

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

COLUMBIA PACIFIC BUILDING TRADES COUNCIL,
PORTLAND BUSINESS ALLIANCE,
OREGON BUSINESS & INDUSTRY, and
WESTERN STATES PETROLEUM ASSOCIATION,
Petitioners,

and

WORKING WATERFRONT COALITION,
Intervenor-Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

COLUMBIA RIVERKEEPER,
CENTER FOR SUSTAINABLE ECONOMY,
OREGON PHYSICIANS FOR
SOCIAL RESPONSIBILITY, and
PORTLAND AUDUBON SOCIETY,
Intervenors-Respondents.

LUBA No. 2020-009

FINAL OPINION
AND ORDER

Appeal from City of Portland.

William L. Rasmussen, Portland, filed a petition for review and reply brief
and argued on behalf of petitioners. With him on the briefs was Miller Nash
Graham & Dunn LLP.

1
2 Phillip E. Grillo, Portland, filed a petition for review and reply brief and
3 argued on behalf of intervenor-petitioner. With him on the brief was Olivier
4 Jamin and Davis Wright Tremaine LLP.

5
6 Lauren A. King, Deputy City Attorney, Portland, filed a response brief and
7 argued on behalf of respondent. With her on the brief was Dennis M. Vannier.

8
9 Maura C. Fahey, Portland, filed a response brief and argued on behalf of
10 intervenors-respondents. With her on the brief was Christopher Killmer and Crag
11 Law Center.

12
13 RUDD, Board Chair; ZAMUDIO, Board Member, participated in the
14 decision.

15
16 RYAN, Board Member, did not participate in the decision.

17
18 REMANDED 10/30/2020

19
20 You are entitled to judicial review of this Order. Judicial review is
21 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal the city council’s adoption of Ordinance No. 189807, which amends the city’s zoning ordinance to prohibit (1) the establishment of new bulk fossil fuel terminals (FFTs) and (2) the expansion of existing FFTs (2019 FFT amendments).

MOTION TO INTERVENE

Working Waterfront Coalition (intervenor-petitioner) moves to intervene on the side of petitioners. Columbia Riverkeeper, Center for Sustainable Economy, Oregon Physicians for Social Responsibility, and Portland Audubon Society (intervenor-respondents) move to intervene on the side of the city. The motions are unopposed and are granted.

MOTIONS TO TAKE OFFICIAL NOTICE

The city asks that we take official notice of its Comprehensive Plan Designation Map updated March 16, 2020. Respondent’s Response Brief 35 n 6. ORS 40.090(7) provides, in part, that official notice may be taken of “[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom.” The city asserts that the map “reflects the Plan Designations in effect following remand,” but the city provides neither evidence that the map has been incorporated into an ordinance nor any other basis for us to conclude that it is an enactment subject to official notice. The map includes the following notation:

1 “The information on the map was derived from City of Portland GIS
2 databases. Care was taken in the creation of the map but it is
3 provided ‘as is’. The City of Portland cannot accept any
4 responsibility for error, omissions or positional accuracy.”
5 Respondent’s Response Brief App 13.

6 LUBA will not take official notice of a planning map where the requesting party
7 fails to establish that the map is the kind of “enactment” that is subject to official
8 notice. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239, 283 (2003). The
9 motion to take official notice of the map is denied.

10 The city also requests that we take official notice of its June 15, 2016
11 adoption of Ordinance No. 187832, approving the 2035 Comprehensive Plan
12 (CP). “LUBA routinely takes official notice of local government comprehensive
13 plans * * *.” *McNamara v. Union County*, 28 Or LUBA 722, 723 (1994); *see*
14 *also* ORS 40.090(7) (judicially noticed law includes the comprehensive plans of
15 incorporated cities). The motion to take official notice of Ordinance No. 187832
16 is granted.

17 **FACTS**

18 We first considered the city’s adoption of FFT amendments in *Columbia*
19 *Pacific Building Trades Council v. City of Portland*, 76 Or LUBA 15 (2017)
20 (*CPBT I*), *aff’d in part, rev’d in part, and rem’d*, 289 Or App 739, 412 P3d 258
21 (*CPBT II*), *rev den*, 363 Or 390 (2018). In *CPBT I*, we reviewed Ordinance No.
22 188142, which the city adopted on December 14, 2016 (2016 FFT amendments).

23 As we explained in *CPBT I*, prior to adoption of the 2016 FFT
24 amendments, the city’s zoning code regulated all freight terminals under the

1 general land use category of “Warehouse And [*sic*] Freight Movement,” a use
2 category generally allowed in employment and industrial zones under standards
3 that do not limit the size or number of such terminals. 76 Or LUBA at 21. The
4 2016 FFT amendments provided that, rather than Warehouse and Freight
5 Movement, FFTs would be regulated as “Bulk Fossil Fuel Terminals,” defined
6 generally as

7 “establishments primarily engaged in the transport and bulk storage
8 of fossil fuels. Terminal activities may also include fuel blending,
9 regional distribution, and wholesaling. The firms rely on access by
10 marine, railroad, or regional pipeline to transport fuels to or from the
11 site, and either have transloading facilities for transferring a
12 shipment between transport modes, or have storage capacity
13 exceeding 2 million gallons for fossil fuels. There is minimal on-site
14 sales activity with the customer present.” Portland City Code (PCC)
15 33.920.300(A).¹

¹ PCC 33.920.300(D) lists the following exceptions to the Bulk Fossil Fuel Terminal use category:

- “1. Truck or marine freight terminals that do not store, transport or distribute fossil fuels are classified as Warehouse And [*sic*] Freight Movement uses.
- “2. Truck or marine freight terminals that do not have transloading facilities and have storage capacity of 2 million gallons or less are classified as Warehouse And [*sic*] Freight Movement uses. However, multiple fossil fuel facilities, each with 2 million gallons of fossil fuel storage capacity or less but cumulatively having a fossil fuel storage capacity in excess of 2 million gallons, located on separate parcels of land will be classified as a Bulk Fossil Fuel Terminal when two or more of the following factors are present:

1 In *CPBT I*, we reversed the city’s decision adopting the 2016 FFT
2 amendments because we determined that the amendments violated the Dormant
3 Commerce Clause of the United States Constitution. 76 Or LUBA at 56-74.

“a. The facilities are located or will be located on one or more adjacent parcels of land. Adjacent includes separated by a shared right-of-way;

“b. The facilities share or will share operating facilities such as driveways, parking, piping, or storage facilities; or

“c. The facilities are owned or operated by a single parent partnership or corporation.

“3. Gasoline stations and other retail sales of fossil fuels are not Bulk Fossil Fuel Terminals.

“4. Distributors and wholesalers that receive and deliver fossil fuels exclusively by truck are not Bulk Fossil Fuel Terminals.

“5. Industrial, commercial, institutional, and agricultural firms that exclusively store fossil fuel for use as an input are not Bulk Fossil Fuel Terminals.

“6. Uses that involve the transfer or storage of solid or liquid wastes are classified as Waste-Related uses.

“7. The storage of fossil fuels for exclusive use at an airport, surface passenger terminal, marine, truck or air freight terminal, drydock, ship or barge servicing facility, rail yard, or as part of a fleet vehicle servicing facility are not Bulk Fossil Fuel Terminals.

“8. Uses that recover or reprocess used petroleum products are not Bulk Fossil Fuel Terminals.”

1 However, recognizing that we were unlikely to be the last step on the appeal
2 ladder, we resolved the remaining assignments of error and concluded that the
3 2016 FFT amendments were also inconsistent with the city's obligations under
4 Statewide Planning Goal 12 (Transportation), and were not supported by an
5 adequate factual base, as required by Statewide Planning Goal 2 (Land Use
6 Planning).² On judicial review, the Court of Appeals sustained only our
7 determination that the amendments were not supported by an adequate factual
8 base. *CPBT II*, 289 Or App 739. We then remanded the decision back to the city
9 for consideration of compliance with Goal 2, consistent with the court's opinion.
10 *Columbia Pacific Building Trades Council v. City of Portland*, ___ Or LUBA
11 ___ (LUBA No 2017-001, Oct 5, 2018).

12 On November 20, 2019, the city council held a public hearing to address
13 the remand and consider readoption of the 2016 FFT amendments. Record 178.
14 On December 18, 2019, the city council adopted the 2019 FFT amendments.
15 Record 19. The city council's findings state, "The Zoning Code amendments are
16 similar to the changes adopted in 2016, except for a few minor adjustments to

² Goal 12 is "[t]o provide and encourage a safe, convenient and economic transportation system." OAR 660-015-0000(12).

Goal 2 is "[t]o establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions." OAR 660-015-0000(2).

1 reconcile the [FFT amendments] with subsequent changes in the zoning code that
2 have been adopted since 2016.” Record 18, 178.

3 The 2019 FFT amendments prohibit the establishment of new FFTs.
4 Record 198. Existing FFTs are allowed to continue under the amendments,

5 “but the total amount of fossil fuel that can be stored on the site in
6 storage tanks is limited to the fossil fuel storage tank capacity that
7 existed on [insert effective date]. Total fossil fuel storage tank
8 capacity on the site in excess of the capacity that existed on [insert
9 effective date] is prohibited.” *Id.* (brackets in original).

10 Eleven FFTs are located in the city’s Northwest Industrial District, at the
11 terminus of the Olympic pipeline. Record 179. The city’s Bureau of Planning and
12 Sustainability (BPS) submitted evidence into the record that the largest existing
13 FFT has a capacity of 67 million gallons, the smallest has a capacity of 11 million
14 gallons, and the average size is 32 million gallons. Record 3665. The 400-mile
15 Olympic pipeline is the primary mode for transporting gasoline, diesel, and jet
16 fuel to Oregon and Southwest Washington. City of Portland Freight Master Plan
17 (FMP) 2. As a common carrier, the pipeline “transports approximately 12.3
18 million gallons of fuel per day—the daily equivalent of 1,500 tanker trucks
19 traveling Interstate 5”—to Portland from refineries in the Puget Sound area. *Id.*

20 This appeal followed.

1 **PETITIONERS’ AND INTERVENOR-PETITIONER’S SECOND**
2 **ASSIGNMENTS OF ERROR**

3 State law requires that cities’ land use decisions be in compliance with
4 their acknowledged comprehensive plans. ORS 197.175(2)(d). Under Goal 2,
5 “[c]ity, county, state and federal agency and special district plans and actions
6 related to land use shall be consistent with the comprehensive plans of cities and
7 counties and regional plans adopted under ORS Chapter 268.” OAR 660-015-
8 0000(2).³ PCC 33.835.040 implements state law and provides:

9 “Text amendments to the zoning code must be found to be consistent
10 with the Comprehensive Plan, Urban Growth Management
11 Functional Plan, and the Statewide Planning Goals. In addition, the
12 amendments must be consistent with the intent or purpose statement
13 for the base zone, overlay zone, plan district, use and development,
14 or land division regulation where the amendment is proposed, and
15 any plan associated with the regulations. The creation of a new plan
16 district is subject to the approval criteria stated in 33.500.050.”

