petitioners contend that application of the NC zone to the portion of the subject property designated MUC is inconsistent with Goal 2.3, because the NC zone allows somewhat higher-intensity, mixed use commercial development, but the portion of the

subject property to which it is applied is not along, or anywhere near, a transit corridor.

Respondents argue that no party raised this issue below and it is therefore waived under ORS 197.763(1). Alternatively, respondents argue that Goal 2.3 is not a mandatory approval criterion, but rather a general planning directive to the city to focus transit-oriented development along transit corridors. Further, respondents argue that petitioners' arguments amount to an impermissible collateral attack on the comprehensive plan, which designates this portion of the property MUC, and also the Park Place Concept Plan, which directs that this portion of the property be zoned NC.

We agree with respondents that the issue presented under the second assignment of error is waived. Petitioners do not argue that this issue was raised below. Instead, petitioners argue that they can raise this issue for the first time on appeal pursuant to ORS 197.835(4)(a), which provides:

> "A petitioner may raise new issues to [LUBA] if:
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> "(a) The local government failed to list the applicable criteria for a decision under * * * [ORS] 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

ORS 197.763(3)(b), in turn, requires that the notice of hearing to "[l]ist the applicable criteria from the ordinance and the plan that apply to the application

at issue." Petitioners argue that Goal 2.3 is one of the "applicable criteria" for a rezoning application and because the city failed to list Goal 2.3 in the notice of hearing, petitioners may raise new issues regarding compliance with the goal before LUBA.

However, we agree with respondents that Goal 2.3 is not an "applicable criteri[ion]" that the city was required to list in the notice of hearing. Goal 2.3 is a general planning directive to the city, directing the city to focus transit-oriented development along transit corridors. However, as discussed below, the NC zone does not authorize transit-oriented development, the present application does not involve transit-oriented development, and therefore Goal 2.3 has no application. Because Goal 2.3 is not an applicable approval criterion with respect to the present application to rezone a portion of the property from FU-10 to NC, the city was not required to list it on the notice of hearing and ORS 197.835(4)(a) does not operate to allow LUBA to overlook petitioners' failure to preserve this issue below.

Even if issues regarding Goal 2.3 were preserved or otherwise within our scope of review, we agree with respondents that petitioners' arguments regarding Goal 2.3 are simply wrong. Petitioners argue that application of the NC zone in this case conflicts with Goal 2.3, because this portion of the subject property is designated MUC on the city comprehensive plan map, and the MUC plan designation is used only where the city intends to promote transit-oriented development along transit corridors. Because the NC zone is not intended to

promote transit-oriented development along transit corridors, petitioners argue, application of the NC in the present case conflicts with the MUC plan designation, and in such conflicts the comprehensive plan designation controls. *Baker v. Milwaukie*, 271 Or 500, 509-10, 533 P2d 772 (1975). We understand petitioners to argue that the only zone the city can apply to property designated MUC is one of the two MUC zones, which are expressly intended to promote transit-oriented development along transit corridors.

However, petitioners' premise, that the MUC plan designation is used only where the city intends to promote transit-oriented development along transit corridors, is incorrect. The MUC plan designation is implemented by four commercial zoning districts: MUC-1, MUC-2, NC and HC (historic commercial). OCMC Table 17.06.030. The MUC-1 and MUC-2 zones are transit-oriented zones that are intended to be placed along transit corridors. OCMC 17.29.010 (purpose of MUC zone districts).[5] The NC zone is not a

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[5] OCMC 17.29.010 states:

> "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. A mix of high-density residential, office, and small-scale retail uses are encouraged in this District. Moderate density (MUC-1) and high density (MUC-2) options are available within the MUC zoning

transit-oriented zone, and is clearly not intended to be placed along transit corridors. OCMC 17.24.010 (purpose of NC zone district).[6] Thus, rezoning the MUC-designated portion on the subject property that is not along a transit corridor to NC does not represent a conflict between the NC zone district and the MUC plan designation.[7] On the contrary, as respondents point out, the comprehensive plan *compels* the city to zone this portion of the subject property

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district. The area along 7th Street is an example of MUC-1, and the area along Warner-Milne Road is an example of MUC-2."

[6] OCMC 17.24.010 states:

> "The Neighborhood Commercial District is designed for small-scale commercial and mixed-uses designed to serve a convenience need for residents in the surrounding low-density neighborhood. Land uses consist of small and moderate sized retail, service, office, multi-family residential uses or similar. This district may be applied where it is appropriate to reduce reliance on the automobile for the provision of routine retail and service amenities, and to promote walking and bicycling within comfortable distances of adjacent residential infill neighborhoods, such as within the Park Place and South End Concept Plan areas. * * *"

[7] We note that petitioners' argument that the city can *only* rezone this MUC-designated portion of the property to one of the two MUC zone districts, notwithstanding that the property is not along (or anywhere near) a transit corridor, would seem to invite error. *See Nicita v. City of Oregon City*, 286 Or App 659, 399 P3d 1087, *rev den*, 362 Or 300 (2017) (affirming that property can be designated MUC consistently with Goal 2.3 and hence zoned MUC-1 or -2 as long as it at least borders a transit corridor). Had the city planned the property MUC and then zoned it MUC-1 or MUC-2, as petitioners suggest it was required to, such zoning might well be deemed inconsistent with Goal 2.3, which directs the city to focus transit-oriented development along transit corridors.

