

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

3  
4                                   JAMES J. NICITA,  
5   *Petitioner,*

6  
7   and

8  
9                                   PATRICIA SPADY and WILLIAM SPADY,  
10   *Intervenors-Petitioners,*

11  
12   vs.

01/03/19 AM 9:49 LUBA

13  
14                                   CITY OF OREGON CITY,  
15   *Respondent,*

16  
17   and

18  
19                                   HISTORIC PROPERTIES, LLC,  
20   *Intervenor-Respondent.*

21  
22   LUBA No. 2018-102

23  
24   FINAL OPINION  
25   AND ORDER

26  
27                   Appeal from City of Oregon City.

28  
29                   James J. Nicita, Oregon City, filed the petition for review and argued on  
30 his own behalf and on behalf of intervenors-petitioners.

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

34  
35                   Michael C. Robinson, Portland, filed a joint response brief and argued on  
36 behalf of intervenor-respondent. With him on the brief was Schwabe,  
37 Williamson & Wyatt, P.C.

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

AFFIRMED

01/03/2019

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

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**NATURE OF THE DECISION**

Petitioners appeal a decision approving comprehensive plan map and zoning map amendments to allow mixed-use commercial and residential development.

**REPLY BRIEF**

Petitioner and intervenors-petitioners (collectively, petitioners) move to file a reply brief to respond to new matters in the joint response brief. There is no opposition to the motion and it is allowed.

**MOTION TO TAKE OFFICIAL NOTICE**

Petitioners moved to file a “Memorandum of Additional Points and Authorities,” requesting that LUBA take official notice of page 30 from a document that describes technical assistance provided under the state agency coordination program of the Oregon Department of Fish and Wildlife (ODFW). We understand petitioners to request that LUBA consider the page in resolving an argument under petitioners’ third assignment of error, which alleges that the city failed to coordinate with ODFW.

Intervenor-respondent Historic Properties, LLC (intervenor) objects to the motion, arguing that petitioners request that LUBA consider page 30 for its evidentiary value, and that it is inappropriate to take official notice of the document under Oregon Evidence Code (OEC) 202 for an evidentiary purpose.

1           The cited paged from the ODFW stage agency coordination program is  
2 an “official act” of a state agency, and thus subject to official notice under OEC  
3 202(2).<sup>1</sup> As far as we can tell, petitioners cite the page to demonstrate that as a  
4 matter of law technical assistance was available to help the city in addressing  
5 impacts on natural resources, which is apparently intended to somehow support  
6 petitioners’ argument that the city failed to coordinate with ODFW. That  
7 purpose is non-evidentiary, and we shall consider the page for that limited  
8 purpose. The motion to take official notice is allowed.

9 **FACTS**

10           The challenged decision is on remand from LUBA. *Nicita v. City of*  
11 *Oregon City*, 75 Or LUBA 38, *aff’d* 286 Or App 744, 399 P3d 1087, *rev den*  
12 399 P3d 1087 (2017) (*Nicita I*). On remand, the city again approved  
13 intervenor’s application to amend the comprehensive plan designation of the  
14 subject property from low and medium density to Mixed Use Corridor, and to  
15 rezone the property from lower density residential districts to Mixed Use

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<sup>1</sup> OEC 202 provides, in relevant part:

“Law judicially noticed is defined as:

“\* \* \* \* \*

“(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.”

1 Corridor-2 (MUC-2). A significant difference between the prior zoning and the  
2 MUC-2 zoning is that the MUC-2 zone allows maximum site coverage of 90  
3 percent, compared to the 40 to 55 percent site coverage allowed under the prior  
4 zoning.

