

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY SHAFF,
Petitioner,

vs.

CITY OF MEDFORD,
Respondent,

and

JAY HARLAND,
Intervenor-Respondent.

LUBA No. 2018-146

FINAL OPINION
AND ORDER

Appeal from City of Medford.

Gary Shaff, Ashland, filed the petition for review and argued on his own behalf.

Lori J. Cooper, City Attorney, Medford, filed a response brief and argued on behalf of respondent.

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

RUDD, Board Member; RYAN, Board Chair participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

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AFFIRMED

04/23/2019

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

Petitioner appeals a city council’s decision adopting a revised Transportation System Plan (TSP).

MOTION TO TAKE OFFICIAL NOTICE

Petitioner attaches seven appendices to his petition for review. None of the material in the appendices is included in the record of the appeal. Petitioner requests that LUBA take official notice of the appendices, citing ORS 40.090 and ORS 40.085. For the reasons we explain below, the motion is granted in part and denied in part.

LUBA has long acknowledged that, consistent with the legislative policy set forth in ORS 197.805, it may take official notice of law subject to judicial notice as defined in ORS 40.090. *Blatt v. City of Portland*, 21 Or LUBA 337, *aff’d*, 109 Or App 259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992). LUBA is, however, with limited exceptions, not a fact finder and its review of facts is generally limited to the record. ORS 197.835(2)(a). Although LUBA will take official notice of law as defined by ORS 40.090, it will not take notice of facts pursuant to ORS 40.085.¹ As we explain in more detail below, to the extent petitioner requests that LUBA consider facts included in the materials in the

¹ ORS 40.085(1) provides that when instructing a jury in a civil action or proceeding, “the court shall instruct the jury to accept as conclusive any fact or law judicially noticed.”

1 appendices to inform LUBA’s review of petitioner’s challenges to the local
2 decision, we reject that request. With that background, the seven appendices are
3 discussed below.

4 **A. Appendices H, G, C, D and F Are Officially Noticed**

5 **1. Appendices H and G are Subject to Official Notice as**
6 **Local Enactments**

7 Petitioner’s Appendix H is the Jackson County Transportation System
8 Plan (Jackson County TSP). Petitioner indicates that information in Appendix H
9 is relevant to the eighth assignment of error, stating that “[t]he extent of rural or
10 non-urban roadways, as determined by Jackson County, may be established
11 through reference to sources whose accuracy may not reasonably be questioned,
12 and because it is an enactment of Jackson County.” Motion to Allow Notice 7.
13 ORS 40.090(7) defines law subject to notice to include “[a]n ordinance,
14 comprehensive plan or enactment of any county or incorporated city in this state,
15 or a right derived therefrom. As used in this subsection, ‘comprehensive plan’
16 has the meaning given that term by ORS 197.015.” The Jackson County TSP is
17 an element of the Jackson County Comprehensive Plan and officially noticed as
18 a county enactment.

19 Petitioner’s reference to the establishment of facts “through reference to
20 sources whose accuracy may not reasonably be questioned” is not a relevant
21 standard. “LUBA does not have authority to take official notice of adjudicative
22 facts” contained within an officially noticed document. *Friends of Deschutes*

1 *County v. Deschutes County*, 49 Or LUBA 100, 103 (2005). To the extent
2 petitioner seeks to rely on Appendix H to establish adjudicative facts, we will not
3 consider it for that purpose.

4 Petitioner also seeks notice of Appendix G, the Rogue Valley Metropolitan
5 Planning Organization’s (RVMPO) Regional Transportation Plan (RTP) (Mar
6 28, 2017). OAR 660-012-0015(2)(c) provides that regional transportation system
7 plans “shall be adopted by the counties and cities within the jurisdiction of the
8 [metropolitan planning organization],” and the city adopted the RTP. Record 328.
9 We take official notice of the RTP as an enactment of an incorporated city
10 pursuant to ORS 40.090(7). For the reasons stated above, we will not consider
11 Appendix G to the extent petitioner relies upon it to establish adjudicative facts.

12 **2. Appendices C, D and F are Subject to Official Notice as**
13 **Official Acts of the State**

14 As discussed in more detail below, Appendices C, D and F are subject to
15 official notice as official acts of the federal or state government. They will not,
16 however, be considered for evidentiary value.

17 Petitioner cites ORS 40.090(2) and (4) as authority for LUBA taking notice
18 of Appendix C: United States Center for Disease Control, *Bicyclist Deaths*
19 *Associated with Motor Vehicle Traffic–United States, 1975-2012* (Aug 14, 2015).
20 Appendix C is not a “[r]egulation[], ordinance[] or similar legislative
21 enactment[]” and therefore is not subject to notice under ORS 40.090(4).
22 Appendix C may be officially noticed pursuant to ORS 40.090(2) as a public or

1 private official act of the legislative, executive or judicial department of the
2 United States. *Hess v. City of Corvallis*, 70 Or LUBA 283, 307 (2014), *aff'd*, 269
3 Or App 908, 347 P3d 1 (2015) (FEMA Biological Assessment officially noticed
4 “for appropriate purposes under [Oregon Evidence Code] 202(2)”). Appendix C
5 is, however, submitted at least in part to supplement the facts in the record below.
6 Petitioner asserts that Appendix C “serves to provide a ‘health’ perspective and
7 thereby broaden the understanding of the challenges associated with Goal 12’s
8 requirement to create a ‘safe and convenient’ bicycle network.” Motion to Allow
9 Notice 2. We will not consider Appendix C to establish facts not in the record.

10 Petitioner argues that Appendix D: Oregon Department of Transportation
11 (ODOT), Kittelson & Associates, *Pedestrian and Bicycle Safety Implementation*
12 *Plan* (Feb 2014) (Implementation Plan) is subject to notice as an official act of
13 ODOT. LUBA may take official notice of the document as an official act of a
14 state agency. ORS 40.090(2). Petitioner contends, however, that Appendix D
15 illustrates the failure of the city to consider certain factors as part of its adoption
16 of the TSP. Motion to Allow Notice 3. Petitioner also indicates that the document
17 is relevant to the appeal because it identifies “bicycle safety corridors not
18 considered for improvement as part of the TSP’s safety analysis.” *Id.* Petitioner
19 does not argue that the city was required to comply with the Implementation Plan.
20 Although this document may be a public or private official act of ODOT as
21 described in ORS 40.090(2), petitioner seeks at least in part to introduce the

1 document to establish facts on the issue of bicycle safety corridors. We will not
2 consider Appendix D for that purpose.

3 Appendix F is the ODOT *Analysis Procedure Manual Version 2* (Oct
4 2018) (ODOT manual) and LUBA may take official notice of the ODOT manual
5 as an official act of a state agency. Petitioner, however, seeks LUBA’s
6 consideration of the ODOT methodology and conclusions in this manual as
7 support for petitioner’s argument that a minimum bike lane width is required by
8 ODOT. Motion to Allow Notice 5. This reflects another attempt to introduce the
9 ODOT manual to support an evidentiary matter. Any adjudicatory facts are not
10 subject to official notice by LUBA.² See n 5.

11 We take official notice of Appendices C, D and F with the caveat that they
12 will not be considered for adjudicative facts.

13 **B. Appendices E and I are Not Officially Noticed**

14 Petitioner seeks notice of Appendix E: City of Medford Memorandum—
15 *Transportation System Plan—Bicycle and Pedestrian Level of Traffic Stress* (Nov
16 20, 2017) (LTS). Appendix E is a memorandum prepared by Kyle Kearns,
17 Medford City Planner II and directed to “TSP Review Bodies.” Petitioner asserts

² Petitioner also argues that Exhibit F was submitted to provide LUBA background and an understanding of “technical * * * jargon” in the TSP. Petitioner’s Response to Intervenor’s Response to Petitioner’s Motion to Allow Judicial Notice of Documents (Petitioner’s Reply Brief for Motion for Notice) 5. Petitioner’s argument does not establish that the documents are not submitted as evidence.