³ In addition, ORS 197.010(1) provides that comprehensive plans are necessary to secure the “highest possible level of livability in Oregon” and that they

“ (d) Shall be prepared to assure that all public actions are consistent and coordinated with the policies expressed through the comprehensive plans; and

“ (e) Shall be regularly reviewed and, if necessary, amended to keep them consistent with the changing needs and desires of the public they are designed to serve.”

1 The city council adopted over a hundred pages of findings discussing the
2 2019 FFT amendments' compliance with this provision. Record 13-175.
3 Petitioners and intervenor-petitioner argue in their second assignments of error⁴
4 that the city's adoption of the 2019 FFT amendments violates Goal 2 because the
5 decision is not supported by an "adequate factual base," which is the equivalent
6 of substantial evidence, which in turn is evidence a reasonable person would rely
7 upon to make a decision. *DLCD v. Douglas County*, 37 Or LUBA 129, 132
8 (1999) (citing *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372,
9 377-78, *aff'd*, 130 Or App 406, 882 P2d 1130 (1994); *Dodd v. Hood River*
10 *County*, 317 Or 172, 179, 855 P2d 608 (1993)). ORS 197.835(9)(a) provides that
11 we will reverse or remand a decision if we determine that the local government

12 “(A) Exceeded its jurisdiction;

13 “(B) Failed to follow the procedures applicable to the matter before
14 it in a manner that prejudiced the substantial rights of the
15 petitioner;

16 “(C) Made a decision not supported by substantial evidence in the
17 whole record;

18 “(D) Improperly construed the applicable law; or

19 “(E) Made an unconstitutional decision[.]”

20 We conclude below that, although there is an adequate factual base for the
21 city council's decision with respect to safety, the city council's conclusion that

⁴ Petitioners incorporate intervenor-petitioner's first and second assignments of error. Petitioners' Petition for Review 17, 21.

1 there is adequate fossil fuel storage capacity to meet regional demand is not
2 supported by an adequate factual base.

3 **A. Safety**

4 CP Policy 6.48 is to “[l]imit fossil fuels distribution and storage facilities
5 to those necessary to serve the regional market.” CP Policy 4.79 is to “[l]imit
6 development in or near areas prone to natural hazards, using the most current
7 hazard and climate change-related information and maps.” CP Policy 4.80 is to
8 “[e]valuate slope and soil characteristics, including liquefaction potential,
9 landslide hazards, and other geologic hazards.” The city council summarized its
10 findings concerning these three policies in General Finding 33:

11 “a. Statewide Planning Goal 7 (Natural Hazards) and [CP] Goal
12 4.D with Policies 4.79 and 4.80, requires reducing risk to
13 people and property from natural hazards. The FFT[]
14 amendments further these goals and policies * * * by limiting
15 the risks of storing large volumes of hazardous materials in
16 an area with moderate to high susceptibility to an earthquake.
17 Large [FFTs] represent a risk to people, property and the
18 natural environment that the City Council finds as a
19 compelling reason to limit future risk by limiting the size of
20 new facilities and prohibit the expansion of existing facilities.
21 Continuing to allow an unlimited increase in storage capacity
22 at FFTs in a moderate to high risk area would be less
23 supportive of the [CP] than adopting the FFT[] amendments.

24 “b. [CP] Policy 6.48 provides direction to limit [FFTs] to what is
25 necessary to serve the [regional market]. The City Council
26 recognizes that Portland’s [FFTs] handle 90 percent of the
27 fossil fuel for the State of Oregon and Southwest Washington.
28 These changes support the retention of existing [FFTs] by
29 designating them as a limited use that allows the terminals to

1 continue to operate and invest in upgrades and supports
2 opportunities for growth through exceptions, such as aviation
3 or renewable fuels. Further, the use limitations provide
4 flexibility to FFTs to replace and reconfigure existing storage
5 tank capacity to increase safety and meet future needs. In
6 addition, limiting storage capacity to the existing facilities
7 reduces risk from a major earthquake, which outweighs the
8 policy direction to provide capacity to accommodate any
9 potential future increase in fossil fuel consumption, in part,
10 because continuing to consolidate fossil fuel storage capacity
11 in Portland is counter to resiliency principles that emphasize
12 redundancy and distributed facilities.” Record 16-17.

13 More detailed findings of consistency with CP Policy 6.48 are provided in
14 Finding 218, which expands on the city’s conclusion that

15 “limiting storage capacity to the existing facilities, with some
16 exceptions, reduces risk from a major earthquake, which outweighs
17 the policy direction to provide capacity to accommodate any
18 potential future increase in fossil fuel consumption, in part because
19 continuing to locate all of the fossil fuel storage capacity in a high
20 risk area in Portland is counter to the 2013 Oregon Resilience Plan
21 that recommends the diversification of locations for the storage of
22 liquid fuels and identification of new liquid fuel energy corridors.”
23 Record 116.

24 “Most of Portland’s industrial zoning [is] in areas with high levels of
25 liquefaction susceptibility, as documented by the 2018 DOGAMI Earthquake
26 Regional Impact Analysis.” Record 89. “As described in the 2012 Oregon State
27 Energy Assurance Plan, [the city’s critical energy infrastructure hub] sits on top
28 of very poor soils that are highly susceptible to earthquake-induced permanent
29 ground deformation.” Record 90. The city council found that restricting FFTs

1 would limit the increase in storage of fossil fuels in a hazardous area and therefore
2 promote safety.

3 Petitioners and intervenor-petitioner argue that allowing new storage
4 tanks, even with greater capacity, would decrease risk because “a key component
5 of the risks posed by the [critical energy] infrastructure is the age of the existing
6 storage tanks, most of which were built without any, or only limited, seismic
7 design criteria.” Intervenor-Petitioner’s Petition for Review 30-31. Petitioners
8 and intervenor-petitioner point to the Portland Bureau of Emergency
9 Management’s 2019 Seismic Assessment of Tank Inventory, which states that
10 the

11 “[e]ffectiveness of anchoring storage tanks has been demonstrated
12 in past earthquakes and would most likely be implemented for any
13 new tank construction. Tanks in the [critical energy infrastructure]
14 hub area are unlikely to be anchored and would need to be
15 retrofitted. As with most seismic retrofit cases, mitigating existing
16 structures is more challenging than starting with a blank slate.”
17 Record 4813.

18 Petitioners and intervenor-petitioner maintain that the 2019 FFT amendments
19 preclude relocating the storage tanks to more stable soil and “freeze existing
20 infrastructure in place, resulting in less safety upgrades.” Intervenor-Petitioner’s
21 Petition for Review 31.

22 The city council rejected those arguments, and referenced evidence in the
23 record that the prior ability to expand storage capacity had not yielded a
24 significant number of seismic upgrades. Record 28. This is evidence upon which

1 a reasonable person could rely to conclude that allowing FFT storage expansion
2 will not promote investments in seismic upgrades in a hazardous area of the city.
3 The city council's conclusion concerning safety has an adequate factual base.

4 Petitioners' and intervenor-petitioner's second assignments of error, first
5 subassignments of error, are denied.

6 **B. Future Fossil Fuel Demand**

7 In *CPBT I*, we concluded that there was not an adequate factual base
8 supporting the city's conclusion that, because regional fuel demand would
9 plateau or decline or be accommodated via increased throughput, limiting FFTs
10 would not inhibit the ability to meet regional demand. 76 Or LUBA at 50-54.
11 Here, petitioners and intervenor-petitioner argue that the city again erred in
12 concluding that regional fuel demand would be satisfied by reconfiguring
13 existing storage capacity to increase throughput because there is no substantial
14 evidence in the record to support that conclusion.⁵ Intervenor-Petitioner's
15 Petition for Review 28-29; Petitioners' Petition for Review 21.

16 The city responds that, in approving the 2019 FFT amendments, the city
17 council did not rely on increased throughput to conclude that existing FFTs have

⁵ Petitioners state that they also incorporate by reference intervenor-petitioner's argument that the city "failed to provide evidence or even set forth a reasonable theory * * * that the FFT Amendments will lower emissions/help transition to lower-carbon fuel." Petitioners' Petition for Review 21. However, we do not find that argument in intervenor-petitioner's second assignment of error, and we therefore do not address it.

1 sufficient capacity to meet regional demand. Instead, the city argues that the city
2 council found that existing FFTs are sufficient to meet future demand without
3 additional storage *or* increased throughput. “Contrary to [intervenor-petitioner’s]
4 assertion, Council never relied on reconfiguration as a mechanism to meet future
5 needs.” Respondent’s Response Brief 33-34.

6 The city council’s general findings state that “the use limitations provide
7 flexibility to FFTs to replace and reconfigure existing storage tank capacity to
8 increase safety *and meet future needs*.” Record 17 (emphasis added). This finding
9 is not linked to evidence explaining how reconfiguration supports meeting future
10 needs. However, the more detailed findings addressing CP Policy 6.48 explain
11 that existing storage capacity is sufficient to meet future needs, and that the use
12 limitations “provide flexibility to FFTs to replace and reconfigure existing
13 storage tank capacity to increase safety.” Record 116. The city argues, and we
14 agree, that this more detailed finding relates to safety improvements, and not
15 throughput. We therefore agree with the city that the city council did not conclude
16 that CP Policy 6.48 was met by the potential for increased throughput.
17 Accordingly, petitioners’ and intervenor-petitioner’s substantial evidence
18 challenge regarding increased throughput provides no basis for remand.

19 Petitioners and intervenor-petitioner also contend that the city has “failed
20 to support its finding that fossil fuel demand will not increase.” Intervenor-
21 Petitioner’s Petition for Review 28; *see also* Petitioners’ Petition for Review 21.
22 The city council’s findings reference an ODOT study that forecasts a decline in

1 motor fuel (gasoline and diesel) demand through 2029. Record 116, 4730-73.
2 However, petitioners and intervenor-petitioner argue that the ODOT study is
3 outweighed by the following commodity flow/cargo forecasts: a 2012 Portland
4 and Vancouver Harbor Forecast Update predicting 0.7 percent annual growth, a
5 2015 Port of Portland Commodity Flow Forecast predicting 0.7 percent growth,
6 a 2017 Marine Cargo Forecast and Rail Capacity Analysis predicting 0.8 percent
7 growth, and the revised 2011 Oregon Freight Plan predicting 1.7 percent growth.
8 Intervenor-Petitioner’s Petition for Review 26; Petitioners’ Petition for Review
9 22 n 5; Record 4118-21. Intervenor-petitioner argues that the city council
10 concluded that these studies are unpersuasive and that we rejected that conclusion
11 in *CPBT I*.