5 The southern portion of the subject property is subject to a Natural  
6 Resources Overlay District (NROD) that extends 50 feet from the banks of  
7 Newell Creek, which is an inventoried resource in the city's comprehensive  
8 plan inventory of Statewide Planning Goal 5 (Natural Resources, Scenic and  
9 Historic Areas and Open Spaces) resources. In the city's original decision, the  
10 city assumed that the NROD regulations would suffice to protect the resource  
11 from the new or increased impacts of new uses allowed under the amendments,  
12 including increased stormwater runoff from impervious surfaces into the creek.  
13 LUBA remanded the original decision in order for the city to re-evaluate under  
14 OAR 660-023-0250 whether new commercial and higher density residential  
15 uses allowed under the proposed post-acknowledgment plan amendments  
16 (PAPA) could conflict with Newell Creek.<sup>2</sup>

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<sup>2</sup> LUBA held:

“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

1           On remand, intervenor submitted additional evidence regarding increased  
2 impacts of development allowed under the MUC-2 zone on Newell Creek,  
3 including expert testimony concluding that the city’s existing NROD  
4 regulations and other applicable regulations are sufficient to avoid new or  
5 increased impacts on Newell Creek. The planning commission held an  
6 evidentiary hearing and recommended approval of the proposed amendments.  
7 The city council approved the amendments, adopting additional findings and  
8 conditions. This appeal followed.

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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.” 75 Or LUBA at 51-52 (emphasis in original, footnote omitted).

1   **INTRODUCTION**

2           OAR 660-023-0250 addresses the applicability of Goal 5 and the Goal 5  
3 rule at OAR chapter 660, division 023, to post-acknowledgement plan  
4 amendments such as the decision before us. OAR 660-023-0250(3) provides, in  
5 relevant part:

6           “Local governments are not required to apply Goal 5 in  
7 consideration of a PAPA unless the PAPA affects a Goal 5  
8 resource. For purposes of this section, a PAPA would affect a Goal  
9 5 resource only if:

10           “\* \* \* \* \*

11           “(b) The PAPA allows new uses that could be conflicting uses  
12 with a particular significant Goal 5 resource site on an  
13 acknowledged resource list[.]”

14           Under OAR 660-023-0250(3), a local government must initially evaluate  
15 whether new uses approved by a PAPA “could be” conflicting uses with respect  
16 to a particular Goal 5 resource site. As the phrase “could be” suggests, that  
17 initial evaluation presents a fairly low threshold. On its face, a zone change that  
18 significantly increases the volume or intensity of development impacts on a  
19 natural resource compared to development under the existing zoning almost  
20 certainly would, without more, exceed that low threshold, by allowing uses that  
21 “could be” conflicting uses. As we explained in *Nicita I*, a local government  
22 can avoid further analysis under OAR 660-023 only if it concludes, supported  
23 by substantial evidence, that existing regulations that protect the resource are  
24 sufficient to “eliminate the possibility of conflicts” from more intensive

1 development allowed under the proposed zoning. 75 Or LUBA at 51. If the  
2 answer to that question is no, the local government must repeat any of the steps  
3 in the Goal 5 planning process that are necessary to ensure that the city's Goal 5  
4 obligations with respect to the protected resources continue to be met. One of  
5 the key steps in the Goal 5 planning process requires an analysis of the  
6 economic, social, environmental and energy (ESEE) consequences of allowing,  
7 limiting or prohibiting the proposed new conflicting uses, and an ultimate  
8 determination whether to allow, limit or prohibit new conflicting uses. OAR  
9 660-023-0040.

10 In the present case, the city concluded, based on expert testimony  
11 submitted by intervenor, that the city's existing NROD regulations and other  
12 applicable city regulations are sufficient to eliminate new or increased conflicts  
13 or impacts on Newell Creek from more intensive development allowed under  
14 the MUC-2 zone. In the alternative, the city assumed that the rezone could  
15 cause new or increased conflicts, and adopted an ESEE analysis submitted by  
16 one of intervenor's experts, which concludes that the positive ESEE  
17 consequences of allowing new conflicting uses under MUC-2 zoning  
18 outweighed the negative ESEE consequences to the resource.

19 Under the first and second assignments of error, petitioners argue that the  
20 city's primary conclusion that the city's existing regulations are sufficient to  
21 eliminate new or increased conflicts with Newell Creek is not supported by



1 adequate findings and substantial evidence. Under the third assignment of  
2 error, petitioners challenge the adequacy of the ESEE analysis.