1 that the document contains “the conclusion of the City of Medford that LTS 3
2 and 4 serve few people and LTS 2 will not serve all users may be determined by
3 reference to a source whose accuracy cannot reasonably be questioned.” Motion
4 to Allow Notice 4-5. First, a memorandum prepared by a city employee is not an
5 official act by the city. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA
6 488, 490 (2017) (LUBA will not take notice of a memorandum from assistant
7 director of the Department of Energy (DOE) to Department of Land Conservation
8 and Development (DLCD) staff person because it is not an official act of a state
9 executive department). Second, petitioner posits that this document is subject to
10 notice as an official act of the city without citing an ORS provision authorizing
11 notice of local official acts. Third, petitioner does not explain the basis for his
12 reference to “a source whose accuracy cannot reasonably be questioned” as an
13 applicable criterion for LUBA’s consideration in determining whether to take
14 notice. Fourth, petitioner references ORS 40.090(7), authorizing notice of an
15 ordinance, comprehensive plan or enactment of a city, but does not establish that
16 the memo is an ordinance or comprehensive plan. Appendix E is not noticed.³

17 Lastly, petitioner argues Appendix I: City of Medford Memorandum—
18 *Transportation System Plan–Policy Discussion* (Oct 5, 2017) (memorandum) is

³ Petitioner also argues that Exhibit E was submitted to provide legislative history and an understanding of “technical * * * jargon” used in the TSP. Petitioner’s Reply Brief for Motion for Notice 4-5. LUBA does not have authority to take official notice of local legislative history or adjudicative facts. *Martin v. City of Central Point*, 73 Or LUBA 422, 426 (2016).

1 properly subject to notice because it was relied upon in developing the city's
2 Comprehensive Plan. Motion to Allow Notice 7-8. Appendix I is a memorandum
3 addressed to the Mayor and City Council. A note on the face of Appendix I notes
4 that it was prepared "for 10/12/2017 Study Session." Petitioner states that it is
5 subject to notice because "it is a document considered by the City of Medford in
6 evaluating the relationship between Level of Service (LOS) and TSP project
7 selection, and because it reflects the policy of the City of Medford related to the
8 use of LOS in enacting the TSP." Motion to Allow Notice 7-8. Petitioner has not
9 established that the memorandum is part of the Comprehensive Plan. If the
10 memorandum was before the city council in their proceeding, it should have been
11 included in the record. OAR 661-010-0025(1)(b). Appendix I is not officially
12 noticed.

13 **FACTS**

14 Statewide Planning Goal 12 (Transportation) is "[t]o provide and
15 encourage a safe, convenient and economic transportation system." OAR 660-
16 015-0000(12). Goal 12 is implemented by OAR 660-012 with OAR 660-012-
17 0020 requiring development of transportation plans to "establish a coordinated
18 network of transportation facilities adequate to serve state, regional and local
19 transportation needs" and plan for roadways, pipelines, air, water and bicycle and
20 pedestrian facilities.

21 The city's prior TSP was adopted in 2003. Record 17. Anticipating
22 population growth within the city limits as well as within an expanded urban

1 growth boundary, in 2010 the city began the initial work to update its plan.
2 Record 16. The city coordinated development of the TSP with a technical
3 advisory committee (TAC) whose members included, among others, Jackson
4 County Roads and Greenway and Planning, the City of Phoenix, the City of
5 Central Point, ODOT and the Rogue Valley Metropolitan Planning Organization.
6 Record 27. Petitioner participated in the proceedings below and argued that the
7 plan under consideration was insufficient with regards to reducing reliance on
8 automobiles and providing adequate bicycle facilities. Record 1313-20.

9 In December 2018, the city amended the applicable portions of its
10 Comprehensive Plan, “including the Transportation Element, Public Facilities
11 Element, and the Conclusions, Goals, Policies, and Implementation Strategies of
12 the *Medford Comprehensive Plan*,” and adopted the 2018-2038 TSP. Record 15
13 (emphasis in original). Petitioner timely filed his appeal and his twelve
14 assignments of error are addressed below.

15 **FIRST ASSIGNMENT OF ERROR**

16 OAR 660-012-0020(2) sets forth the required elements of transportation
17 system plans and provides that the plan must identify the network of bicycle
18 routes throughout the planning area. OAR 660-012-0020(2)(d). Petitioner asserts
19 that the required inventory of bicycle facilities in the city’s TSP is inaccurate and
20 thus fails to comply with OAR 660-012-0020(3)(d) and Goal 2 (Land Use
21 Planning). Petition for Review 16.

1 **A. Inventory of Existing Bicycle Facilities (OAR 660-012-**
2 **0020(3)(a))**

3 OAR 660-012-0020(3)(a) provides that each required element of a
4 transportation plan must include “[a]n inventory and general assessment of
5 existing and committed transportation facilities and services by function, type,
6 capacity and condition.”⁴ Petitioner first argues that the adopted inventory fails
7 to comply with the rule because it includes certain areas, such as roadways
8 physically marked by a road shoulder, that petitioner believes are inadequate for
9 safe bicycle travel. Petition for Review 15. To the extent petitioner alleges that
10 the city improperly included narrow or substandard bike lanes, petitioner does
11 not explain how such inclusion violated OAR 660-012-0020(3)(a).⁵ Petitioner
12 has not shown that the rule requires bicycle facilities of a minimum width, or that
13 the inclusion of “substandard” width bike lanes in the inventory violates the rule.

⁴ Petitioner cites OAR 660-012-0020(3)(d) which requires identification of the provider of each transportation facility or service. Petition for Review 16. Given the content of the assignment of error, we believe petitioner intended to cite OAR 660-012-0020(3)(a).

⁵ The initial part of petitioner’s argument relies upon a desired minimum bicycle lane width petitioner asserts is set forth in petitioner’s Appendix F, the ODOT *Analysis Procedure Manual Version 2*, of which we took official notice above. Petition for Review 15. LUBA will not consider evidence from Appendix F as it is not in the record, and although we took official notice of this document, official notice of a document does not allow consideration of the document for adjudicative facts.

1 In *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131, 139
2 (1999), LUBA held:

3 “We agree with petitioners that the county’s TSP does not comply
4 with the requirements of OAR 660-012-0020(3). The list of
5 ‘Designated Bikeway Routes’ at Record 341-53 appears to include
6 only designated bicycle routes and thus is not a complete inventory
7 of the existing and committed bicycle and pedestrian facilities in the
8 county.”

9 LUBA concluded that the inventory was insufficient in *Douglas* because it only
10 included designated bikeways. This holding recognized that the bike system will
11 often include a range of facilities. Here, the city’s inventory includes a variety of
12 facilities, and therefore does not suffer from a failure to include all existing and
13 committed bicycle facilities.

14 **B. The Bicycle Facilities Assessment is Supported by an**
15 **Adequate Factual Base**

16 Petitioner argues that the “TSP’s bicycle inventory is inconsistent with
17 Goal 2 which requires a ‘land use planning process and policy framework as a
18 basis for all decisions and actions related to use of land and to assure an adequate
19 factual base for such decision and actions.’” Petition for Review 16. The Goal 2
20 (Land Use Planning) requirement that decisions be supported by an adequate
21 factual base is met by evidence a reasonable person would rely upon to reach a
22 decision. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-
23 78, *aff’d*, 130 Or App 406, 882 P2d 1130 (1994). The city’s decision meets this
24 standard.

1 OAR 660-012-0020(3)(a) requires that the TSP include a general
2 assessment of existing bicycle facilities by “function, type, capacity and
3 condition.” The condition analysis is to include a description of “the general
4 physical and operational condition of each transportation facility (e.g., very good,
5 good, fair, poor, very poor).” OAR 660-012-0020(3)(a)(C). Petitioner challenges
6 the quality of information included in the TSP’s assessment of bicycle facilities.

7 During the proceedings below, petitioner introduced into the record his
8 sampling of 23 sites identified by the city as bicycle facilities. Petitioner reported
9 that 19 of the 23 facilities he sampled were too narrow and hazardous, with only
10 four meeting city bicycle lane width and striping standards. Petition for Review
11 15. The city rejected the suggestion that the small sample size supported the
12 conclusion that a substantial number of bicycle facilities within the city had
13 substandard width or were potentially unsafe for travel due to standing water or
14 litter, concluding that petitioner failed to explain how he selected the 23 bicycle
15 lanes or why they were appropriate for extrapolation. Response Brief 6-7.