12 In *CPBT I*, we concluded that there was insufficient evidence in the record
13 to support the city council’s conclusion that regional fossil fuel demand would
14 be flat or decline. Here, the city council found:

15 “BPS presented evidence that national petroleum consumption
16 forecast out to 2050 is essentially flat, which is a continuation of
17 historic trends in Oregon and Washington, during a period of a
18 thriving economy. In addition, ODOT is forecasting a decline in
19 motor fuel consumption over the medium term to 2029. The more
20 recent cargo forecasts project a modest growth in volumes, but *those*
21 *volumes do not exceed the historic peak volumes that were handled*
22 *by the Portland terminals*. No other evidence of future demand for
23 fossil fuels was submitted in testimony. Therefore, the City Council
24 finds that the fossil fuel storage capacity at the existing FFTs is
25 sufficient to meet future needs.” Record 116 (emphasis added).

26 In its brief, the city argues:

1 “Council found, based on evidence in the record, the existing
2 terminal storage capacity is sufficient to meet future needs.
3 Council’s finding was supported by BPS’s memo. The memo
4 summarizes evidence in the record and identifies six points that a
5 reasonable person could rely on to determine the existing storage
6 capacity, with allowed exceptions, is sufficient to serve the region
7 out to a 2050 planning horizon. *Significantly, Council found the*
8 *projections of moderate growth in liquid bulk cargo, which are*
9 *largely petroleum products, could be accommodated without any*
10 *new terminals.* This finding is supported by the fact that in 2000,
11 when the Olympic pipeline shut down for an extended period of
12 time, Portland terminals were estimated to have handled the
13 forecasted 2040 volumes.” Respondent’s Response Brief 27
14 (emphasis added) (citations omitted).

15 Thus, unlike in *CPBTI*, the city council here did not conclude that demand would
16 be flat or decline, but rather that there is adequate existing storage capacity to
17 accommodate a modest growth in demand. Accordingly, petitioners’ and
18 intervenor-petitioner’s substantial evidence challenge regarding flat or decreased
19 demand provides no basis for remand.

20 Intervenor-petitioner also argues that the city’s reliance on policies
21 designed to influence petroleum demand does not support the conclusion that
22 there is adequate natural gas capacity. The BPS memo on which the city council
23 relied concludes that “existing FFT storage capacity, with the allowed
24 exceptions, is sufficient to serve the region out to a 2050 planning horizon” based
25 on a variety of findings, including the existence of policies to reduce the
26 consumption of fossil fuels. Record 4108-09. Summarizing the U.S. Energy
27 Information Administration’s 2019 Annual Energy Outlook, the BPS memo
28 describes the expectation that

1 “[e]nergy use per passenger-mile traveled in light-duty vehicles
2 declines nearly 40% between 2018 and 2050 as newer, more fuel-
3 efficient vehicles enter the market, including both more efficient
4 conventional gasoline vehicles and *highly efficient alternatives such*
5 *as battery electric vehicles.*” Record 4112 (emphasis added).

6 Based upon that same report, the BPS memo describes an expectation that

7 “[t]he combined share of sales attributable to gasoline and flex-fuel
8 vehicles (which use gasoline blended with up to 85% ethanol)
9 declines from 93% in 2018 to 75% in 2050 *because of the growth in*
10 *battery electric vehicle (BEV), plug-in hybrid electric vehicle*
11 *(PHEV), and hybrid electric vehicle sales.*” Record 4113 (emphasis
12 added).

13 The BPS memo also references an Oregon Clean Fuels Program forecast that,
14 “[b]y 2025, Oregon’s forecasted [annual plug-in hybrid electric vehicle sales] are
15 expected to be 21% of light-duty vehicle sales.” Record 4122. Describing
16 Oregon’s Clean Fuels Program, the BPS memo states:

17 “The Clean Fuels Program helps Oregon reduce its consumption of
18 traditional petroleum fuels. *Potential fuels that could be used to*
19 *achieve the standard are ethanol, biodiesel, hydrogen, electricity,*
20 *natural gas, propane, and biogas.*” Record 4115 (emphasis added).

21 Finally, when describing its key findings, the BPS memo states:

22 “There are other state, regional and local policies and programs,
23 such as the Oregon Clean Fuels Program, Metro’s Climate Smart
24 Strategy, and TriMet’s Non Diesel Bus Plan. The purpose of these
25 policies and programs is to shift single-occupant vehicle travel to
26 other transportation modes; encourage more fuel-efficient vehicles
27 and *more electric vehicles*; and provide more renewable fuels that
28 can be expected to further reduce the demand for fossil fuels.”
29 Record 4109 (emphasis added).

1 Intervenor-petitioner argues that the city’s reliance on policies designed to reduce
2 petroleum demand lacks a necessary logical connection with its conclusion that
3 existing fossil fuel storage capacity is sufficient to meet regional demand because
4 the city “fails to recognize that almost all the clean fuels mandated by these
5 policies (e.g. natural gas and renewable fossil blends) fall under the city’s over-
6 expansive definition of ‘fossil fuel’ in the FFT Amendments.” Intervenor-
7 Petitioner’s Petition for Review 27. As an example, intervenor-petitioner argues
8 that the city has not explained how the electricity necessary to serve the
9 anticipated battery-powered vehicles will be available if fossil fuel storage may
10 not be increased and natural gas, which falls under the amendments’ definition
11 of fossil fuel, is needed to produce that electricity. Intervenor-Petitioner’s
12 Petition for Review 27-28.

13 Intervenor-petitioner does not develop its argument concerning renewable
14 fuels sufficiently for our review.⁶ *Deschutes Development Company v. Deschutes*
15 *County*, 5 Or LUBA 218, 220 (1982). However, we agree with intervenor-
16 petitioner’s argument concerning natural gas. The BPS memo describes the
17 Oregon Freight Plan’s conclusion that “[n]atural gas is 100% delivered via
18 pipeline. Natural gas imports used by Oregon (4.7M tons in 2002) are forecast to

⁶ Petitioners also argue, in their third assignment of error, that the city council’s findings of adequate capacity as they relate to renewable fuels are not supported by substantial evidence. We address this argument in our resolution of petitioners’ third assignment of error.

1 grow by 1.7% annually from 2002 to 2035.” Record 4119. The BPS memo also
2 explains that “[t]he Oregon Freight Plan was revised in 2017, but the revisions
3 did not include an update to the [2011] commodity flow forecast data.” Record
4 4119. NW Natural has a liquefied natural gas (LNG) storage facility within the
5 city, designated the NW Natural GasCo terminal. Record 4132. “NW Natural
6 supplies natural gas to its Western Oregon market area and operates peak-
7 consumption storage terminals in Northwest Portland and Newport.” Record
8 4110. “NW Natural’s GasCo terminal provides peak-consumption storage of
9 natural gas for the region.” Record 4129. The record for the 2016 FFT
10 amendments included the following description of NW Natural’s 2014 Integrated
11 Resource Plan (IRP):⁷

12 “NW Natural’s service to end users in Oregon is regulated by the
13 Oregon Public Utility Commission. The company periodically
14 prepares an [IRP] to document its forecast for natural gas use by its
15 customers. The IRP also details how NW Natural proposes to meet
16 changes in natural gas demand and is statutorily obligated to do so
17 in ways that result in the ‘least cost’ to customers, while managing
18 risk and complying with all applicable environmental and workplace
19 regulations.” Record 341.

⁷ OAR 860-027-0400(2) defines “Integrated Resource Plan” or “IRP” as an
“energy utility’s written plan * * * detailing its determination of future long-term
resource needs, its analysis of the expected costs and associated risks of the
alternatives to meet those needs, and its action plan to select the best portfolio of
resources to meet those needs.”

1 The 2014 IRP forecasts an average annual growth in its customer demand for
2 natural gas of 1.9% to 2034. Record 331. In the 2016 FFT Amendments, the city
3 found that the 2014 IRP “provides an estimate of market expansion needs for
4 natural gas distribution facilities.” *Id.*

5 NW Natural is required to produce an IRP every two years to demonstrate
6 how the company plans to meet customer demand. Record 2800. In addressing
7 the 2019 FFT amendments’ compliance with energy infrastructure policy, the
8 city council found:

9 “NW Natural’s 2018 [IRP] identifies the replacement of mechanical
10 process equipment used for the liquefaction, vaporization or storage
11 capacity. The FFT[] amendments only regulate fossil fuel storage
12 tank capacity, therefore these changes are consistent with the NW
13 Natural IRP.” Record 133.

14 The city council’s findings do not rely on NW Natural’s IRP to support its
15 conclusion that existing natural gas terminals and storage facilities are adequate
16 to serve future demand in Oregon and Southwest Washington. Record 116. The
17 city states in its brief that NW Natural’s IRP does not identify a need to expand
18 storage capacity at its Portland LNG facility, and that the replacement of
19 mechanical process equipment used for liquefaction, vaporization, and storage of
20 LNG, which *is* described in the IRP, is not affected by the 2019 FFT amendments.
21 Respondent’s Response Brief 29. The city did not find and does not argue that
22 NW Natural is the only company that could utilize natural gas terminal facilities
23 in Portland. The city does not explain the time period covered by the demand

1 anticipated in NW Natural's 2018 IRP, or the relationship between the demand
2 projections in NW Natural's IRP and the policies that the BPS memo indicates
3 will shift fuel demand away from petroleum and towards natural gas.⁸ The record
4 establishes that NW Natural did not include plans to expand its storage facility
5 within the city in its 2018 IRP, but the record also establishes that natural gas
6 demand will increase. The 2020 Clean Fuels Forecast referenced in the BPS
7 memo states:

8 "The amount of natural gas, including renewable natural gas
9 (biogas), reported in 2018 in diesel gallon equivalents equaled 3.2
10 million gallons. This represented 14.7 percent growth from the prior
11 year. Annualized growth from the 2018 base year to 2020 is
12 assumed to be 6.9 percent, equal to the Energy Information
13 Administration's outlook for the Pacific region. This results in a
14 forecast of 3.6 million gallons, which is 6.9 percent annually above
15 the 2018 level. * * * Annualized growth from the 2018 base year to
16 2020 is assumed to be 213.9 percent, resulting in a forecast of 7.3

⁸ The Remand Report, adopted by the city council as findings, explains:

"The City Council also expressed support for accelerating the transition to non-fossil fuel energy sources. As part of that transition, the Oregon Department of Environmental Quality (ODEQ) is implementing the Oregon Clean Fuels Program, which requires a 10% reduction in average carbon intensity by 2025. Fuels that could be used to achieve the standards include ethanol, biodiesel, electricity, hydrogen, *natural gas*, propane, and biogas, *which may require additional storage capacity*. In order to facilitate implementation of the Clean Fuels Program, non-fossil fuel storage tanks are not subject to the capacity limits." Record 4129 (emphasis added).