3 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

4 **A. Downstream Fish Habitat**

5 Petitioners first argue that the findings identify only “Newell Creek” as  
6 the relevant Goal 5 resource, apparently limited to the portions of Newell Creek  
7 on the subject property, without acknowledging that the city’s Goal 5 inventory  
8 identifies downstream portions of Newell Creek as including habitat for  
9 anadromous fish such as salmon and trout.

10 Intervenor responds that no issue was raised below regarding impacts on  
11 fish habitat located downstream of the property, and argues that those issues are  
12 thus waived, because they were not raised either in the first proceeding leading  
13 to *Nicita I* or in the proceedings on remand. *Beck v. City of Tillamook*, 313 Or  
14 148, 831 P2d 678 (1992) (issues that were resolved, or could have been raised  
15 and resolved in earlier appeals on the same application, cannot be raised in an  
16 appeal of a subsequent decision on remand); ORS 197.763(1).<sup>3</sup> On the merits,

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<sup>3</sup> 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

1 intervenor argues that anadromous fish are not a distinct Goal 5 “resource” for  
2 purposes of OAR 660-023-00250(3), and in any case the record reflects that the  
3 portion of Newell Creek located on the subject property is inaccessible to  
4 anadromous fish. Record 647.

5         Petitioners do not dispute that they raised no issues below regarding  
6 impacts on anadromous fish habitat in Newell Creek downstream of the subject  
7 property, but argue that having raised general concerns regarding stormwater  
8 and pollution impacts on Newell Creek in general, the county and intervenor  
9 should not be surprised on appeal that petitioners now raise related issues  
10 regarding impacts of stormwater runoff and pollution on downstream fish  
11 habitat. *See Boldt v. Clackamas County*, 21 Or LUBA 40, *aff’d* 107 Or App  
12 619, 813 P2d 1078 (1991) (the “raise it or waive it” principle embodied in ORS  
13 197.763(1) does not limit the parties on appeal to the exact same arguments  
14 made below, but does require that the issue was raised below with sufficient  
15 specificity so as to prevent “unfair surprise” on appeal).

16         We disagree with petitioners. Goal 5 resources such as riparian or  
17 wildlife habitat are site and resource-specific, and if petitioners wished the city  
18 to adopt findings addressing impacts on downstream fish habitat, it was  
19 incumbent on petitioners to raise some issue below regarding impacts on  
20 downstream fish habitat during the proceedings below. Despite several

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commission, hearings body or hearings officer, and the parties an  
adequate opportunity to respond to each issue.”

1 opportunities to do so, petitioners raised no such issues, and the city and  
2 intervenor reasonably understood that the scope of the analysis included  
3 potential impacts on the portions of Newell Creek located on or near the subject  
4 property. Petitioners’ argument on appeal that the city erred in failing to  
5 address impacts on downstream anadromous fish habitat amounts to an “unfair  
6 surprise.” *Boldt*, 107 Or App at 622. Accordingly, that issue is waived.

7 **B. Temperature Impacts**

8 Petitioners argue that the county erred in failing to adopt any findings  
9 addressing an issue they raised below, namely that increased impervious  
10 surfaces would increase the temperature of the elevated volume of stormwater  
11 runoff entering the creek, because water flowing across heat-gathering surfaces  
12 such as asphalt parking lots is warmed, and if that warmer water enters Newell  
13 Creek it could harm water quality. Record 1037.

14 Intervenor responds initially, that petitioners failed to raise issues below  
15 regarding impacts on stream temperature with sufficient specificity and thus  
16 this issue is waived under ORS 197.763(1). We disagree with intervenor. In  
17 the reply brief petitioners cite to testimony in the record where petitioner Nicita  
18 twice raised issues regarding impacts on stream temperature.<sup>4</sup> That testimony is  
19 sufficient to provide the city and others with fair notice of the issue.