16 Petitioner argues that the city failed to offer evidence to counter
17 petitioner’s sampling of 23 sites. Petition for Review 15. We understand
18 petitioner to contend that the city’s inclusion of the 19 sites that petitioner
19 maintains are too narrow or hazardous results in failure to comply with the rule
20 and suggests that the extent of undersized facilities in the city may be large.
21 Petition for Review 16. In response, the city points to material in the record it

1 asserts provides the necessary general condition information that is required by
2 the rule. Response Brief 7.

3 The city indicates that the Level of Stress (LTS) analysis is the city's
4 required general assessment of capacity and condition. Response Brief 8. As
5 explained in the record:

6 "[LTS] classifies four levels of traffic stress that a cyclist can
7 experience on the roadway ranging from LTS 1 (little traffic stress)
8 to LTS 4 (high traffic stress). A road segment with a LTS 1 generally
9 has low traffic speeds and low volumes and is suitable for all
10 cyclists, including children. A road segment with a LTS 4 generally
11 has high speeds, high volume, and is perceived as unsafe by most
12 adults. LTS 2 is considered appealing to a majority of the bike-riding
13 population and is therefore the desired target on most roadways."
14 Record 339.

15 Materials cited by the city as establishing compliance with OAR 660-012-
16 0020(3)(a) include figures, described below, identifying bicycle facility
17 improvements needed to achieve low stress connections. Figure 11 is "Existing
18 Bicycle Facilities" and Figure 12 is "Existing Bicycle Level of Traffic Stress
19 (LTS)." Record 340-41. Figure 13 is "Bicycle Facility Improvement Needs for
20 Low-Stress Connection" and illustrates improvements needed to reach levels
21 LTS 1 or 2. Record 342. These figures provide general information on the
22 condition of at least some facilities in the form of, for example, places where the
23 road needs to be widened, and petitioner has not established that this is
24 insufficient to satisfy the rule's requirement to describe "the general physical and

1 operational condition of each transportation facility.”⁶ OAR 660-012-
2 0030(3)(a)(C).

3 Petitioner also argues that the city inventory did not include an assessment
4 of the capacity or condition of multi-use paths and petitioner cites a statement by
5 staff in the record that the condition of multi-use paths was not assessed.⁷ Petition

⁶ The petitioner in *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131, referenced a letter from a DLCD staff member that stated:

“The TPR requires: (1) an inventory (i.e., a listing) of existing and committed bicycle and pedestrian facilities; (2) a general assessment of the physical and operational condition of the facilities (using standards of the planning profession); * * *. The plan should clearly identify any locations where deficiencies exist and identify appropriate planned improvements to remedy the identified deficiencies.” *Id.* at 138-39.

The DLCD staffer’s letter also suggested that “[t]he assessment of operational conditions should document and consider bicycle and pedestrian volumes or usage, the types of users (children, adults, elderly etc.), and traffic volumes and speeds.” *Id.* However, we did not reach the issue of whether the level of detail suggested by the DLCD staffer in her comments was required by the rule.

⁷ The city also provides a description of the Bear Creek Greenway (BCGW), the most significant multi-use path, explaining that:

“The BCGW is used for recreation and commuting and runs through numerous parks that have restrooms, drinking water, and picnic areas. The BCGW connects Ashland and Central Point; however, there is a need to improve connectivity to the trail within each city as well as provide low-stress routes to the trail.” Response Brief 8.

1 for Review 16. The city points out in its response brief that the bicycle network,
2 including multi-use paths, is in the record, citing the figures mapping existing
3 bikeways and existing bicycle level of stress. Response Brief 8. According to the
4 TSP, “only multi-use paths and low order streets currently provide low stress
5 (LTS 1 or 2) connectors for bicyclists.” Record at 339. Under the city’s approach,
6 this reflects the condition of these facilities.

7 Petitioner fails to explain why LTS does not reflect capacity and condition
8 of the low stress multi-use paths or the other higher stress facilities. *Deschutes*
9 *Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982) (it is not
10 LUBA’s “function to supply petitioner with legal theories or to make petitioner’s
11 case for petitioner”); *see also Marine Street LLC v. City of Astoria*, 37 Or LUBA
12 587, 596 (2000) (petitioners’ allegation that jurisdiction failed to coordinate with
13 affected entities as required by rule does not provide a basis for reversal or
14 remand where petitioners fail to identify any affected entities).

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 OAR 660-012-0035(4) provides that “[i]n MPO areas, regional and local
18 TSP’s shall be designed to achieve adopted standards for increasing
19 transportation choices and reducing reliance on the automobile.” Regional and

The description of the amenities adjacent to the BCGW and the need to improve some of the feeders to the facility does not clearly address BCGW’s condition. Rather, it describes adjacent facilities.

1 local TSPs shall adopt benchmarks to assure satisfactory progress is made
2 towards meeting approved standards “at regular intervals over the planning
3 period.” OAR 660-012-0035(7). Petitioner’s second assignment of error asserts
4 the city failed to “demonstrate conformance with the [vehicle miles traveled]
5 VMT reduction standard, or include interim benchmarks between 2020 and
6 2038.” Petition for Review 20. Petitioner claims the city failed to comply with
7 requirements for reduced reliance upon automobiles because the city is applying
8 benchmarks it has already failed to meet over the prior planning period (2000-
9 2020), and the adopted benchmarks only run through 2020. Petition for Review
10 17, 19-20. Absent benchmarks extending beyond 2020 and covering the
11 remainder of the 2018-2038 planning period, petitioner maintains that the city is
12 subject to the “OAR 660-12-0045(6)” requirement for five percent reduction in
13 VMT over 20 years.⁸ Petition for Review 20.

14 **A. OAR 660-012-0035(7)**

15 OAR 660-012-0035(7) provides that:

16 “Regional and local TSPs shall include benchmarks to assure
17 satisfactory progress towards meeting the approved standard or
18 standards adopted pursuant to this rule at regular intervals over the
19 planning period. MPOs and local governments shall evaluate
20 progress in meeting benchmarks at each update of the regional
21 transportation plan. Where benchmarks are not met, the relevant
22 TSP shall be amended to include new or additional efforts adequate

⁸ OAR 660-012-0045(6) does not address VMT and we assume that petitioner intended to reference OAR 660-012-0035(6).

1 to meet the requirements of this rule.”

2 Thus, evaluation of progress in meeting benchmarks is expressly required by the
3 rule to occur at each update of the Regional Transportation Plan (RTP).⁹

4 The city’s TSP is not the RTP. The RTP is “the long-range transportation
5 plan prepared and adopted by a metropolitan planning organization for a
6 metropolitan area as provided for in federal law.” OAR 660-012-0005(26).
7 OAR 660-012-0016 provides that local governments must either find that the
8 RTP update is consistent with the local plan or update the local plan to achieve
9 consistency. OAR 660-012-0055(1)(b) and (6) provide that within one year of
10 adoption of a regional transportation plan, the cities within the MPO must adopt
11 the regional TSP and amend the local TSPs to be consistent therewith. The city
12 adopted the RTP. Record 328. Given that the TSP benchmarks must be
13 consistent with those in the RTP, we agree with the city that benchmarks in the
14 TSP are established at the regional level.

15 As stated above, progress in meeting benchmarks is evaluated by the
16 MPOs and local governments at the time the RTP is updated. The RTP update
17 occurs before the TSP update to achieve consistency with that new RTP. The
18 TSP is required to be consistent with, and therefore properly relied upon, the
19 RTP. Petitioner has not alleged that the TSP is inconsistent with benchmarks in

⁹ The TSP notes that the benchmark analysis reports are available at the RVMPO and that “[m]oving forward, the City will need to work with the State and the RVMPO to identify the appropriate target numbers in each category for Medford.” Record 329.

1 the RTP, but rather concedes that neither the RTP nor the city TSP extend the
2 benchmarks past 2020. Petition for Review 19. Accordingly, the city properly
3 relied on the adopted and acknowledged RTP benchmarks. Record 1305.