1 million gallons.”⁹ Record 4116, 4649.

2 We explained in *CPBT I* that

3 “none of the cited evidence supports the findings that future fossil
4 fuel demand in the region may plateau or decline ‘with
5 implementation of climate resilience goals and strategies’ or ‘with a
6 continued shift to other modes of transportation, more fuel-efficient
7 vehicles, electric vehicles and other carbon reduction
8 strategies. * * *

9 “[E]ven focused exclusively on the local or regional demand, the
10 findings essentially ignore uncontradicted projections of moderate
11 growth in demand for fossil fuels, and instead rely on what are no
12 more than unsupported speculations that demand will actually
13 plateau or decline. The city’s findings on that point, which appear to
14 be key support for the prohibition on any expansion of existing
15 terminals to meet even local or regional needs, are not supported by
16 substantial evidence[.]” 76 Or LUBA at 53.

17 Similarly here, the city council’s findings that there is existing adequate
18 capacity are not supported by substantial evidence. The city council
19 acknowledged testimony from intervenor-petitioner that FFT investment in
20 facilities was important as “demand continues.” Record 116. However, the city
21 council concluded that the general statement that “demand continues” did not
22 quantify or demonstrate increased demand. *Id.* The city council also dismissed
23 testimony by petitioner Western States Petroleum Association, alleging that the
24 ordinance would undercut the ability to meet “future energy needs,” because
25 “future energy needs” were not defined. *Id.* Lastly, the city council dismissed

⁹ The 2018 blend rate for biogas was 54.1%. Record 4650.

1 testimony from Zenith Energy that the ordinance would inhibit investment to
2 “meet changing market demands” because the phrase “changing market
3 demands” was not explained. Record 117. In doing so, the city council
4 improperly placed the burden on opponents to ensure that there was adequate
5 evidence in the record to support the adoption of the 2019 FFT amendments. The
6 burden is on the city council to ensure that there is adequate evidence in the record
7 to support its conclusions regarding ability to meet regional demand for both
8 petroleum and other fuel types.

9 The city council’s findings rely on the BPS memo, which concluded that
10 “[t]he more recent cargo forecasts project a modest growth in volumes, but those
11 volumes do not exceed the historic peak volumes that were handled by the
12 Portland terminals.” Record 4108. The BPS memo relies in part on a 2012
13 Portland Harbor: Industrial Land Supply Analysis prepared by ECONorthwest¹⁰:

14 “Estimates of existing cargo capacity are difficult to obtain,
15 particularly for privately owned marine terminals, like the [FFTs].
16 ECONorthwest (2012) prepared an estimate based on historical data
17 for total cargo volume for the years 2000 and 2010 from the BST
18 report and consultation with the Port of Portland to determine the
19 estimated current capacity. For private marine terminals, the
20 assumption was that existing facilities do not have significant excess
21 capacity, based on the assumption that recent historical peaks are a
22 reasonable estimate of maximum capacity. Based on a 2000 report,

¹⁰ The ECONorthwest report “addresses the capacity of industrial land in the Portland Harbor area to accommodate future development, both for new public marine terminals and private marine-dependent businesses.” Record 6556.

1 BST estimated that there was 8.28 million metric tons of capacity
2 for liquid bulks. Based on that capacity estimate, ECON[orthwest]
3 found that no additional land is needed for new liquid bulk terminals
4 in Portland through the year 2040.” Record 4120.

5 The BPS memo explains further that

6 “[t]he projections of moderate growth are found in the cargo
7 forecasts that include liquid bulks, which are mostly petroleum
8 products. The 2012 Portland and Vancouver Harbor Forecast
9 Update has a high scenario of 0.7% annual growth rate and a low
10 scenario of 0.3% annual growth rate to the year 2040.
11 ECONorthwest (2012) found that these volumes could be
12 accommodated without a new terminal because this forecast and
13 analysis was for marine cargo only and in 2000, Portland terminals
14 are estimated to have handled the 2040 volume when the Olympic
15 pipeline shutdown for an extended period of time.” Record 4109.

16 These findings do not explain why the 2019 FFT amendments ensure
17 adequate storage for changing commodities. ECONorthwest did not forecast
18 future cargo demand but rather reviewed the forecasts from a 2012 Portland and
19 Vancouver Harbor Forecast Update prepared by BST Associates. Record 6589.

20 The BST report explains:

21 “The liquid bulk trades in the Pacific Northwest are dominated by
22 petroleum, including crude oil and refined petroleum products.
23 Other important commodities include chemicals, fertilizers and
24 other liquid bulk products.

25 “* * * * *

26 “*New opportunities for liquid bulk cargo are also considered; most*
27 *notably LNG imports and/or exports.*” Record 6669 (emphasis
28 added).

29 ECONorthwest explained in its report that

1 “[c]omparing the capacity of existing facilities with the forecast
2 demand provides an estimate of the potential capacity shortfall for
3 the Port of Portland * * * in 2040. Two factors complicate this
4 analysis: (1) private marine terminals also handle a portion of the
5 city’s cargo volume, and there are not accurate estimates of the
6 capacity of private terminals in the City; and (2) *if the growth in*
7 *cargo volumes comes from a different mix of clients and*
8 *commodities than the terminals are currently handling, then the*
9 *existing facilities may not be able to accommodate the new*
10 *opportunities, which means these facilities may not reach 100%*
11 *capacity before new terminals are needed.”* Record 6590-91
12 (emphasis added).

13 Given that the Olympic pipeline transmits petroleum, the ability of existing
14 facilities to accommodate sufficient petroleum storage during the period that
15 pipeline was inoperable does not establish sufficient capacity for natural gas.
16 FMP 2. The city argues that Portland has only one natural gas FFT and that NW
17 Natural’s published plans do not include plans to expand storage capacity in
18 Portland, but there is not substantial evidence in the record that NW Natural’s
19 plans necessarily reflect the plans of all potential purveyors of natural gas. The
20 city argues that the city council’s finding that Portland handles 90% of
21 transportation fuel needs for Oregon and Southwest Washington is based on
22 transportation fuels and not natural gas, but the city does not address the future
23 role of natural gas in fueling transportation. Respondent’s Response Brief 29.
24 Thus, we agree with intervenor-petitioner that the city council’s findings that
25 there is sufficient existing fossil fuel storage capacity are inadequate because the
26 findings do not address natural gas needs. We also agree with intervenor-
27 petitioner that the city council’s findings that there is adequate fossil fuel storage

1 capacity are not supported by an adequate factual base because there is no
2 evidence of the amount of terminal and storage capacity needed for natural gas
3 generally as opposed to NW Natural specifically.

4 Petitioners' and intervenor-petitioner's second assignments of error,
5 second subassignments of error, are sustained, in part.¹¹

6 Petitioners' and intervenor-petitioner's second assignments of error are
7 sustained, in part.

8 **PETITIONERS' AND INTERVENOR-PETITIONER'S FIRST**
9 **ASSIGNMENTS OF ERROR AND PETITIONERS' THIRD**
10 **ASSIGNMENT OF ERROR**

11 ORS 197.835(7)(a) provides that the board shall reverse or remand the
12 adoption of a new land use regulation which is not in compliance with the
13 comprehensive plan. Petitioners and intervenor-petitioner argue in their first
14 assignments of error that, when evaluating consistency with the CP, the city
15 council improperly balanced policies, advancing some policies to the detriment of
16 others, and failed to properly evaluate alternatives. Petitioners argue in their third
17 assignment of error that the 2019 FFT amendments violate certain CP policies.
18 We address these assignments of error together.

¹¹ Petitioners and intervenor-petitioner also argue in their second assignments of error that the city council's findings that the amendments only impact only one type of business are not supported by substantial evidence. We address this argument in our resolution of petitioners' third assignment of error.

1 **A. Consistency with Comprehensive Plan**

2 Petitioners and intervenor-petitioner argue that the city council erred in its
3 evaluation of the 2019 FFT amendments’ consistency with the CP.

4 **1. Use of Balancing to Evaluate Compliance**

5 **a. Broad Challenges**

6 The city council adopted extensive findings explaining its rationale for
7 adopting the 2019 FFT amendments. Intervenor-petitioner provides a list of
8 twenty-two findings addressing compliance with various PCC provisions, CP
9 policies, and Goal 2, which petitioners and intervenor-petitioner contend include
10 improper balancing. Intervenor-Petitioner’s Petition for Review 13-14;
11 Petitioners’ Petition for Review 17. We agree with the city and intervenor-
12 respondent (collectively, respondents) that simply listing twenty-two challenged
13 findings by number fails to adequately develop an argument that those findings
14 are inadequate. We will not develop those arguments for intervenor-petitioner.
15 *Deschutes Development Company*, 5 Or LUBA at 220.

16 Petitioners’ and intervenor-petitioner’s first assignments of error, first
17 subassignments of error, are denied.

18 **b. Specific Challenges**

19 Petitioners and intervenor-petitioner argue that Findings 3, 319, 54, and
20 287 “contain the clearest examples of the city’s improper use of a balancing

1 test.”¹² Intervenor-Petitioner’s Petition for Review 15; *see also* Petitioners’
2 Petition for Review 17.

3 Finding 3 contains a general discussion of the city’s analytical approach in
4 considering the 2019 FFT amendments and includes a statement that the city
5 council found generally that it had considered the public testimony, weighed all
6 applicable goals, and

7 “considered applicable policies to determine that [the 2019 FFT
8 amendments] on the whole compl[y] with the [CP] and on balance
9 [are] equally or more supportive of the goals and policies of the [CP]
10 than the current regulations. In reaching this conclusion, City
11 Council has weighed and balanced competing policy directions.”
12 Record 21.

13 As indicated above, PCC 33.835.040 requires that zoning code text
14 amendments be consistent with the CP. The city council addressed PCC
15 33.835.040 in Finding 319, which states, in part, that the city council “applied all
16 applicable policies and the findings in this exhibit demonstrate how the FFT[]
17 amendments to the zoning code are, on balance, consistent with the [CP]” and
18 that “this criterion operates in conjunction with [CP] Policy 1.10.” Record 171.
19 CP Policy 1.10 requires that the city council

20 “[e]nsure that amendments to the [CP’s] elements, supporting

¹² Intervenor-petitioner explains, “These findings repeatedly state that some policies ‘outweigh’ others, that ‘on balance’ the FFT amendments are ‘equally or more supportive’ of the [CP] as a whole, and that city council has ‘weighted and balanced competing policy directions.’” Intervenor-Petitioner’s Petition for Review 15.

documents, and implementation tools comply with the [CP].
'Comply' means that amendments must be evaluated against the
[CP's] applicable goals and policies and on balance be equally or
more supportive of the [CP] as a whole than the existing language
or designation."