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<sup>4</sup> Petitioners cite to the following statements made during the June 11, 2018 planning commission hearing:

1           Intervenor also argues that on appeal petitioners’ arguments regarding  
2 temperature are insufficiently developed for review. However, those arguments  
3 seem relatively straightforward: increased impervious surfaces means not only  
4 more stormwater runoff, but warmer stormwater runoff, and if that warmer  
5 runoff is directed into the creek instead of infiltrated into the soil the result  
6 could be warmer stream temperatures, which “could” harm the Goal 5 resource,  
7 Newell Creek water quality. OAR 660-023-0250(3).

8           Finally, intervenor argues that the lack of findings addressing this issue is  
9 not a basis for reversal or remand, because other findings generally conclude  
10 that NROD and other city standards will assure that water quality is maintained,  
11 implicitly encompassing water quality issues related to stream temperature.  
12 Intervenor argues that the NROD purpose statement at Oregon City Municipal  
13 Code (OCMC) 17.49.010 states that the NROD regulations are intended to

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[Videotape 1:24:45] “[I]ncreased imperviousness is going to increase temperature[.]”

[Videotape 1:45:07]: “One of the critical ways you solve the temperature problem is infiltration so the ground cools it. Now if you’re going to increase imperviousness and add more pavement that heats the water and you can’t infiltrate it, then you are going to discharge it into Newell Creek and because of that it ‘could’ impact the resource with higher water temperature. And I don’t know any of the BMPs [best management practices] in the stormwater management plan or the [Stormwater and Grading Design] manual that addresses temperature, and the temperature issues is the critical one for salmon habitat.”

1 implement federal requirements for shading streams and “reduction of water  
2 temperatures[.]” Intervenor contends that the NROD and other applicable  
3 regulations rely upon a required 50-foot vegetated buffer to provide shade in  
4 order to cool stream temperatures, and petitioners cite no reason to believe that  
5 such measures will not be effective at preventing or mitigating impacts on  
6 stream temperature from warmer stormwater runoff.

7 We disagree with intervenor that general findings regarding adequacy of  
8 the city’s regulations to ensure “water quality” are sufficient to address the  
9 specific issue petitioners raised regarding stream temperatures. No findings  
10 address that issue, and intervenor cites us to no evidence in the record  
11 addressing temperature impacts. In the absence of any findings and evidence  
12 on this point, intervenor cites no basis for LUBA to reject this argument.  
13 Accordingly, we agree with petitioners that the city’s conclusion that the city’s  
14 existing regulations will eliminate the possibility of conflicts with Newell Creek  
15 are inadequate, for failure to address impacts on stream temperature.

16 **C. Impact of Pollutants on Water Quality**

17 Next, petitioners argue that the city’s findings fail to adequately explain  
18 why increased stormwater runoff from the more extensive impervious surfaces  
19 allowed under the MUC-2 zone would not “conflict[.]” with Newell Creek by  
20 increasing the amount of pollutants from parking lots, etc., that would enter the  
21 creek, thus harming water quality. OAR 660-023-0250(3).

1           As noted, the MUC-2 zone allows a maximum lot coverage of 90  
2 percent, almost double what was allowed under the prior residential zoning, and  
3 there is no dispute that the increased percentage of impervious surfaces (e.g.,  
4 roofs and parking lots) will significantly increase the volume of stormwater  
5 runoff from development on the property. As we understand it, stormwater is  
6 commonly infiltrated into the soil, where it filters down to the water table and  
7 eventually to the nearest water body. However, due to the potential for  
8 landslides on the subject property, intervenor's consultant recommended that  
9 stormwater facilities on the property not employ infiltration, but instead that  
10 stormwater be detained in ponds or facilities, then released at a prescribed rate  
11 into the creek, in quantities and at velocities that do not exceed pre-  
12 development rates. Under the city's regulations, such detention facilities are  
13 scaled in size to the amount of runoff generated by the proposed extent of  
14 impervious surfaces.