4 **B. OAR 660-012-0035(6)**

5 OAR 660-012-0035(6) provides that a metropolitan area may accomplish
6 compliance with standards set forth in sections (3)(e), (4) and (5) of the rule by
7 demonstrating to the Land Conservation and Development Commission
8 (LCDC) a likelihood that the jurisdiction is likely to achieve a five-percent
9 reduction in VMT per capita over the planning period. According to petitioner,
10 the city must analyze VMT per capita and demonstrate conformance with the
11 five-percent VMT reduction standard, and because the TSP does not contain
12 that analysis, the TSP violates OAR 660-012-0035(6). Petition for Review 20.

13 OAR 660-012-0035(6) provides a safe harbor for compliance with OAR
14 660-012-0035(3)(e), (4) and (5) by providing local jurisdictions with the option
15 to establish compliance by demonstrating adopted plans and measures are likely
16 to result, over the 20-year planning period, in a five-percent reduction in VMT
17 per capita. The city is not, however, proceeding under OAR 660-012-0035(6).
18 As a result, the five-percent reduction standard is not applicable.¹⁰

¹⁰ LCDC considers the jurisdiction's request and if LCDC approves the request, the jurisdiction adopts interim benchmarks for VMT reduction and periodically evaluates progress in achieving VMT reduction. As explained above, the city properly relied upon benchmarks in the adopted RTP. Accordingly, the lack of interim benchmarks in the TSP for the period between 2020 and 2038 is

1 The city is proceeding under OAR 660-012-0035(7), which provides that
2 “[w]here benchmarks are not met, the relevant TSP shall be amended to include
3 new or additional efforts adequate to meet the requirements of this rule.” OAR
4 660-012-0035(4) provides that

5 “regional and local TSPs shall be designed to achieve adopted
6 standards for increasing transportation choices and reducing
7 reliance on the automobile. * * * It is anticipated that metropolitan
8 areas will accomplish reduced reliance [on the automobile] by
9 changing land use patterns and transportation systems so that
10 walking, cycling, and use of transit are highly convenient and so
11 that, on balance, people need to and are likely to drive less than they
12 do today.”

13 The city identified a variety of steps it is taking to reduce reliance on the
14 automobile, including recent amendments to the land use code concerning
15 minimum density and street network design, as well as establishment and
16 promotion of transit-oriented districts and bicycle and pedestrian improvements.
17 Response Brief 11-12. These steps are sufficient to show compliance with OAR
18 660-012-0035(4).

19 The second assignment of error is denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 OAR 660-012-0045(6) provides that “[i]n developing a bicycle and
22 pedestrian circulation plan as required by OAR 660-012-0020(2)(d), local
23 governments shall identify improvements to facilitate bicycle * * * trips to meet

not a basis for remand of the TSP and the TSP is not required to analyze or show conformance with the VMT reduction standard at OAR 660-012-0035(6).

1 local needs in developed areas.”¹¹ “Appropriate improvements should provide
2 for more direct, convenient and safer bicycle or pedestrian travel within and
3 between residential areas and neighborhood activity centers (i.e., schools,
4 shopping transit stops).” *Id.*

5 Petitioner’s third assignment of error is that the TSP improperly uses vague
6 descriptions of bicycle facility improvements as opposed to describing specific
7 attainable cycling safety improvements. Petition for Review 21. Petitioner
8 focuses on the TSP project designated “PR2.” PR2 is a project allocated \$100,000
9 per year and described as intended to “[e]valuate and construct potential roadway
10 reconfigurations to accommodate bicycle facilities through re-striping and/or
11 minor reconstruction at high priority locations.”¹² Record 410. Petitioner asserts
12 the related commitment to allocate \$100,000 a year to evaluate and construct
13 potential roadway configurations through re-striping and/or minor reconstruction
14 at high priority locations is too vague and fails to identify specific bicycle
15 improvements. Petition for Review 21.

16 Petitioner argues that the level of specificity provided in the TSP is higher
17 for pedestrian facilities than it is for bicycle facilities, but does not establish that

¹¹ The TSP is required to include “[a] bicycle and pedestrian plan for a network of bicycle and pedestrian routes throughout the planning area. The network and list of facilities shall be consistent with the requirements of ORS 366.514.” OAR 660-012-0020(2)(d).

¹² High-priority areas “includ[e] schools, activity centers and essential destinations, transit routes, and transit-oriented development areas.” Record 410.

1 the same level of specificity is required for all elements of the plan. Petition for
2 Review 22. Nonetheless, the city responds by identifying numerous additional
3 bicycle facility specific projects in the TSP facilitating safe travel based upon the
4 assessment of LTS on the roads. Response Brief 16. TSP Table 16 lists shared
5 bicycle/pedestrian path projects. Record 404. Neighborhood bikeway projects are
6 identified in Table 18. Record 408. Figure 12 identifies bicycle facilities with
7 LTS 3 and 4, the higher LTS, and therefore in need of work to reach the desired
8 LTS 2. Record 341. TSP Figure 13 contains a map graphic illustrating the
9 improvements needed on various bicycle facilities to bring the facilities into level
10 LTS 2. Record 342. Table 19 in the TSP includes over 30 bicycle facility
11 improvement projects in developed parts of the city. Record 410. Comparing
12 Figure 13 and Table 19 demonstrates how certain identified projects will improve
13 LTS generally from its current level. Contrary to petitioner’s assertion, the TSP
14 identifies improvements beyond PR2 to facilitate bicycle trips to meet local needs
15 in developed areas. The TSP is consistent with the OAR 660-012-0020(2)(d) and
16 660-012-0045(6) requirements that the local government identify projects to
17 facilitate bicycle trips.

18 The third assignment of error is denied.

19 **FOURTH ASSIGNMENT OF ERROR**

20 The TSP provides that existing improved roads that do not meet TSP cross-
21 section standards for new development are considered “Legacy Streets” and
22 adopts a Legacy Streets policy. Record 360. Petitioner argues that “[t]he TSP

1 'Legacy Street' policy undermines the objectives of Goal 12 and OAR 660-12 to
2 reduce reliance on motor vehicle travel, and instead, places priority on expanding
3 right-of-way for motor vehicle use." Petition for Review 24.

4 Goal 12 is to "[t]o provide and encourage a safe, convenient and economic
5 transportation system." OAR 660-015-0000(12). The text does not directly
6 require reducing motor vehicle use, and a lack of a finding that motor vehicle
7 reliance will be reduced is not a basis for finding that the TSP does not comply
8 with Goal 12.

9 OAR 660-012-0045(6) requires that, in developing a bicycle plan, local
10 governments

11 "identify improvements to facilitate bicycle and pedestrian trips to
12 meet local travel needs in developed areas. Appropriate
13 improvements shall provide for more direct, convenient and safer
14 bicycle * * * travel * * *. Specific measures include, for example,
15 constructing walkways between cul-de-sacs and adjacent roads,
16 providing walkways between buildings and providing direct access
17 between adjacent uses."

18 Legacy streets are existing streets. The Legacy Street policy includes a
19 provision that the city will consider alternate route, off-street paths, extra wide
20 sidewalks and vehicle lane reconfiguration where existing facilities do not
21 include bicycle facilities. Record 374. Multiple steps are required before bike
22 lanes are narrowed or eliminated, prioritizing the provision of bicycle facilities.
23 Planter strips are reduced or eliminated, center turn lanes (except at higher order
24 intersections) are eliminated, lanes are narrowed, and parking removed before

1 bicycle facilities will be narrowed or removed from an existing street. Record
2 375.

3 The city adopted findings concluding that the Legacy Streets policy:

4 “help[s] to ensure missing facilities on roadways, including bicycle
5 facilities, will be addressed either through consideration of a parallel
6 but separate street network, a multi-use path such as Larson Creek,
7 or retrofitting existing right-of-way to include a fourteen foot wide
8 multi-use path on streets historically lacking bicycle facilities and
9 that likely are not safe or convenient to serve bicyclists. Rather than
10 ignoring the built environment and deciding that the existing
11 conditions are good enough, the legacy street policy takes into
12 consideration missing facilities and determines a path forward to
13 accommodate it.” Record 1309.