The city council found that CP Policy 1.10 was met in Finding 54:

"The City Council interprets the policy to require the Council to
consider whether, after considering all the relevant facts, an
amendment is equally or more supportive of the [CP]. The City
Council finds that an amendment is equally supportive when it is on
its face directly supported by goals and policies in the [CP]. The City
Council finds that an amendment is more supportive of the [CP]
when the amendment will further advance goals and policies,
particularly those that are aspirational in nature. The City Council
finds that the policy requires consideration as to whether
amendments are equally or more supportive of the Plan *as a whole*.
The City Council finds that amendments do not need to be equally
or more supportive with individual goals and policies, but rather
amendments must be equally or more supportive of the entire
[CP]. * * *

"The Council notes that the [CP] introduction explains that '[t]he
[CP] contains a broad range of policies [for] Council to consider.
Each policy describes a desirable outcome. But it is unlikely that all
policies are relevant to a particular decision and that a particular
decision could be expected to advance all of the policies in the plan
equally well * * * [E]ven the strongest policies do not automatically
trump other policies. Every decision is different, with different facts.
The particular policies that matter will change from one decision to
another. There is no set formula—no particular number of 'heavier'
pol[ic]ies equals a larger set of 'lighter' policies. In cases where
there are competing directions embodied by different policies, City
Council may choose the direction they believe best embodies the
plan as a whole.

"* * * * *

1 “For the reasons stated in these findings, the City Council concludes
2 that the FFT[] amendments are on balance more supportive of the
3 goals and policies of the [CP] than the current regulations. The City
4 Council has considered all applicable goals and policies to achieve
5 an optimum outcome. Goals and policies are considered as factors
6 which must be weighed, balanced and met on the whole, not as
7 criteria that must be individually met. The purposes of the FFT[]
8 amendments are to enhance public safety and protect the
9 environment. The City Council has weighed and balanced the
10 applicable goals and policies and concludes that, on the whole,
11 continuing to allow an unlimited increase in storage capacity at
12 FFTs in a high risk area would be less supportive of the [CP] than
13 adopting the FFT[] amendments.” Record 48-49 (emphasis in
14 original).

15 The last of the four findings identified by petitioners and intervenor-
16 petitioner as a “clear[] example[] of the city’s improper use of a balancing test”
17 is Finding 287. Finding 287 responds to CP Policy 10.4.a, which provides that
18 amendments to the zoning code should promote good planning and effectively
19 and efficiently implement the CP. Record 161. In addressing whether the
20 amendments comply with CP Policy 10.4.a, the city council stated that it had

21 “[c]onsidered applicable policies to determine that this ordinance on
22 the whole complies with the [CP] and on balance is equally or more
23 supportive of the goals and policies of the [CP] than the current
24 regulations. In reaching this conclusion, City Council has weighed
25 and balanced competing policy directions.” *Id.*

26 Although the city states in its brief that “Council considered and found the
27 Amendments are consistent and comply with all applicable goals and policies,”
28 the city also states that “Council interpreted its regulations to require the Council
29 to evaluate amendments against all applicable goals and policies and determine

1 whether the amendments are on balance equally or more supportive of the [CP]
2 as a whole.” Respondent’s Response Brief 8, 11. For the reasons set forth below,
3 we conclude that the city council did not err in reviewing, evaluating, and
4 balancing applicable policies when evaluating the consistency of the 2019 FFT
5 amendments with the CP.

6 The record on appeal of a legislative decision must demonstrate that
7 “required considerations were indeed considered.” *Citizens Against Irresponsible*
8 *Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). However, as we
9 explained in *CPBT I*, comprehensive plans often contain potentially competing
10 policies:

11 “[G]iven the generally-worded language of most of the goals and
12 policies at issue, and the leeway a governing body has in balancing
13 and weighing consistency of a zoning text amendment with a variety
14 of sometimes competing policy objectives, petitioners and
15 [intervenor-petitioner] must do more than simply disagree with the
16 city’s conclusions. Petitioners and [intervenor-petitioner] must
17 demonstrate that the city council failed to meaningfully consider a
18 reasonably specific and pertinent [CP] goal or policy.” 76 Or LUBA
19 at 27-28.

20 The weighing of policies is consistent with our decision in *Shamrock Homes LLC*
21 *v. City of Springfield*, 68 Or LUBA 1 (2013). *Shamrock* concerned a refinement
22 plan that served as a comprehensive plan for a specific part of the city.
23 Refinement plans were required to be consistent with the Metro Plan, the
24 comprehensive plan for a planning area that included Eugene, Springfield, and

1 portions of Lane County. In turn, Metro Plan Housing Policy A.25 directed to the
2 city to

3 “[c]onserve the metropolitan area’s supply of existing affordable
4 housing and increase the stability and quality of older residential
5 neighborhoods, through measures such as revitalization; code
6 enforcement; appropriate zoning; rehabilitation programs;
7 relocation of existing structures; traffic calming; parking
8 requirements; or public safety considerations. These actions should
9 support planned densities in these areas.” *Shamrock*, 68 Or LUBA
10 at 18.

11 The petitioners argued that, contrary to the direction provided in Policy A.25,
12 mobile home parks made non-conforming as a result of the refinement plan
13 would be demolished sooner than would otherwise occur, resulting in a reduction
14 in affordable housing. We agreed with respondents that

15 “the city [was] not required to consider Policy A.25 in isolation from
16 other applicable policies, and it is possible the city could conclude,
17 after balancing all applicable policy requirements, that making the
18 existing manufactured dwelling parks non-conforming uses is an
19 acceptable sacrifice to give as much effect as possible to all
20 applicable comprehensive plan policy objectives.” *Shamrock*, 68 Or
21 LUBA at 21.

22 The Springfield Development Code (SDC) provides that adoption or amendment
23 of refinement plan text is a legislative act. SDC 5.6-110, 5.1-140. Here, the city
24 council’s adoption of the 2019 FFT amendments is, like adoption of the
25 refinement plan in *Shamrock*, a legislative act. PCC 33.740.010. Thus, while the
26 city council was required to give meaningful consideration to all applicable
27 policies, it retained the flexibility to balance competing policies.

1 The balancing standard that is permissible for legislative actions differs
2 from that which is permissible in the quasi-judicial context. We recently
3 discussed balancing in the context of a quasi-judicial decision in *Mumper v. City*
4 *of Salem*, ___ Or LUBA ___ (LUBA No 2019-106, Feb 24, 2020). The subject
5 property in *Mumper* was an approximately 14-acre site. The intervenor sought to
6 subdivide the property into 16 lots with open space and gain approval of a
7 refinement plan for the subject property. Salem refinement plans are detailed
8 regulatory plans implementing the master plan with standards that supersede the
9 development code and provide review criteria for specific development
10 proposals. Salem Revised Code (SRC) 530.030. The code required that a
11 refinement plan for property within the applicable zone be reviewed through a
12 quasi-judicial process and found to be consistent with the underlying master plan.
13 SRC 530.030(3), 300.100. We concluded that balancing approval criteria was not
14 appropriate when all of the standards could be applied. *Mumper*, ___ Or LUBA
15 at ___ (slip op at 10) (citing *Lennar Northwest, Inc. v. Clackamas County*, 280
16 Or App 456, 464, 380 P3d 1237 (2016), *rev den*, 360 Or 752 (2017) (hearings
17 officer improperly discounted the relevance of two of seven factors identified in
18 the comprehensive plan as applicable to a quasi-judicial rezone of property)). As
19 the *Lennar* court explained:

20 “[D]ecisional standards are facially inconsistent in application when
21 two or more provisions *require* different and incompatible results.
22 Reconciliation of those types of inconsistent policies can sometimes
23 be made by application of less directory standards through a

1 'balancing' of each of the directives with the remaining criteria to
2 determine the cumulative effect of all of those standards. But that
3 type of balancing, at least in the sense of ignoring the effect of one
4 standard in favor of the remaining criteria, is not necessary when *all*
5 of the standards can be applied or considered." 280 Or App at 470
6 (emphasis in original).

7 The use of balancing in a quasi-judicial context was also explained in *Columbia*
8 *Riverkeeper v. Clatsop County*: "It is only when the standards themselves are
9 incompatible in operation—by requiring both approval and disapproval of any
10 generic application—that an overarching reconciliation of clashing standards is
11 necessary." 238 Or App 439, 457-58, 243 P3d 82 (2010). A legislative action is
12 not a generic application and a local government has greater flexibility in the
13 legislative context to balance policies in a manner which gives varied effect to
14 competing directives.

15 Petitioners' and intervenor-petitioner's first assignments of error, second
16 subassignments of error, are denied.

17 2. Specific Policy Compliance Challenges

18 ORS 197.829(1) provides:

19 "The Land Use Board of Appeals shall affirm a local government's
20 interpretation of its comprehensive plan and land use regulations,
21 unless the board determines that the local government's
22 interpretation:

23 "(a) Is inconsistent with the express language of the
24 comprehensive plan or land use regulation;

25 "(b) Is inconsistent with the purpose for the comprehensive plan
26 or land use regulation;

1 “(c) Is inconsistent with the underlying policy that provides the
2 basis for the comprehensive plan or land use regulation; or

3 “(d) Is contrary to a state statute, land use goal or rule that the
4 comprehensive plan provision or land use regulation
5 implements.”

6 Accordingly,

7 “LUBA must affirm a governing body’s interpretation of its
8 comprehensive plan or land use regulations, unless the interpretation
9 is inconsistent with the express language, purpose or policy
10 underlying the local legislation under interpretation, or the
11 interpretation is contrary to a statewide planning goal, statute, or
12 administrative rule that the local legislation implements.” *CPBT I*,
13 76 Or LUBA at 25-26.

14 We will give deference to the city’s interpretation of its comprehensive plan
15 provisions so long as that interpretation is not “inconsistent with the express
16 language, purpose, or underlying policy of the comprehensive plan or land use
17 regulation.” *Michaelson v. City of Portland*, 296 Or App 248, 254, 437 P3d 1215
18 (2019), *rev den*, 365 Or 556 (2019).

19 “[T]o the extent that the interpretation is directed at multiple
20 statements that may be in conflict, the inconsistency determination
21 is a function of two inquiries: (1) whether the interpretation in fact
22 is an interpretation, *i.e.*, a considered determination of what was
23 intended that plausibly harmonizes the conflicting provisions or
24 identifies which ones are to be given full effect; and (2) the extent
25 to which the interpretation comports with the ‘express language’ of
26 the relevant provisions (including, necessarily, those provisions
27 that, according to the interpretation at issue, are to be given full
28 effect).” *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776
29 (2010).