15           Petitioners argue that the city's findings are inadequate and not supported  
16 by substantial evidence, because the findings do not address impacts on water  
17 quality from increased levels of pollutants, such as toxic metals and petroleum-  
18 based compounds picked up from stormwater flowing over impervious surfaces  
19 such as parking lots. Before the county, petitioner submitted a study regarding  
20 a different development site near the Clackamas River, Clackamette Cove, to  
21 demonstrate that stormwater runoff from impervious surfaces carries a mix of  
22 pollutants, including toxic metals and petroleum-based compounds.

1           However, petitioners argue that the city’s findings fail to demonstrate  
2 that increased stormwater flows from impervious surfaces will not carry a  
3 greater volume of pollutants to Newell Creek, harming water quality and thus  
4 “conflicting” with the Goal 5 resource. OAR 660-023-0250(3). Petitioners  
5 note that the city’s Stormwater and Grading Design Manual (Manual) states that  
6 water quality facilities shall be designed to capture and treat 80 percent of the  
7 runoff volume, with the goal of 70 percent suspended solids removal. Record  
8 1542. However, petitioners argue that the Manual includes no standards or  
9 requirements for removing toxic metals and petroleum-based compounds.  
10 Further, petitioners argue that the Manual requires only treatment of 80 percent  
11 of the runoff volume, which means that 20 percent of the runoff volume will be  
12 untreated. Because the increase in impervious surfaces will increase the total  
13 volume of runoff, petitioners argue that the absolute amount of untreated,  
14 polluted runoff entering Newell Creek will also increase, which “could” impact  
15 water quality.

16           Intervenor responds by citing to findings at Record 51-55 that, intervenor  
17 argues, adequately explain why the city’s existing regulations, including the  
18 NROD regulations at OCMC 17.49, the city’s water pollution control standards  
19 in OCMC chapter 17.47, the city’s federal National Pollution Discharge  
20 Elimination System (NPDES) “MS-4” stormwater discharge permit and  
21 standards in the city’s Manual, are sufficient to ensure that the increased

1 quantity of stormwater runoff from more impervious surfaces will not result in  
2 increased amounts of pollution and contaminants entering the creek.

3 Most of the city's findings at Record 51-55 focus on increased water  
4 quantity and water velocity, which apparently will be addressed by facilities  
5 sized to the amount of runoff generated by impervious surfaces, and that are  
6 designed to avoid "pulsed runoff" by slowly releasing runoff into the creek over  
7 time in quantities and at velocities that do not exceed pre-development rates.  
8 Record 53. However, the findings at Record 51-55 do not, for the most part,  
9 address impacts of pollution on water quality, with the exception of the  
10 following finding:

11 "Petitioner argued that the stormwater runoff from the site could be  
12 a conflicting use because it will contain contaminants including  
13 dissolved copper, zinc, and lead. However, the City Commission  
14 finds that the City's existing program, including erosion and  
15 sediment control and other requirements, will assure that  
16 contaminants from the uses allowed by the [PAPA] will not  
17 conflict with the inventoried Goal 5 Resource. A water quality  
18 study from Clackamette Cove noting that existence of  
19 contaminants that may affect anadromous fish is irrelevant as it has  
20 no bearing on water quality condition in Newell Creek near the  
21 subject property. Further, this study concludes that the low impact  
22 swales required by the City standards will adequately collect and  
23 treat stormwater runoff coupled with other factors relevant solely  
24 to site conditions of the Clackamette Cove." Record 55.

25 Intervenor argues that petitioners do not specifically challenge the above-quoted  
26 finding, and failure to challenge that finding is fatal to petitioners' general  
27 findings and evidentiary challenge.