14 Petitioner’s assignment of error fails to challenge the city’s findings quoted
15 above regarding separated, parallel or multi-use path development. Where a party
16 speculates about adverse impacts resulting from a decision without recognizing
17 or challenging the responsive city findings, the party fails to establish a basis for
18 reversal or remand. *Marine Street LLC*, 37 Or LUBA 587, 603. Petitioner has not
19 shown how the Legacy Streets policy fails to comply with Goal 12 and
20 contributes to a failure to meet transportation needs.

21 The fourth assignment of error is denied.

22 **FIFTH ASSIGNMENT OF ERROR**

23 Goal 12 (Transportation), and the Goal 12 rule establish safety and
24 convenience as primary goals of the transportation system. OAR 660-015-
25 0000(12). Petitioner argues in his fifth assignment of error that “[t]he TSP does
26 not demonstrate and the record does not show that the existing bicycle

1 transportation system is ‘safe and convenient’ or that it will be so at the end of
2 the planning horizon (2038).” Petition for Review 39.

3 In support of his arguments, petitioner cites evidence related to accident
4 data, citizen testimony, level of traffic stress, street environment, and TSP
5 response to unsafe conditions and requirements of law. Petition for Review 26-
6 40. Some of the materials petitioner cites are not in the record or are not subject
7 to official notice for the reasons we explain above, and are not considered.
8 Material in items subject to official notice but submitted for adjudicative facts is
9 similarly disregarded. Further, petitioner argues that weight should be given to a
10 2014 ODOT Pedestrian and Bicycle Safety Implementation Plan, but provides no
11 authority that requires the city to consider that plan and we have advised above
12 that we will not take notice of the plan for adjudicative facts. Petition for Review
13 40. With that understanding, the assignment of error is addressed below.

14 Petitioner’s assignment is based in part on a claim that the TSP’s reliance
15 on LTS as a basis for street cross-section design fails to consider traffic volumes,
16 and therefore does not ensure that future roadways avoid levels of automobile
17 traffic which might interfere with or discourage bicycle travel. Petition for
18 Review 33-34. It is clear, however, that the city LTS analysis does in fact
19 consider traffic volumes. Record 339. The record includes an explanation that
20 automobile traffic levels are considered in assigning LTS, with LTS 4, for
21 example reflecting high volumes of traffic. *Id.*

1 Petitioner also argues that the city’s safety analysis is flawed because it
2 uses an approach that petitioner claims is biased toward improving the safety of
3 motor vehicle travel. Petition for Review 39. Petitioner believes that the TSP
4 safety analysis should not be relied upon because in the context of that analysis,
5 petitioner believes the character of bicycle accidents, the underreporting of
6 bicycle accidents, and lack of bicycle volume data results in a bias toward
7 automobile safety improvement investments as opposed to bicycle system
8 improvements. Petition for Review 27. As a result, petitioner believes bicycle
9 safety improvements are marginalized. Petition for Review 39.

10 First, the TSP includes a “Safety & Technical Memorandum” as Appendix
11 B (Memorandum). The Memorandum evaluated crash trends, but also relied
12 upon the LTS analysis to address safety. Record 276. The Memorandum
13 identified top safety projects and included them in the TSP improvements to
14 enhance bicycle safety. Response Brief 23. Petitioner has not established that the
15 city unreasonably relied upon its safety analysis, and the city is entitled to rely on
16 its analysis. *Neighbors for Dallas v. City of Dallas*, 66 Or LUBA 36 (2012)
17 (petitioners fail to establish a basis for reversal or remand where they fail to
18 identify a requirement that a particular study method be used).

19 Second, although petitioner argues that the TSP fails to make appropriate
20 improvements in the urban cycling network and that the TSP improperly
21 “focus[es] on improving the motor vehicle network and only includes a few

1 projects that would serve to meet the TSP’s identified bicycle transportation
2 needs,” the record contains evidence to the contrary. Petition for Review 35-36.

3 Petitioner states that approximately 100 miles of protected bike lanes are
4 needed “[y]et, none of these needs are included in the TSP project lists (except if
5 they coincide with planned motor vehicle improvements).” Petition for Review
6 36. Record 410-12 sets forth numerous bicycle facility projects. The city
7 responds, and we agree, that the city has taken numerous steps in the TSP to
8 promote safety, including establishing a preference for separating bicycle traffic
9 from automobile traffic on heavily traveled roads. Record 310.

10 Despite these TSP provisions, petitioner asserts that the TSP establishes
11 that the existing system is not safe for all users, and planned improvements will
12 not change that condition. Petition for Review 39. The city responds that bicycle
13 facility improvements are planned in areas served by new streets and where
14 upgrades to existing streets are planned. Response Brief 21. OAR 660-012-
15 0045(3) applies to new development and explains that the purpose of the section
16 is

17 “to provide for safe and convenient pedestrian, bicycle and vehicular
18 circulation consistent with access management standards and the
19 function of affected streets, to ensure that new development
20 provides on-site streets and accessways that provide reasonably
21 direct routes for pedestrian and bicycle travel in areas where
22 pedestrian and bicycle travel is likely if connections are provided,
23 and which avoids wherever possible levels of automobile traffic
24 which might interfere with or discourage pedestrian or bicycle
25 travel.”

1 After setting forth the purpose of the rule section, section (3) proceeds to identify
2 the types of local land use regulations required for new development. These
3 include bicycle parking facilities as part of new multi-family residential
4 developments with more than three units, new retail, office and institutional
5 developments, transit transfer stations and park and ride lots. OAR 660-012-
6 0045(3)(a). On-site facilities accommodating safe and convenient bicycle access
7 from within new development adjacent to residential areas and transit stops and
8 neighborhood activity centers within one-half mile of the development are
9 required. OAR 660-012-0045(3)(b). Arterials and major collectors must have
10 bikeways. *Id.* Off-site road improvements required as a condition of approval
11 must include facilities accommodating convenient bicycle travel. OAR 660-012-
12 0045(3)(c). As the city explains, the city’s code includes responsive regulations.
13 Response Brief 36; *see, e.g.*, City of Medford Municipal Code 10.747 “General
14 Provisions, Bicycle Parking.” The city’s multipronged approach to improving the
15 safety and convenience of the bicycle system is consistent with the need to
16 consider reasonable cost when developing the plan set out in OAR 660-012-
17 0035(1).¹³

¹³ OAR 660-012-0035(1) provides in part: “The TSP shall be based upon evaluation of potential impacts of system alternatives that can reasonably be expected to meet the identified transportation needs in a safe manner and at a reasonable cost with available technology.”

1 Petitioner argues that the TSP will promote a system that “serves few,” “is
2 unsafe for most people,” that does not “meet the needs of the transportation
3 disadvantaged,” and as a result violates Goal 12. Petition for Review 38. We
4 disagree. As the city points out, petitioner fails to acknowledge that the TSP
5 promotes a more accessible system by including provisions promoting mode split
6 (by providing separate bike path systems or diverting traffic onto appropriate
7 parallel routes) and supporting transit, and these efforts meet the Goal 12
8 requirement. Response Brief 12.

9 Petitioner also argues that by failing to provide a “safe and convenient”
10 bicycle transportation network, the TSP fails to meet the direction of OAR 660-
11 012-0040(2)(d) to increase the use of alternative modes. Record at 39. Petition
12 for Review 25-37. Compliance with OAR 660-012-0040(2)(d) is addressed in the
13 disposition of the eighth assignment of error and petitioner’s claim of error here
14 is denied for the same reasons set forth in the disposition of that assignment.

15 The city reasonably relied upon its analysis. Ultimately, petitioner disputes
16 the city’s choices of priorities and strategies. Petitioner argues that the TSP does
17 not allocate sufficient funding for construction of bicycle safety projects, but the
18 policy considerations which inform the investment and programmatic decisions
19 embedded in the TSP are within the discretion of the city council, and petitioner
20 has failed to demonstrate that those considerations fail to comply with Goal 12
21 or the Goal 12 rule. *Jaqua v. City of Springfield*, 46 Or LUBA 134, 176-177,
22 *rev’d on other grounds*, 193 Or App 573, 91 P3d 817 (2004).