1 **a. CP Policy 6.48 and Resolution 37168**

2 Petitioners argue that the city engaged in improper balancing, and that the
3 failure to meet any one CP policy is a basis for reversal or remand. Petitioners’
4 Petition for Review 23. The city council expressly acknowledged that, in
5 reaching its decision to adopt the 2019 FFT amendments, it “weighed and
6 balanced competing policy directions.” Record 16. We concluded above that
7 balancing is permissible in the context of a legislative decision. Under Goal 2,
8 however, proper balancing requires that there be adequate facts for the city to
9 understand the implications of any tradeoffs it is making. Petitioners argue in
10 their third assignment of error that, as explained in intervenor-petitioner’s second
11 assignment of error, the city’s conclusions that CP Policy 6.48 is satisfied because
12 future demand for fossil fuels will decline or that higher demand will be met via
13 increased throughput are not supported by an adequate factual base—that is,
14 substantial evidence. Petitioners’ Petition for Review 23-24. As explained in our
15 resolution of petitioners’ and intervenor-petitioner’s second assignments of error,
16 the city council’s findings did not conclude that demand would decline or that
17 CP Policy 6.48 would be met by the potential for increased throughput.
18 Accordingly, this part of the assignment of error provides no basis for reversal or
19 remand, either.¹³

¹³ Petitioners also argue that “the FFT Amendments block expansion of ‘capacity’ for storage of fossil fuels, not the actual storage of a product,” and that, as a result, “a party would have to demonstrate that the additional capacity would be unable to hold anything but exempt fuels.” Petitioners’ Petition for Review

1 Relatedly, petitioners contend that, although the city council found “that
2 future increased demand for fuel could be met by expansion of operations
3 allowed under the exceptions to the restrictions in the 2019 FFT Amendments[,]
4 [t]he City * * * fails to explain how the increased demand could be satisfied
5 through the provision of ‘* * * renewable fuels’ when these products represent a
6 very small portion of the fossil fuel market, and virtually all ‘renewable fuels’
7 fall under the amendments’ definition of fossil fuel.” Petitioners’ Petition for
8 Review 25. Ethanol and biogas with more than 5 percent fossil fuel content,
9 propane, and natural gas are all regulated by the 2019 FFT amendments. Record
10 211. As the city points out, however, some of the studies relied upon by BPS
11 include blended fuels in their definitions of petroleum and gasoline, including a
12 blend rate of 10.1 percent for ethanol, 6.9 percent for biodiesel, and 3.5 percent
13 for renewable diesel. Respondent’s Response Brief 30; Record 4647-48. As the
14 city explains in its brief,

15 “the Amendments specifically state that ethanol and
16 biodiesel/renewable diesel with less than 5 percent fossil fuel
17 content are not fossil fuels. These types of renewable fuels are not
18 subject to the fossil fuel storage capacity limitation. Therefore it is
19 unnecessary to consider the future forecast for renewable fuels with
20 this exception in place.” Respondent’s Response Brief 30 (citations
21 omitted).

25. If the city were to interpret the code in that manner, the provision allowing alternative fuel storage could be illusory. However, we will not analyze interpretations that the city has not adopted.

1 We agree with the city that the city council gave adequate consideration to how
2 increased demand could be met by renewable fuels.

3 Lastly, in 2015, the city council passed Resolution 37168, which provided
4 that “the City Council will actively oppose expansion of infrastructure whose
5 primary purpose is transporting or storing fossil fuels in or through Portland or
6 adjacent waterways” and directed BPS “to develop proposed code changes for
7 Council consideration to advance the policies set forth in th[e] Resolution.”
8 Record 4047. Petitioners argue that Resolution 37168 mandates that the City not
9 restrict the supply of fossil fuel to satisfy regional demand. Petitioners’ Petition
10 for Review 23. However, petitioners do not establish that Resolution 37168 is an
11 approval criterion, and we will not develop that argument for them.

12 Petitioners’ third assignment of error, first subassignment of error, is
13 denied.

14 **b. CP Policies 6.23, 6.41, and 6.7**

15 LUBA will reverse or remand a zoning code amendment which does not
16 comply with the comprehensive plan or is not supported by substantial evidence.
17 ORS 197.835(7)(a), (9)(a)(C). Petitioners argue that the 2019 FFT amendments
18 violate CP Policies 6.23, 6.41 and 6.7, relating to economic development, and
19 that the city council’s conclusions that these policies are met have inadequate
20 documentation of the underlying rationale and are not supported by substantial
21 evidence. Petitioners’ Petition for Review 29-31. The city council adopted
22 findings of compliance with these policies. Record 101-02, 107-08, 114. Findings

1 must “(1) identify the relevant approval standards, (2) set out the facts which are
2 believed and relied upon, and (3) explain how those facts lead to the decision on
3 compliance with the approval standards.” *Heiller v. Josephine County*, 23 Or
4 LUBA 551, 556 (1992). Again, substantial evidence is evidence a reasonable
5 person would rely upon to reach a decision. *Dodd*, 317 Or at 179.

6 CP Policy 6.23 provides that the city will “[e]ncourage investment in
7 transportation systems and services that will retain and expand Portland’s
8 competitive position as a West Coast trade gateway and freight distribution hub.”
9 To the extent the city council’s interpretation of CP policies “is directed at a
10 single term or statement,” we must determine “whether the interpretation
11 plausibly accounts for the text and context of the term or statement.” *Siporen*,
12 349 Or at 262. The city council’s findings explain that “encourage,” as defined
13 in the CP, means “to promote or foster using some combination of voluntary
14 approaches, regulations, or incentives.” Record 107. The city council concluded,
15 in part, that CP Policy 6.23 applies “to the city as a whole and not to individual
16 businesses or sectors of businesses” and that the city’s voluntary approaches,
17 regulations, or incentives to promote or foster investment in transportation
18 systems and services do not have to extend to FFTs. Record 107-08 The city
19 council concluded that the 2019 FFT amendments are consistent with this policy
20 because the city will continue to invest in and encourage public sector
21 transportation investments and because the amendments allow existing FFTs to
22 continue to operate and to invest in their non-storage components. This

1 interpretation plausibly accounts for the policy’s text. We agree with the city that
2 a policy to encourage voluntary investment in transportation systems does not
3 require the city to promote investment in FFTs, and we defer to the city’s
4 interpretation of its policy. *Siporen*, 349 Or at 262. Additionally, the evidence in
5 the record is that the 2019 FFT amendments will not bar public sector
6 transportation investments and that existing FFTs will be allowed to continue to
7 operate. This is evidence upon which a reasonable person would rely to conclude
8 that the policy is met. This portion of this subassignment of error is denied.

9 CP Policy 6.41 provides that the city will “[e]ncourage freight-oriented
10 industrial development to locate where it can maximize the use of and support
11 reinvestment in multimodal freight corridors.” The city council found that CP
12 Policy 6.41 is met, in part, because the policy applies “to districts as [a] whole
13 and not to individual businesses or sectors of business,” whereas the 2019 FFT
14 amendments “apply to only one type of business that makes up a small part of
15 the businesses found in Portland’s industrial districts.” Record 114. The city
16 council concluded that the 2019 FFT amendments are consistent with this policy
17 because the city primarily promotes the location of industrial development
18 through the imposition of industrial zoning and the 2019 FFT amendments do not
19 change the zoning of any areas. The city council found that it also encourages
20 industrial development in these areas through investments set out in the Citywide
21 System Plan and Transportation System Plan, and that the 2019 FFT amendments
22 do not impact those investments. As we concluded above, a policy to encourage

1 particular activity allows for voluntary approaches. The city council's
2 interpretation of the policy is consistent with its text, and we defer to that
3 interpretation. Additionally, evidence in the record supports the conclusion that
4 the 2019 FFT amendments to do not implicate the Citywide System Plan or
5 Transportation System Plan, or rezone industrial land. This portion of this
6 subassignment of error is denied.

7 CP Policy 6.7 provides that the city will “[m]aintain and strengthen [its]
8 comparative economic advantages including access to a high-quality workforce,
9 business diversity, competitive business climate, and multimodal transportation
10 infrastructure.” The city council states in its findings that

11 “[t]he verb ‘maintain’, which is defined in the [CP], means to keep
12 what you have; conserve; preserve; continue. The verb ‘strengthen,’
13 which is not defined in the [CP], means to make stronger, improve.
14 The City Council interprets this policy to apply to the city as [a]
15 whole and not to individual businesses or sectors of business. These
16 regulations apply to only one type of business that makes up a
17 minority part of the businesses found in Portland, [and they]
18 therefore will not have a significant impact on the workforce.”
19 Record 101.

20 In interpreting law, it is improper to omit language that has been inserted. ORS
21 174.010. The city council failed to properly interpret CP Policy 6.7 because the
22 city council did not address, and therefore gave no import to, the “strengthen”
23 component of the policy as it relates to the workforce. Petitioners contend that
24 the city council misconstrued CP Policy 6.7, and made inadequate findings
25 regarding that policy, because the findings conclude that the amendments impact

1 one type of business, without addressing the importance of the FFTs and their
2 interconnectedness with other businesses and their workforces. Petitioners’
3 Petition for Review 29-31. The text of CP Policy 6.7 requires that the city
4 “strengthen”—that is, improve—access to “a high-quality workforce, business
5 diversity, competitive business climate, and multimodal transportation
6 infrastructure.” Petitioners argue:

7 “Given the critical nature of this infrastructure and the vital supply
8 of energy it provides to all other aspects of the economy, the City’s
9 determination of compliance because the FFT Amendments affect
10 only ‘one type of business’ is patently untenable.” Petitioners’
11 Petition for Review 31.