1           We might agree with intervenor if the above-quoted finding were less  
2   conclusory. The finding concludes that the city’s existing regulations will  
3   assure that increased volume of contaminates will not conflict with the  
4   resource, but does not explain why. The finding notes that “low impact swales”  
5   were used at the Clackamette Cove site, and implies that similar low impact  
6   swales will be required by city regulations as part of development of the subject  
7   property under the MUC-2 zone. However, it is not clear why the city believes  
8   that swales are sufficient to eliminate the possibility that increased levels of  
9   pollutants from increased impervious surfaces will harm water quality in  
10   Newell Creek. As petitioners argue, and intervenor does not dispute, the city’s  
11   stormwater manual states that stormwater treatment facilities are designed to  
12   capture and treat only 80 percent of runoff volume. It is undisputed that the  
13   MUC-2 zone nearly doubles the amount of impervious surfaces permitted on  
14   the subject property, which will result in increased runoff volume. Petitioners  
15   argue that that increased stormwater runoff volume will carry an increased  
16   volume of pollutants to Newell Creek, even presuming swales or other  
17   stormwater facilities are employed that would treat up to 80 percent of the  
18   runoff. An increased volume of untreated, polluted runoff from entering the  
19   creek certainly “could be” a conflict with a Goal 5 resource for purposes of  
20   OAR 660-023-0250(3). Intervenor cites no findings or evidence in the record  
21   addressing this issue. We agree with petitioners that the city’s conclusion that  
22   the city’s existing regulations will eliminate the possibility of conflicts with

1 Newell Creek are inadequate, for failure to address the issue of impacts from  
2 increased levels of pollutants entering the creek.

3 **D. Goal 5 Program**

4 Under a portion of the second assignment of error, petitioners argue that  
5 the city erred in relying upon the city Manual and other regulations that have  
6 not been adopted specifically as part of the city's acknowledged Goal 5  
7 program to protect natural resources such as Newell Creek. Petitioners contend  
8 that the Manual was adopted to implement a different statewide planning goal,  
9 Goal 11 (Public Facilities and Services). According to petitioners, in evaluating  
10 whether new uses could conflict with Goal 5 resources under OAR 660-023-  
11 0250(3) the city may consider only regulations such as the NROD regulations  
12 that were specifically acknowledged as part of the Goal 5 program to protect  
13 natural resources.

14 Intervenor notes that the Manual is incorporated into the city's  
15 comprehensive plan as an ancillary plan, and further that other code provisions  
16 that the city's decision cites and relies upon, such OCMC 17.47 (Erosion and  
17 Sediment Control), are part of the city's acknowledged land use regulations.  
18 Intervenor argues that the city commission rejected petitioners' argument below  
19 that the city can consider only regulations such as the NROD regulations that  
20 were adopted to implement Goal 5, for purposes of determining whether new

1 uses could conflict with Newell Creek.<sup>5</sup> Intervenor contends that petitioners do  
2 not challenge that finding or the interpretations therein, and thus fail to  
3 demonstrate that the city erred in relying on local standards that do not directly  
4 implement Goal 5.

5 We agree with intervenor. Petitioners do not acknowledge or challenge  
6 the finding quoted at n 5. That problem aside, petitioners cite to no authority  
7 for the proposition that the only local regulations that can be considered for  
8 purposes of determining whether new uses subject to such regulations could  
9 conflict with Goal 5 natural resources under OAR 660-023-0250(3) are  
10 regulations specifically adopted to implement Goal 5 natural resource  
11 protections. We reject the argument. If a local government has adopted  
12 acknowledged land use regulations that apply to the subject property and  
13 function to protect inventoried natural resources, the local government can

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<sup>5</sup> The city commission's findings state:

“Petitioner argued that the City’s MS-4 permit and other existing regulations were not adopted in compliance with Goal 5 and, as a result, the City may not rely on compliance with those standards in order to demonstrate that the existing Goal 5 program adequately protects Newell Creek from impacts of the new allowed uses. \* \* \* [The City Commission finds that] Goal 5 does not require that the regulations be acknowledged insuring that compliance with Goal 5 in order for the City Commission to determine, based on substantial evidence in the whole record, that the new uses allowed in the MUC-2 zone will not conflict with the Goal 5 resource.” Record 53.

1 consider those regulations, in determining whether such uses could conflict with  
2 Goal 5 resources for purposes of OAR 660-023-0250(3). Petitioners’  
3 arguments on this point do not provide a basis for reversal or remand.