1 The fifth assignment of error is denied.

2 **SIXTH ASSIGNMENT OF ERROR**

3 OAR 660-12-0045(3)(d) identifies new development requirements to
4 promote a “safe and convenient” bicycle network. Petitioner’s sixth assignment
5 of error again challenges the city’s cross-sections, asserting that the TSP fails to
6 provide a safe and convenient bicycle network because it includes unsafe cross-
7 sections where motor vehicles endanger cyclists. Petition for Review 41.

8 Petitioner argues that the TSP includes cross-sections unsafe for the
9 majority of residents, with nine of the city’s 13 cross-sections failing to meet the
10 city’s desired level LTS2, and that 11 cross-sections would not serve “all
11 potential users, including the transportation disadvantaged’ as required by [the
12 Oregon Transportation Plan] OTP, Policy 1.2.” Petition for Review 44.
13 Petitioner also argues that the city’s street designs do not meet the requirement
14 in OAR 660-012-0045(3)(d)(A)-(C) that street designs be reasonably free from
15 hazards. Petition for Review 41.

16 Petitioner has not addressed the city findings related to OTP Policy 1.2
17 provided at Record 273. Accordingly, compliance with OTP Policy 1.2 is not a
18 basis for reversal or remand. *Deumling v. City of Salem*, 76 Or LUBA 99, 109
19 (2017) (petitioners fail to provide a basis for reversal or remand where petitioners
20 do not challenge jurisdiction’s finding that applicable standard is met).

21 Further, as the city explains, the transportation system is designed to
22 address a variety of users, transportation modes and travel lengths as required by

1 OAR 660-012-0045(3)(d). Response Brief 37. OAR 660-012-0045(3) provides
2 that the rule is intended to “ensure that new development provides on-site streets
3 and accessways that provide reasonably direct routes for pedestrian and bicycle
4 travel in areas where pedestrian and bicycle travel is likely if connections are
5 provided.” The rule is not applicable in all cases, but rather applicable in those
6 cases where bicycle travel is likely if a connection is provided.

7 OAR 660-012-0045(3)(d)(A) provides that, in the context of new
8 development, safe and convenient bicycle facilities are those “reasonably free
9 from hazards, particularly types or levels of automobile traffic which would
10 interfere with or discourage pedestrian or cycle travel for short trips.” As
11 previously explained, the TSP expresses a preference for separated bicycle
12 facilities and provides cross-sections with separated facilities for both major and
13 minor arterials, reducing exposure to hazards such as automobile traffic. Record
14 361. The TSP complies with OAR 660-012-0045(d)(A)-(C). Further, bicycle
15 facilities are to be consistent with the access management standards and functions
16 of affected streets. Not all cross-sections are intended for all locations and
17 nothing in the TSP requires that all road facilities meet all needs. In fact, the city
18 could decide not to provide bicycle facilities at some locations. This is consistent
19 with a safe and convenient network.

20 OAR 660-012-0045(1)(a) provides that certain facilities need only be
21 subject to land use regulations to the extent necessary to implement the TSP, and
22 “under ordinary circumstances” these transportation facilities do not have a

1 significant impact on land use. The potentially excepted transportation facilities
2 include the operation, maintenance and repair of existing transportation facilities
3 identified in the TSP, dedication of right of way and construction of
4 improvements consistent with clear and objective standards and certain outright
5 permitted uses. Petitioner argues that based on this provision, the city may select
6 designs dangerous for bicyclists without the remedy of a LUBA appeal.

7 To the extent we understand petitioner’s argument, we reject it. Nothing
8 cited by petitioner guarantees a right to appeal a decision regarding a
9 transportation facility to LUBA. LUBA has exclusive jurisdiction to review “land
10 use decisions” as defined in ORS 197.015(10)(a), and if a decision regarding a
11 transportation facility fails to qualify as a land use decision under ORS
12 197.015(10)(a), or is excluded from LUBA’s jurisdiction by another statutory
13 provision, that failure does not provide a basis for reversal or remand.

14 The sixth assignment of error is denied.

15 **SEVENTH ASSIGNMENT OF ERROR**

16 OAR 660-012-0020(2)(d) requires the TSP to include a bicycle plan.
17 Petitioner’s seventh assignment of error argues initially that the TSP’s bicycle
18 plan is not supported by an adequate factual base because it includes unfunded
19 projects. Intervenor responds, and we agree, that the TSP’s bicycle plan is
20 supported by an adequate factual base. Intervenor’s Response Brief 9-10. The
21 TSP explains that there are projects likely to be funded based on existing
22 resources (Tier 1), and those that exceed the projected resources (Tier 2). Record

1 376. Tier 2 projects can be moved to Tier 1 if funding becomes available. *Id.*
2 “Nothing in the TPR requires that a local government provide funding certainty
3 for anticipated transportation facility improvements that are identified in a TSP.”
4 *Jaqua*, 46 Or LUBA 134, 176. Further, OAR 660-012-0040(4) provides
5 “[a]nticipated timing and financing provisions in the transportation financing
6 program are not considered land use decisions as specified in ORS
7 197.712(2)(e)” and therefore cannot be the basis of an appeal to LUBA.

8 Petitioner also argues, again, that the shared facility strategy is not safe and
9 convenient and therefore should not have been included in the TSP. Petition for
10 Review 48-49. As intervenor explains, the TSP must include a road plan with:

11 “‘standards for the layout of local streets’ that ‘provide for safe and
12 convenient bike and pedestrian circulation necessary to carry out
13 OAR 660-012-0045(3)(b).’ OAR 660-012-0020(2)(b). In turn, OAR
14 660-012-0045(3)(b) calls for ‘[o]n-site facilities’ to “accommodate
15 safe and convenient pedestrian and bicycle access’ from within new
16 development to adjacent residential and transit uses and nearby
17 activity centers.” Intervenor’s Response Brief 11-12.

18 The bicycle plan proposes 14-foot wide “behind the curb” shared use
19 bicycle/pedestrian facilities in some locations. Petitioner argues that these shared
20 use facilities do not comply with OAR 660-12-0020(2)(b) and OAR 660-012-
21 0045(3)(b).

22 Intervenor responds, and we agree, that OAR 660-012-0020(2)(b) and 660-
23 012-0045(3)(b) do not prohibit behind the curb shared use facilities. More
24 importantly, the city adopted findings addressing petitioner’s argument that

1 concluded, on balance, that the shared use facilities would be safe. Record 1300-
2 01. The paths promote safety through vehicle traffic separation and their
3 attractiveness to a variety of users. Record 444. Petitioner does not challenge
4 those findings. Accordingly, this argument provides no basis for reversal or
5 remand.

6 The seventh assignment of error is denied.

7 **EIGHTH ASSIGNMENT OF ERROR**

8 In his eighth assignment of error, petitioner argues the TSP (1) does not
9 reduce reliance on the automobile as required by OAR 660-012-0030(3)(b) and
10 (4); (2) does not evaluate alternatives or use criteria in the selection of projects
11 as required by OAR 660-012-0040(2)(d); and (3) does not include systemic
12 measures or projects that will provide a safe and convenient bicycle network
13 during the 2018-2038 planning period, in violation of Goal 12.

14 **A. OAR 660-012-0030(3)(b) and -0030(4)**

15 Petitioner argues that the TSP transportation needs analysis does not
16 satisfy the requirements of OAR 660-012-0030(3)(b) and (4) to reduce reliance
17 on the automobile.¹⁴ However, there is ample evidence in the record

¹⁴ OAR 660-012-0030(3)(b) provides that within urban growth boundaries, the determination of local and regional transportation needs will be based in part on measures adopted pursuant to OAR 660-012-0045 to encourage reduced automobile reliance.

1 demonstrating compliance with the rules that require the city to reduce reliance
2 on the automobile.

3 TSP Section 3 addresses transportation need in its “Existing Conditions &
4 Future Needs Assessment” section. Rec. 318-52. This portion of the TSP
5 discusses bicycle, pedestrian and transit needs as well as the development of
6 transit-oriented development and activity centers. Policies set forth in the Record
7 at 314 help reduce auto reliance. Petitioner disagrees with the city without
8 demonstrating why the city’s TSP fails to satisfy the requirements of OAR 660-
9 012-0030(3)(b) and (4). Accordingly, petitioner’s arguments provide no basis for
10 reversal or remand of the decision.