12 The CP defines critical infrastructure as “[s]ystems that are essential for the
13 functioning of society and the economy, including energy generation,
14 transmission and distribution[.]” CP Glossary G-6. The FMP explains that,
15 because Portland does not have local petroleum facilities, “all of the
16 Portland/Vancouver metropolitan region’s fuel must be imported from Puget
17 Sound refineries.” FMP 2. The Portland Business Alliance testified that
18 “restricting expansion at existing fuel terminals and prohibiting new terminal
19 development may impact industrial job growth and middle-income jobs.” Record
20 2661. We conclude that the city council’s interpretation does not give meaning
21 to the “strengthen” term of CP Policy 6.7 as it relates to the workforce. Thus, the
22 city’s interpretation is inconsistent with the express language of the policy. ORS
23 197.829(1)(a). We agree with petitioners that the city council’s findings that CP

1 Policy 6.7 is satisfied are inadequate because they fail to consider the relationship
2 between the FFTs, any products they make locally available to other businesses,
3 and any resulting impact on the workforce.¹⁴

4 Petitioners' third assignment of error, second subassignment of error, is
5 sustained, in part.

6 **c. CP Policies 9.30 and 9.32, and CP Goal 9.G**

7 Petitioners argue that the city council's findings (1) that certain
8 transportation goals and policies apply only to transportation system design and
9 city investment decisions in the FMP, and (2) that the 2019 FFT amendments
10 limit only storage capacity and allow FFTs to continue to operate and invest in
11 upgrades for other elements, such as transloading facilities, docks, or pipelines,

¹⁴ Petitioners and intervenor-petitioner argue in their second assignments of error that the city council's findings that the amendments are narrowly constructed to apply to one class of business, that the terminals do not have a significant effect on other uses allowed in the industrial and employment zones, and that the "remaining industrial uses [will] continue to operate under current conditions" are not supported by substantial evidence. Intervenor-Petitioner's Petition for Review 35-36; *see also* Petitioners' Petition for Review 31. Intervenor-petitioner asserts that there is uncontested evidence in the record that the amendments will have a significant effect "on other industrial and employment uses throughout the region, and on workers and consumers that depend on the regional supply chain for sending and receiving goods." Intervenor-Petitioner's Petition for Review 36. Intervenor-petitioner cites forty-two findings and directs us to over thirty pages of the record without describing what criteria relate to the findings or what evidence the cited pages set forth. We agree with respondents that petitioners and intervenor-petitioner fail to adequately develop this argument. *Deschutes Development Company*, 5 Or LUBA at 220.

1 misconstrue the applicable law and fail to adequately address the policies.
2 Petitioners' Petition for Review 31-34. Petitioners also argue that the city
3 council's findings that the amendments' exceptions for renewable and other types
4 of fuel provide growth opportunities are not supported by substantial evidence.
5 *Id.* at 33.

6 CP Policy 9.30 provides that the city must "[d]evelop, maintain, and
7 enhance a multimodal freight transportation system for the safe, reliable,
8 sustainable, and efficient movement of goods within and through the city." CP
9 Policy 9.32 calls for maintenance of "Portland's role as a multimodal hub for
10 global and regional movement of goods," as well as enhancement of its "network
11 of multimodal freight corridors." CP Goal 9.G provides:

12 "The transportation system supports a strong and diverse economy,
13 enhances the competitiveness of the city and region, and maintains
14 Portland's role as a West Coast trade gateway and freight hub by
15 providing efficient and reliable goods movement, multimodal access
16 to employment areas and educational institutions, as well as
17 enhanced freight access to industrial areas and intermodal freight
18 facilities. The transportation system helps people and businesses
19 reduce spending and keep money in the local economy by providing
20 affordable alternatives to driving."

21 We agree with respondents that the city council's interpretation of policies calling
22 for it to develop, maintain, and enhance a multimodal freight transportation
23 system to apply only to infrastructure for which the city has planning
24 responsibility is consistent with the language of the policies. We therefore affirm

1 the city's interpretation of CP Policies 9.30 and 9.32, and CP Goal 9.G.¹⁵ ORS
2 197.829(1)(a); *Siporen*, 349 Or at 262.

3 We also agree with respondents that the city council's findings explain
4 how the 2019 FFT amendments support maintaining Portland's role as a
5 multimodal hub through the limited use designation, which allows existing FFTs
6 to continue to operate and which provides opportunities for enhancement/growth,
7 whether or not those opportunities are realized. The city's findings regarding CP
8 Policies 9.30 and 9.32, and CP Goal 9.G, are adequate.

¹⁵ With respect to CP Goal 9.G, for example, the city found:

“Specifically, the City Council finds that Goal 9.G requires Portland to maintain Portland's role as a multimodal freight hub as part of supporting a strong and diverse economy. The FFT[] amendments maintain[] Portland's role as a multimodal freight hub with enhanced freight access because they do not amend the Citywide System Plan or the Transportation System Plan, therefore the City continues to plan for public infrastructure investments to maintain and strengthen the multimodal transportation infrastructure in the industrial areas where the existing FFTs are located. The regulations are narrowly crafted to support the retention of existing [FFTs] by designating them as a limited use that allows the terminals to continue to operate and invest in upgrades and supports opportunities for growth through exceptions, such as aviation or renewable fuels. Finally, even though transloading facilities are a defining characteristic of [FFTs], the ordinance only limits new fossil fuel storage tank capacity. It does not regulate transloading facilities, docks or pipelines—facilities that are key components of the multimodal freight transportation system. Existing FFTs and other industrial uses can make investments in multimodal freight facilities.” Record 147.

1 The city council also concluded that there was no evidence of increased
2 future fuel demand beyond current storage capacity, and relied on this finding to
3 support its conclusion that the 2019 FFT amendments will not result in a change
4 in transportation mode potentially impacting the multimodal system. Record 152-
5 53. Petitioners challenge those findings as unsupported by substantial evidence.
6 Petitioners' Petition for Review 27. We agree.

7 As noted in our resolution of the second assignments of error, the city's
8 conclusion that there is adequate storage capacity rests, at least in part, on the
9 evidence that there was adequate storage for petroleum during a shutdown of the
10 Olympic pipeline. As we explained, however, the city's conclusions that existing
11 storage is adequate for natural gas is not supported by substantial evidence. For
12 similar reasons, we agree with petitioners that evidence in the record does not
13 support the finding that the 2019 FFT amendments' prohibition of new FFTs and
14 limitation on additional storage capacity will not result in any impacts on the
15 intermodal transportation system. Contrary to the city's findings, evidence in the
16 record supports petitioners' argument that limiting FFT storage capacity could
17 impact pipeline and truck traffic. For example, the Oregon Freight Plan notes that
18 there are 17,000 miles of natural gas pipeline in Oregon and includes the
19 following observation:

20 "Although the pipeline system is privately owned and operated, it
21 does interact with the rest of the state's transportation network.
22 Petroleum product pipelines, for instance, create demand for truck
23 transportation at their termini since fuel products must be shipped

1 from the terminal to their final destination. If Oregon's pipeline
2 systems reach capacity in the future and no new ones are built, these
3 shipments would have to be made by truck, with potential negative
4 impacts such as infrastructure wear and tear and increased roadway
5 congestion." Record 5165.

6 As recognized by the Oregon Freight Plan, a constriction in one component of an
7 intermodal system may shift demand to other transportation modes, thereby
8 increasing truck traffic. Tidewater Barge Lines testified that the FFTs

9 "are key to a fuel distribution network that allows Tidewater to
10 supply fuel by barge from Portland to Eastern Oregon and
11 Washington in an efficient and environmentally friendly [manner.]
12 As noted in the enclosed document, four barges pushed by a tugboat
13 is the equivalent of 538.5 trucks or 140 railcars that travel on the
14 highways and railroads in our region." Record 444.

15 We agree with petitioners that the record does not contain substantial evidence
16 supporting the city council's finding that there will not be a change in
17 transportation mode impacting the multimodal system.

18 Petitioners' third assignment of error, third subassignment of error, is
19 sustained.

20 **d. CP Goal 8.M and CP Policies 8.125 and 8.126**

21 Petitioners argue that the city council made improper findings of
22 compliance with certain public facilities and services goals and policies. CP Goal
23 8.M is to have "reliable energy infrastructure that provides efficient, low-carbon,
24 affordable energy through decision-making based on integrated resource
25 planning." Petitioners argue that the city council improperly found that CP Goal
26 8.M applies only to public infrastructure. Petitioners' Petition for Review 26.

1 However, this argument does not accurately reflect the city's findings with
2 respect to the goal. The city found:

3 "Goal 8.M (energy infrastructure) is the one goal that is applicable
4 to this ordinance. Oregon Administrative Rules (OAR 860-027-
5 0400) define [IRPs] as investor-owned energy utility's written plan
6 detailing its future long-term resource needs, its analysis of the
7 expected costs and associated risks of the alternatives to meet those
8 needs, and its action plan to select the best portfolio of resources to
9 meet those needs. The NW Natural LNG Storage facility is the only
10 FFT in Portland that is part of an investor-owned utility. NW
11 Natural's 2018 IRP identifies the replacement of mechanical process
12 equipment used for the liquefaction, vaporization, or storage of
13 LNG, but not expansion of storage capacity. The FFT amendments
14 only regulate fossil fuel storage tank capacity, therefore these
15 changes are consistent with the NW Natural IRP." Record 133.

16 CP Goal 8.M expressly references decision making based on integrated resource
17 planning. We agree with the city that interpreting the goal to apply to energy
18 utilities with an IRP is consistent with its text and context.

19 CP Policy 8.125 requires that the city

20 "[p]romote efficient and sustainable production and use of energy
21 resources by residents and businesses, including low-carbon
22 renewable energy sources, district energy systems, and distributed
23 generation, through land use plans, zoning, and other legislative land
24 use decisions."

25 CP Policy 8.126 provides that the city will "[c]oordinate with energy providers
26 to encourage investments that ensure reliable, equitable, efficient, and affordable
27 energy for Portland residents and businesses." The city council adopted
28 consolidated findings of compliance with CP Policies 8.125 and 8.126. The city
29 council interpreted "promote" to mean "further the progress of, advance, or

1 raise.” Record 145. The city council interpreted “coordinate” to mean, in part,
2 “work together.” *Id.* The city council found that these policies work together to
3 promote efficient and sustainable production and use of energy and that “this is
4 done by coordinating with energy providers to encourage investments that will
5 result in reliable, equitable, efficient and affordable energy.” *Id.* The city council
6 found that the city coordinated with energy providers because BPS held
7 stakeholder focus groups, the results of which were discussed in the proposed
8 draft of the FFT amendments. *Id.* Petitioners do not address these findings and
9 we will not develop their argument for them. The city further found that “[t]he
10 FFT[] amendments help provide a reliable, low-carbon energy infrastructure by
11 designating existing FFTs as a limited use, which allows them to continue to
12 operate and invest in facilities to increase safety and reliability.” Record 133. We
13 agree with the city that coordination does not require city council acceptance of
14 stakeholder recommendations.