NC. The Concept Plan, which is adopted as an ancillary part of the comprehensive plan, provides that this portion of property should be zoned NC. Further, OCMC Table 17.68.025, which specifically governs the zoning of land newly annexed into the city, provides that lands designated "Mixed-Use Commercial" can *only* be zoned NC.[8]

For the foregoing reasons, the second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city erred in concluding that rezoning the property from FU-10 to R-10, R-6 and NC is consistent with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). According to petitioners, because the rezone increases the intensity of residential and commercial development allowed on the subject property compared to the FU-10 zone, and because the more intense development could adversely impact the inventoried Goal resources on the subject property, including sections of Livesay, Newell and Abernathy Creeks, the county is obligated to consider whether the rezoning is consistent with the required protection of those Goal 5 resources. Petitioners contend that the city's findings on this point are nonexistent or inadequate.

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[8] The city's comprehensive plan does not include a plan designation of "Mixed-Use Commercial." We presume that the reference in OCMC Table 17.68.025 to "Mixed Use *Commercial*" is a typographic error, and the intended reference is to "Mixed Use *Corridor*," the only mixed-use designation that could possibly apply.

Rezoning the subject property constitutes a "post-acknowledgment plan amendment," or PAPA, for purposes of applying Goal 5 and the administrative rule implementing Goal 5, at OAR chapter 660, division 023. OAR 660-023-0010)(5) (defining PAPA to include the amendment of a land use regulation). OAR 660-023-0250(3) provides that "[l]ocal governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource." The rule then explains that a PAPA would affect a Goal 5 resource only if, among other things, "[t]he PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]" OAR 660-023-0250(3)(b). Petitioners argue that the city failed to consider under OAR 660-023-0250(3)(b) whether the more intense development allowed in the R-10, R-6 and NC zones compared to the former county FU-10 zone "could" be conflicting uses with respect to the inventoried Goal 5 resources on the property.

Respondents offer a number of responses, starting with a response that the issue is waived. Respondents argue that no party below cited or raised any issues under OAR 660-023-00250(3) or any other specific local or statewide provision related to Goal 5. The only issue related to Goal 5 to which petitioners cite was a general argument that "Goal 5 requirements are constantly dismissed by the City where they seem only to build for density, leaving no quality of life for the people." Record 3243 (testimony of Christine Kosinski). In the absence of any specific issues raised regarding Goal 5, respondents argue

that the city adopted general findings addressing all comprehensive plan policies that implement Goal 5 with respect to natural resources, explaining how the Goal 5 resources on the property would be protected under the city's NROD regulations and other regulations. Record 293-95. Respondents argue that petitioners do not acknowledge or challenge those findings and, if those findings do not conduct the inquiry set out in OAR 660-023-0250(3)(b), that is because no party raised that issue below, at least with the specificity required by ORS 197.763(1).

We agree with respondents. The testimony at Record 3243 complained generally about the potential impacts of development on Goal 5 natural resources, but at no point alluded to OAR 660-023-0250(3)(b) or any of its operative language, or made an argument that a reasonable person would recognize as an assertion that the city must conduct an inquiry under that rule into whether development allowed under the R-10, R-6 and NC zones could be new conflicting uses with respect to Goal 5 resources, and potentially require the city to re-evaluate its fundamental choices regarding protection of those resources under its acknowledged Goal 5 program.

Even if the issue were not waived, we also agree with respondents that petitioners have not demonstrated on appeal that the city is required to conduct the inquiry set out in OAR 660-023-0250(3)(b). That is because the city's PAPA is a very limited one, that in relevant part simply applies the zones implementing the LDR, MR and MUC plan designations to portions of the

subject property that the acknowledged comprehensive plan has already designated for the corresponding residential and commercial uses. In other words, the city has already chosen in designating the subject property as LDR, MR and MUC to develop the subject property with the uses and densities allowed under the corresponding zoning districts, subject to the restrictions and regulations in the NROD and other applicable regulations protecting natural resources, and that choice has already been acknowledged to comply with Goal 5. Because the challenged PAPA simply implements that acknowledged plan designation choice, with the exercise of little or no discretion, the PAPA does not authorize any "new uses" for purposes of OAR 660-023-0250(3) and Goal 3.

Stated in yet another way, the county FU-10 zone is in effect a holding zone, that limits development on the subject property unless and until the city annexes the property and zones it consistently with the acknowledged comprehensive plan designations. For purposes of determining whether the uses allowed in those implementing zones represent "new uses," the comparison is not between the uses allowed in the county FU-10 zone and uses allowed in the R-10, R-6 and NC zones, as petitioners argue. If a comparison is made, it must be between the acknowledged LDR, MR and MUC plan designations and the corresponding implementing city zones. Because the zones applied do not allow any new or more intensive uses than the plan

designations they implement, no further inquiry under OAR 660-023-0250(3)(b) is required.[9]

The third assignment of error is denied.

The city's decision is affirmed.

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[9] Petitioners also argue that the city must consider Goal 5 and the Goal 5 rule pursuant to OCCP Policy 5.4.14, which requires that the city comply with state regulations protecting endangered species and critical habitat. Petitioners contend that Goal 5 and the Goal 5 rule are among the state regulations that must be considered under OCCP Policy 5.4.14. However, as discussed in the text, ORS 660-023-0250(3) governs the circumstances in which Goal 5 and the Goal 5 rule applies to a PAPA, and we have already concluded that OAR 660-023-0250(3) does not require the application of Goal 5 or any part of the Goal 5 rule. Therefore, even assuming OCCP Policy 5.4.14 applies and is a preserved issue in this appeal (which are both points that respondents dispute), petitioners have not demonstrated that OCCP Policy 5.4.14 provides a basis for independent application of Goal 5 or the Goal 5 rule.