11 **B. OAR 660-012-0035(1)**

12 OAR 660-012-0035(1) provides in part that “[t]he TSP shall be based upon
13 evaluation of potential impacts of system alternatives that can reasonably be
14 expected to meet identified transportation needs in a safe manner and at a
15 reasonable cost with available technology.” Petitioner argues that the record does
16 not support a determination that the city has evaluated alternatives pursuant to

OAR 660-012-0030(4) provides “[i]n MPO areas, calculation of local and regional transportation needs also shall be based upon accomplishment of the requirement in OAR 660-012-0035(4) to reduce reliance on the automobile.”

1 OAR 660-012-0035(1). Petition for Review 61. Intervenor responds that the
2 record includes an evaluation of alternatives. Intervenor’s Response Brief 18.

3 We agree with intervenor. The TSP includes a Safety Technical
4 memorandum analyzing alternatives to address safety concerns (Record 494-
5 618), an Analysis of Mitigated Conditions, Figures, and Synchro Outputs which
6 analyzed mitigation alternatives (Record 885-973), and a Funding Scenarios
7 memorandum analyzing funding options (Record 1081-1109). Petitioner has not
8 challenged those portions of the TSP or explained why they are inadequate to
9 satisfy the rule. Accordingly, petitioner’s argument provides no basis for reversal
10 or remand.

11 **C. OAR 660-012-0040(2)(d)**

12 OAR 660-012-0040(2)(d) provides that the transportation financing
13 program in metropolitan areas will include

14 “policies to guide selection of transportation facility and
15 improvement projects for funding in the short-term to meet the
16 standards and benchmarks established pursuant to 0035(4)-(6). Such
17 policies shall consider and shall include among the priorities,
18 facilities and improvements that support mixed-use, pedestrian
19 friendly development and increased use of alternative modes.”

20 Petitioner argues that the record does not demonstrate consideration of OAR 660-
21 012-0040(2)(d). Intervenor responds, and we agree, that policies in the TSP
22 supporting mixed-use, pedestrian friendly development and increased use of
23 alternative modes include (1) Policy 12-c to identify gaps such as missing bicycle
24 facilities and systematically upgrade the network to correct the deficiencies, (2)

1 Policy 12-d to consider national guidelines for accommodating all ages and
2 abilities when considering bicycle facility installation, and (3) Policy 13-a to
3 identify and prioritize sidewalk infill within a quarter-mile of transit routes or
4 stops. Intervenor’s Response Brief 19-20.

5 Petitioner has not shown that the city failed to adopt policies consistent
6 with OAR 660-012-0040(2)(d), or that those policies did not inform project
7 selection.

8 Petitioner disagrees with the city’s funding priorities as reflected in the
9 projects given a Tier 1 designation and argues that the amount of funding
10 dedicated to automobile related projects undermines funding projects promoting
11 bicycle infrastructure. Petition for Review 64. As discussed in the response to
12 the seventh assignment of error, funding decisions are the purview of the city
13 council.

14 Petitioner also argues that the TSP fails to separately identify protected
15 bicycle lane improvements. Respondent observes that petitioner has not
16 identified a standard that requires the TSP to separately identify bicycle lane
17 improvements, and that, in addition, protected bicycle lane improvements are
18 included on the project list within street improvement projects that call for bicycle
19 and non-bicycle related improvements. Response Brief 48. We agree.

20 Finally, petitioner restates the arguments made in his fifth assignment of
21 error (that the TSP fails to comply with the OAR 660-12-0045(3)(d) requirement
22 for a “safe and convenient” bicycle network and that the project selection criteria

1 are biased in favor of automobile travel), and his second assignment of error
2 (wrong or inadequate benchmarks). For the reasons we rejected the arguments
3 above, we reject them here.

4 **D. OAR 660-012-0035(5)(c)(D)**

5 OAR 660-012-0035(5)(c)(D) provides in cases where a jurisdiction’s plan
6 uses benchmark standards expected to increase VMT per capita:

7 “(c) [T]he cities and counties in the metropolitan area shall
8 prepare and adopt an integrated land use and transportation plan
9 including the elements listed in paragraphs (A)-(E) below. Such a
10 plan shall be prepared in coordination with the MPO and shall be
11 adopted within three years of the approval of the standard.

12
13 “* * * * *

14 “(D) Policies to review and manage major roadway improvements
15 to ensure that their effects are consistent with achieving the
16 adopted strategy for reduced reliance on the automobile,
17 including policies that provide for the following:

18 “(i) An assessment of whether improvements would result
19 in development or travel that is inconsistent with what
20 is expected in the plan;

21 “(ii) Consideration of alternative measures to meet
22 transportation needs;

23 “(iii) Adoption of measures to limit possible unintended
24 effects on travel and use patterns including access
25 management, limitation on subsequent plan
26 amendments, phasing of improvements, etc.; and

27 “(iv) For purposes of this section a ‘major roadway
28 expansion’ includes new arterial roads or streets and

1 highways, the addition of travel lanes, and construction
2 of interchanges to a limited access highway.”

3 This rule applies when a local government adopts a transportation system
4 plan using a standard approved pursuant to rules expected to result in an increase
5 in VMT per capita. Petitioner has not shown that the TSP is using a standard
6 expected to increase VMT per capita, and that this provision is applicable.

7 **D. OAR 660-012-0015(3)(a)**

8 OAR 660-012-0015(3)(a) requires cities to prepare, adopt and amend local
9 TSP’s within their planning jurisdiction which “establish a system of
10 transportation facilities and services adequate to meet identified local
11 transportation needs” and “consistent with regional TSPs and adopted elements
12 of the state TSP.” Petitioner argues that the TSP is not coordinated with the RTP
13 as it relates to the funding and construction of the South Stage Road overpass, or
14 the extension of South Stage Road from its existing terminus to North Phoenix
15 Road. Petition for Review 64. Petitioner also argues that an arterial project to
16 which the city is dedicating local resources is not prioritized in the Jackson
17 County TSP and is not reflected in the RTP projects. Petition for Review 55-56.

18 The TSP includes findings of coordination with the RVMPO, and other
19 jurisdictions. Record 41. Petitioner does not challenge those findings or explain
20 why they are inaccurate. OAR 660-012-0015(3) provides that the local TSP and
21 the regional TSP must be consistent. Petitioner does not challenge the city’s
22 findings of consistency with the RTP at Record 328-329. Nothing in OAR 660-

1 012-0015(3) requires the city’s TSP to be consistent with the Jackson County
2 TSP.

3 **E. Project Costs vs. Allocated Funds**

4 Finally, petitioner argues that the city’s TSP fails to comply with Goal 2
5 because it includes Tier 1 improvements whose cost is far in excess of money
6 available to construct them. We rejected a nearly identical argument in the
7 seventh assignment of error, and we reject it here for the same reasons.

8 The eighth assignment of error is denied.

9 **NINTH ASSIGNMENT OF ERROR**

10 In his ninth assignment of error, petitioner argues that the city improperly
11 included in the TSP language providing that the TSP is internally focused, not
12 externally applicable and “no part of the TSP serves as a ‘requirement’ to which
13 land use (or other) applicants must demonstrate compliance.” Petition for Review
14 65. Petitioner challenges language that was not included in the version of the TSP
15 that the city ultimately adopted. Record 58-59. Accordingly, petitioner’s
16 arguments provide no basis for reversal or remand.

17 The ninth assignment of error is denied.

18 **TENTH ASSIGNMENT OF ERROR**

19 Petitioner’s tenth assignment of error includes numerous arguments.

20 **A. Statewide Planning Goal 6 (Air, Water and Land Resources)**

21 Statewide Planning Goal 6 (Air, Water and Land Resources) is in relevant
22 part “[t]o maintain and improve the quality of the air, water and land resources

1 of the state.”¹⁵ Petitioner’s tenth assignment of error asserts that the city’s
2 decision should be remanded for failure to assess the TSP’s impact on greenhouse
3 gas (GHG) emissions.