4 The first and second assignments of error are sustained, in part.  
5 However, as explained below, in the alternative the city assumed that the new  
6 uses allowed in the MUC-2 zone “could conflict” with the Goal 5 resource of  
7 Newell Creek, and adopted an ESEE analysis pursuant to OAR 660-023-0040.  
8 Because we reject petitioners’ challenges to the ESEE analysis, the errors  
9 identified under the first and second assignments of error do not warrant  
10 remand.

### 11 **THIRD ASSIGNMENT OF ERROR**

12 As explained in *Nicita I*, if the city cannot eliminate the possibility that  
13 proposed commercial and high density residential uses could conflict with  
14 Newell Creek, the city must repeat the steps in the Goal 5 planning process that  
15 are necessary to ensure that the city’s Goal 5 obligations are met. As an  
16 alternative, the city assumed that the new uses allowed in the MUC-2 zone  
17 “could” conflict with the Goal 5 resource of Newell Creek, and adopted an  
18 ESEE analysis written by intervenor’s consultant, Reed, intended to satisfy the  
19 applicable requirements of OAR 660-023-0040(3). The ESEE analysis  
20 prepared by intervenor’s consultant, Reed, concluded that the net benefits of  
21 allowing the conflicting MUC-2 uses would outweigh the negative impacts, and  
22 would cause no greater conflicts between development of the subject property

1 and Newell Creek, compared to development under the former low density  
2 residential zoning. Based on the ESEE analysis, the city essentially chose to  
3 continue unchanged its program of allowing conflicting uses, as mitigated by  
4 existing regulations designed to protect natural resources such as Newell Creek.

5 Petitioners advance three challenges to the ESEE analysis. First,  
6 petitioner argues that the city’s “findings simply recite [Reed’s] evidence and  
7 arguments. Thus they are not valid ESEE findings.” Petition for Review 20.  
8 We do not understand the argument. The city’s decision consists of the  
9 ordinance, and findings and a staff report attached to the ordinance. The  
10 attached findings in turn incorporate by reference the ESEE analysis. Record  
11 53. Petitioners appear to argue that the findings attached to the ordinance that  
12 describe the incorporated ESEE analysis are not themselves “valid ESEE  
13 findings” because those findings simply recite the conclusions of the ESEE  
14 analysis. Petition for Review 20. That may be so, but the city clearly relied on  
15 the incorporated ESEE analysis itself to provide the findings necessary to  
16 support the conclusions drawn under OAR 660-023-0040(3), not the findings  
17 document attached to the ordinance. To the extent petitioners argue that the  
18 incorporated ESEE analysis does not constitute “valid ESEE findings” that  
19 argument is insufficiently developed for review. *Id.*; *Heiller v. Josephine Co.*,  
20 50 Or LUBA 562, 565-66 (2005).

21 Petitioners next argue that the ESEE analysis does not comply with OAR  
22 660-023-0040(1)(a) because it does not identify the conflicting use.

1 Specifically, petitioners argue that the ESEE analysis does not identify as  
2 conflicting uses discharges of polluted and warmed stormwater into Newell  
3 Creek.

4 OAR 660-023-0040 prescribes a four-step analysis: (1) identify  
5 conflicting uses, (2) determine the impact area, (3) analyze the ESEE  
6 consequences of allowing, limiting or prohibiting conflicting uses, and (4)  
7 based on the ESEE analysis, develop a program to achieve Goal 5 with respect  
8 to the resource, implementing the decision to prohibit, limit or allow conflicting  
9 uses. OAR 660-023-0040(1) states that “[t]he ESEE analysis need not be  
10 lengthy or complex, but should enable reviewers to gain a clear understanding  
11 of the conflicts and the consequences to be expected.” To perform the first step,  
12 identifying conflicting uses, the local government must examine land uses  
13 allowed outright or conditionally within the zones and the impact area.<sup>6</sup>

14 In the present case, the ESEE analysis identifies the conflicting use as the  
15 commercial and high-density residential development allowed in the MUC-2

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<sup>6</sup> OAR 660-0023-0040(2) provides, in relevant part:

“Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. \* \* \*”