4 In *Setniker v. ODOT*, 66 Or LUBA 54, 64 (2012), LUBA discussed the
5 difficulty of addressing air quality issues when adopting a legislative amendment
6 to a transportation plan in the context of the Oregon Highway Plan (OHP). LUBA
7 noted that in the context of the OHP, challenges to the amendments were limited
8 to assertions that the amendments were facially inconsistent with a legal
9 requirement or would categorially violate a local requirement when applied

¹⁵ OAR 660-015-0000(6) explains Goal 6 is:

“[t]o maintain and improve the quality of the air, water and land resources of the state. 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.”

1 locally. *Id.* at 65. The challenged findings in *Setniker* addressed Goal 6 and found
2 that the plan anticipated promoting efficient overall use of resources and
3 enhancing air quality and GHG goals through broader mode choice. *Id.* at 62-63.
4 Here, the TSP includes policies to reduce GHG emissions in Objective 21, which
5 includes evaluating incentives for developer provided electric vehicle charging
6 stations, tree canopy development, and promotion of active transportation.
7 Record 316.

8 Similarly, *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488, 513
9 (2016), *aff'd*, 284 Or App 314, 397 P3d 1007 (2017) concerned adoption of a
10 concept plan for an area, and LUBA observed that “at the post acknowledgment
11 plan amendment stage, a local government only need show it is reasonable to
12 expect that applicable state and federal environmental quality standards can be
13 met” to satisfy Goal 6. Similarly, here, petitioner has not established that it is not
14 reasonable to expect that applicable standards can be met. The city found that
15 compliance with Oregon Transportation Plan (OTP) Policy 4.1-Environmentally
16 Responsible Transportation System (addressed further below), promotes air
17 quality. Record 34.

18 Petitioner also argues that the TSP does not comply with Goal 6 because
19 the TSP does not analyze GHG emissions or provide for their reduction.
20 Petitioner cites OAR 660-012-0000(3), the transportation planning purpose
21 statement which provides the

22 “mix of planned transportation facilities and services should be

1 sufficient to ensure economic, sustainable and environmentally
2 sound mobility and accessibility for all Oregonians. Coordinating
3 land use and transportation planning will also complement efforts to
4 meet other state and local objectives, including * * * conserving
5 energy and reducing emissions of greenhouse gases that contribute
6 to global climate change.”

7 Petitioner fails to cite any authority requiring the city to adopt specific GHG
8 reduction targets. Petitioner cites GHG reporting requirements in OAR 340, but
9 does not demonstrate that the requirements apply to the city’s adoption of an
10 amendment to the TSP.¹⁶

11 **B. OTP Policy 4.1**

12 Petitioner argues that the TSP fails to satisfy OTP Policy 4.1-
13 Environmentally Responsible Transportation System. OTP Policy 4.1 provides
14 that “[i]t is the policy of the State of Oregon to provide a transportation system
15 that is environmentally responsible and encourages conservation and protection
16 of natural resources.” Record 34. The city adopted findings addressing OTP
17 Policy 4.1, and petitioner fails to challenge these findings. Record 1402.
18 Accordingly, petitioner’s argument provides no basis for reversal or remand of
19 the decision.

20 **C. OAR 660-012-0035(3)(c)**

21 Petitioner argues that the TSP violates OAR 660-012-0045(3)(c). Petition
22 for Review 68. OAR 660-012-0045(3)(c) concerns off-site road improvements

¹⁶ Further, ORS 197.010(2)(b) provides that the statewide land use program is not required to manage the effects of climate change.

1 required as a condition of development approval. We assume petitioner intended
2 to cite OAR 660-012-0035(3)(c), which requires the city to consider minimizing
3 adverse economic, social, environmental and energy consequences when
4 selecting alternatives. The city adopted findings that OAR 660-012-0035 is met,
5 and petitioner does not challenge or address those findings. Record 42.

6 **D. Specific Implementation Measures**

7 Goal 2 (Land Use Planning) is “[t]o establish a land use planning process
8 and policy framework as a basis for all decision and actions related to use of land
9 and to assure an adequate factual base for such decisions and actions.” OAR 660-
10 015-000(2). Petitioner argues that Goal 2 requires specific implementation
11 measures. We disagree. Specific implementation measures are not required. A
12 city may adopt plan amendments before adopting implementing measures.
13 *Constant v. City of Lake Oswego*, 5 Or LUBA 311, 316 (1982).

14 Further, the TSP includes Objective 21 to reduce GHG emissions along
15 with action items which include the development of bicycle facilities. As
16 petitioner recognizes, “[t]he TSP acknowledges the importance of reducing
17 environmental impacts of the transportation system and even has an objective
18 calling for reduction of GHG emissions.” Petition for Review 71. The TSP also
19 identifies bicycle facility projects as discussed above.

20 The tenth assignment of error is denied.

1 **ELEVENTH ASSIGNMENT OF ERROR**

2 Goal 13 (Energy) is “to conserve energy.” OAR 660-015-0000(13).
3 Petitioner argues that the TSP violates Goal 13 because, in his view, the TSP does
4 not provide for a more energy efficient transportation system. Petition for Review
5 75. Petitioner argues that the TSP fails to forecast or plan for an increase in
6 bicycle modal share, because the existing network is unsafe and funding is not
7 provided to construct a safe and convenient bike system. *Id.*

8 The city adopted findings of compliance with Goal 13, including that
9 compliance with the RTP performance measures would result in Goal 13
10 compliance because the performance measures require minimum residential
11 densities, transportation connections, and integrated development patterns to
12 serve residents. Record 284. The city also found that the TSP addressed demand
13 management strategies supportive of energy conservation. Petitioner does not
14 challenge or address those findings. Record 281.

15 Further, we have held that Goal 13 does not require maximization of
16 alternative modes. In *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or
17 LUBA 660, 684 (1998), we concluded that Goal 13 “is directed at the
18 development of local energy policies and implementing provisions and does not
19 state requirements with respect to other land use provisions, even if those
20 provisions have incidental impacts on energy use and conservation.”

1 The remainder of petitioner’s eleventh assignment of error restates an
2 argument we rejected in his tenth assignment of error, and we reject it here.
3 Petition for Review 76.

4 The eleventh assignment of error is denied.

5 **TWELFTH ASSIGNMENT OF ERROR**

6 ORS 659A.006 is a statement of state policy regarding discrimination.

7 ORS 659A.006(2) provides in part that

8 “[t]he opportunity to obtain employment or housing or to use and
9 enjoy places of public accommodation without unlawful
10 discrimination because of race, color, religion, sex, sexual
11 orientation, national origin, marital status, age or disability hereby
12 is recognized as and declared to be a civil right.”

13 In his twelfth assignment of error, petitioner argues that the cross-
14 sections included in the TSP are inconsistent with ORS 659A.006. Petition for
15 Review 77. Petitioner believes that the street cross-sections in the TSP do not
16 meet the travel needs of bicyclists of all ages and abilities, and as a result are
17 inconsistent with ORS 659A.006. *Id.* Petitioner does not explain why the
18 provisions of ORS 659A apply to the city’s adoption of the TSP. ORS
19 197.175(2)(a) (the city is required to adopt an amendment to the comprehensive
20 plan in compliance with the statewide planning goals).

21 TSP, Objective 11 provides that “[t]he City of Medford will strive to
22 develop and maintain a well-connected transportation system for all modes and
23 users.” Petitioner argues that cross-sections that do not serve everyone are

1 inconsistent with TSP, Objective 11. Objective 11 is to provide a way for people
2 to travel throughout the City of Medford and its surrounds; it may not necessarily
3 always be by the same means. Petitioner does not point to any requirement that
4 all facilities serve all users, or that a “well-connected” transportation system
5 provides alternatives for every mode and for every user at all places. Further,
6 even if ORS 659A.006(2) applies to the city’s TSP, petitioner does not make clear
7 how the city’s TSP fails to meet ORS 659A.006(2), or otherwise fails to
8 adequately serve modes and users for the purposes of Objective 11.

9 The twelfth assignment of error is denied.

10 The city’s decision is affirmed.