1 zone. Record 93. The ESEE analysis compares the ESEE consequences of  
2 continuing to apply single-family residential zoning to the site, with the ESEE  
3 consequences of applying the MUC-2 zone. Petitioners do not argue that that  
4 approach is inappropriate, for purposes of demonstrating that a post-  
5 acknowledgment plan amendment is consistent with Goal 5. The ESEE  
6 analysis does not specifically address pollution from stormwater, but generally  
7 concludes that the greater development intensity and imperviousness allowed  
8 under the MUC-2 zone may result in greater direct impacts on water quality and  
9 water temperature in Newell Creek, compared to development under the single-  
10 family residential zone, although the analysis concludes that adverse impacts of  
11 development under the MUC-2 zone are offset by various ESEE benefits of  
12 development under that zone. Record 94-95. Petitioners have not demonstrated  
13 that in the present context OAR 660-023-0040(2) requires a more detailed  
14 identification of conflicting uses.

15 Finally, petitioners argue that OAR 660-023-0040(4) requires that the  
16 ESEE analysis “must consider any applicable statewide goal or acknowledged  
17 plan requirements[.]” Statewide Planning Goal 2 (Land Use Planning) includes  
18 a requirement that the city coordinate with “affected governmental units.”  
19 Petitioners contend that the city failed to coordinate with Metro, Clackamas  
20 Community College, the Fisheries Department of the National Oceanic and  
21 Atmospheric Administration (NOAA Fisheries), or the Oregon Department of  
22 Fish and Wildlife (ODFW).

1           Intervenor responds that the city’s original decision included findings  
2 regarding compliance with all applicable statewide planning goals, including  
3 the Goal 2 coordination requirement, and petitioners did not raise any issues  
4 regarding coordination on appeal to LUBA. Consequently, intervenor argues,  
5 petitioners are precluded from raising new issues regarding Goal 2 coordination  
6 in the appeal of the city’s decision on remand. *Beck*, 313 Or 148. On the  
7 merits, intervenor argues that petitioners do not explain why the cited  
8 governmental bodies are “affected governmental units” within the meaning of  
9 Goal 2, or if so why the city is obligated to further coordinate with affected  
10 governmental units on remand. *See Melton v. City of Cottage Grove*, 30 Or  
11 LUBA 331, 337-38 (1996) (on remand a city has no obligation to coordinate  
12 with affected governmental units if LUBA’s remand did not require  
13 coordination and the application does not change on remand).

14           We agree with intervenor that petitioners’ Goal 2 coordination argument  
15 is waived, because that argument could have been made during the original  
16 appeal to LUBA, but was not. Goal 2 applied just as much to the city’s original  
17 decision as it does to the decision on appeal, and if the city fell short in  
18 complying with the Goal 2 coordination requirement petitioners could have  
19 raised that issue before LUBA. On remand, the application remained the same,  
20 and while the city considered new evidence and adopted additional findings  
21 nothing about LUBA’s remand or the nature of the proceedings on remand  
22 required the city to make new or additional efforts to coordinate with affected



1 governmental units. While OAR 660-023-0040(4) requires that the ESEE  
2 analysis must consider any applicable statewide goals, OAR 660-023-0040(4)  
3 does not require the city on remand to repeat its initial unchallenged findings  
4 regarding compliance with goal requirements, or open the door for a petitioner  
5 to raise issues regarding goal compliance that could have been, but were not,  
6 raised in the original proceeding and appeal. Accordingly, petitioners' failure  
7 to raise Goal 2 coordination issues during the earlier appeal precludes  
8 petitioners from raising that issue on appeal of the city's decision on remand.

9 The third assignment of error is denied.

10 **DISPOSITION**

11 We sustained portions of petitioners' first and second assignments of  
12 error, challenging the city's primary approach to determining compliance with  
13 Goal 5. However, because we have rejected petitioner's challenge to the city's  
14 alternative approach to determining compliance with Goal 5, petitioners' first  
15 and second assignments of error do not provide a basis for reversal or remand.

16 The city's decision is affirmed.