15 Petitioners’ third assignment of error, fourth subassignment of error, is
16 denied.

17 **e. Guild’s Lake Industrial Sanctuary**

18 The city encourages the growth of industrial activities by establishing
19 industrial sanctuaries preserving certain land primarily for manufacturing
20 purposes. Guild’s Lake Industrial Sanctuary Plan (GLISP) 3. One such industrial
21 sanctuary is the Guild’s Lake Industrial Sanctuary (GLIS). Located between
22 Forest Park in the West Hills and the Willamette River,

1 “[t]he GLIS contains the majority of the industrially zoned land in
2 Northwest Portland and is one of the few remaining large urban
3 industrial districts in the United States. * * *

4 “The [GLIS] area forms an important part of Portland’s overall
5 ‘Industrial Sanctuary,’ where land is preserved for long-term
6 industrial use. Manufacturing, distribution and other industrial
7 activities have occurred in the GLIS since the late nineteenth
8 century. Over many decades, public and private investments in
9 infrastructure such as marine, rail and highway facilities, as well as
10 investments in industrial physical plants, have made it one of the
11 premier heavy industrial districts in the Pacific Northwest. Industrial
12 businesses continue to thrive in the district, providing well-paying
13 jobs and contributing to the region’s economy. However, because of
14 its proximity to mixed-use and residential neighborhoods and the
15 central city, the [GLIS] is particularly vulnerable to pressure for
16 redevelopment to nonindustrial uses.” *Id.*

17 The purpose of the GLISP is “to maintain and protect this area as a unique
18 place for a broad variety of industrial land uses and businesses” and the GLISP
19 “provides a policy framework that preserves industrial land in the [GLIS], and
20 protects and promotes its long-term economic viability as an industrial district.”
21 *Id.* at 4. Many of the existing FFTs are located within the GLIS, and the GLISP
22 policies are applicable to the 2019 FFT amendments. In *CPBT I*, we concluded
23 that the city failed to consider and demonstrate compliance with GLISP Policies
24 1 and 2. 76 Or LUBA at 30-32. On remand, the city council adopted findings
25 addressing the GLISP policies. Record 164-70. Petitioners argue that the FFT
26 amendments violate the GLISP. Petitioners’ Petition for Review 35-37.

27 GLISP Policy 1 is to

28 “[m]aintain and expand industrial business and employment
29 opportunities in the [GLIS and] [s]timulate investment in the area’s

1 public and private infrastructure and industrial facilities.”

2 The GLISP policies are expanded upon through objectives. GLISP Policy 1,
3 Objective 2, is to:

4 “[f]oster a business and public policy environment that promotes
5 continued private and public sector investments in infrastructure,
6 facilities, equipment and jobs.”

7 We explained in *CPBT I* that Policy 1, Objective 2, arguably “requires the city to
8 protect the ability of existing industrial uses in the sanctuary to expand, or at least
9 consider that objective balanced against other policy objectives.” 76 Or LUBA
10 at 31. We remanded because the city council had made no responsive findings.
11 On remand, the city council made responsive findings and concluded that the
12 2019 FFT amendments promote investment because only *new* storage is limited
13 at existing FFTs. Record 166. The objective does not require investments in
14 infrastructure not currently in existence, and the city’s findings that limited use
15 status supports continued investment is consistent with the objective’s text and
16 context.

17 GLISP Policy 2 is to

18 “[m]aintain, preserve and improve the intermodal and multimodal
19 transportation system to provide for the smooth movement of goods
20 and employees into and through the [GLIS].”

21 GLISP Policy 2, Objective 1, is to

22 “[m]aintain, protect, and enhance the public and private multimodal
23 transportation investments in the GLIS, including rail and marine
24 terminal facilities, to ensure its continued viability as a major center
25 for the import and export of industrial products in the state of

1 Oregon.”

2 The city council found on remand that the 2019 FFT amendments meet the
3 GLISP provisions because (1) the central purpose of the GLISP is to protect the
4 sanctuary from encroachment, (2) the amendments apply to only one type of
5 business, and (3) companies that own or operate the FFTs may still invest in their
6 intermodal components. Record 164-70.

7 The city erred by concluding that the amendments apply to only one type
8 of business and that remaining industrial uses continue to operate under current
9 regulations, without addressing the role of FFTs, if any, in serving other
10 businesses in the area. In addition, while we agree with the city that the primary
11 purpose of the GLISP may be considered as relevant context in interpreting the
12 policies,¹⁶ we agree with petitioners that the former may not overrule the plain

¹⁶ The purpose of the GLIS plan district is set out in PCC 33.531.010:

“The [GLIS] plan district fosters the preservation and growth of this premier industrial area adjacent to Portland’s central city. The plan district’s large number of well-established industrial firms are dependent on the area’s multimodal transportation system, including marine, rail, and trucking facilities, and on the ability of area streets to accommodate truck movements. Because of its proximity to inner-city neighborhoods with high concentrations of commercial and residential uses, the [GLIS] is particularly vulnerable to impacts from, and redevelopment to, nonindustrial uses. The provisions of the plan district recognize that the displacement of industrial uses by inappropriate nonindustrial uses potential threatens the integrity of this district and investments in public and private infrastructure. The provisions of this chapter protect the area from incompatible uses which threaten the district’s

1 language of the latter. The city council’s findings do not address the maintenance,
2 protection, or enhancement of private transportation investments called for by the
3 objective. The city council found:

4 “The limits on expansion of storage capacity at [FFTs] are mitigated
5 by designating existing [FFTs] as a limited use that allows the
6 terminals to maintain, preserve and continue to operate and improve
7 their intermodal facilities to provide for the continued movement of
8 fossil fuels through the GLIS and supports opportunities for
9 enhancement through exceptions, such as aviation or renewable
10 fuels. Finally, even though transloading facilities are a defining
11 characteristic of [FFTs], the ordinance only limits new fossil fuel
12 storage tank capacity and does not regulate transloading facilities,
13 docks or pipelines—facilities that are key components of the
14 multimodal freight transportation system. Existing FFTs and other
15 industrial uses can make investments in multimodal freight
16 facilities.” Record 167.

17 The city’s findings that the 2019 FTT amendments do not inhibit the ability of
18 FFT owners or operators to invest in non-storage elements of their facilities does
19 not address the objective’s call to enhance existing terminal facilities by allowing
20 additional FFT storage or enhance private transportation investment more
21 broadly by allowing new FFTs.

22 GLISP Policy 2, Objective 1, calls for maintenance, protection, and
23 enhancement of private transportation investments to ensure the GLIS’

integrity, stability and vitality and compromise its transportation system. This chapter also includes provisions to ensure a more pedestrian- and transit-oriented streetscape along NW Vaughn Street and an improved interface with the mixed-use neighborhood to the south.”

1 “continued viability as a major center for the import and export of industrial
2 products in the state of Oregon.” We agree with petitioners that the city council’s
3 findings fail to address whether the 2019 FFT amendments will adversely impact
4 the GLIS’ continued viability as a major center for import and export of industrial
5 products.

6 Petitioners’ third assignment of error, fifth subassignment of error, is
7 sustained, in part.

8 **B. Evaluation of Alternatives**

9 As noted, Goal 2 provides:

10 “All land use plans shall include identification of issues and
11 problems, inventories and other factual information for each
12 applicable statewide planning goal, evaluation of alternative courses
13 of action and ultimate policy choices, taking into consideration
14 social, economic, energy and environmental needs.” OAR 660-015-
15 0000(2).

16 CP Policy 2.10 is part of the city’s community assessment plan and directs the
17 city to

18 “[p]rovide meaningful opportunities for individuals and
19 communities to be involved in inventories, mapping, data analysis,
20 and the development of alternatives.”

21 CP Policy 2.15 is part of the city’s plan for transparency and accountability, and
22 directs the city to

23 “[p]rovide clear documentation for the rationale supporting
24 decisions in planning and investment processes[,] [and]
25 [c]ommunicate to participants about the issues raised in the
26 community involvement process, how public input affected

1 outcomes, and the rationale used to make decisions.”

2 Petitioners contend that “[t]he City’s failure to earnestly consider and adopt
3 legislation from the available range of better alternatives is a violation of Goal 2
4 and [CP Policies 2.10 and 2.15], and thus, the FFT Amendments should be
5 remanded or reversed.” Petitioners’ Petition for Review 19-20. We agree with
6 respondents that the city met its burden to consider alternatives.

7 “The directive in Goal 2 to consider alternative courses of action is a very
8 general directive.” *Hubenthal v. City of Woodburn*, 39 Or LUBA 20, 30 (2000).
9 We have held that, where

10 “the decision and adopted findings explain why the county
11 disagreed with the [alternatives], * * * set forth a rationale for the
12 choices the county made[,] [and] specifically respond to particular
13 objections and alternatives raised below[,] [t]he decision and
14 findings are more than sufficient to satisfy the Goal 2 requirement
15 for evaluation of alternative courses of action[.]” *Tipperman v.*
16 *Union County*, 44 Or LUBA 98, 103 (2003) (citation omitted).

17 Petitioners maintain that “the City had a clearly documented range of alternatives
18 to better satisfy the [CP] and resolve the purported conflicts among applicable
19 policies.” Petitioners’ Petition for Review 18. As petitioners explain, the version
20 of the FFT amendments that the planning commission recommended the city
21 council adopt allowed up to a ten percent expansion in existing storage capacity.
22 The city council explained its reasoning for not including an expansion option in
23 the 2019 FFT amendments: “[f]ossil fuel infrastructure poses considerable risks
24 in the event of a major earthquake.” Record 27. The city council found that,
25 according to a 2012 DOGAMI Earthquake Risk Study, in the event of a

1 magnitude 8 or 9 Cascadia Subduction Zone earthquake, the critical energy
2 infrastructure hub where FFTs are located would experience

3 “ground shaking; liquefaction (soil behavior phenomenon in which
4 a saturated sand softens and loses strength during strong earthquake
5 ground shaking); lateral spreading (where surficial soil permanently
6 moves laterally due to earthquake shaking); landslides; co-seismic
7 settlement (where the ground surface is permanently lowered due to
8 seismic shaking; and bearing capacity failures (when the foundation
9 soil cannot support the structure it is intended to support).”*Id.*

10 The city council found that the FFTs have substantial seismic risk because most
11 of the storage tanks were not designed using seismic criteria, and that
12 “[c]ontinuing to allow the increase in FFTs in a high risk area increases the risk
13 to the surrounding industrial district and the Willamette River.” Record 28. The
14 city council also specifically responded to comments from petitioners and
15 intervenor-petitioner, explaining that

16 “[t]estimony from the Portland Business Alliance et al., the Working
17 Waterfront Coalition, the Western States Petroleum Association and
18 Zenith Energy called for the ordinance to specifically allow for
19 safety and seismic upgrades in conjunction with expansion of
20 storage capacity, otherwise there will be fewer tank upgrades. The
21 testimony does not define or explain the economics of upgrades; or
22 what is meant by ‘market-based infrastructure changes’; or what are
23 the ‘business impacts’ of regulating tank capacity; or why FFTs
24 need to expand fossil fuel storage tank capacity in order to make
25 safety upgrades. The FFT[] amendments designate existing FFTs as
26 a limited use specifically to continue to operate to supply fossil fuels
27 and to allow for safety and seismic upgrades. Transloading facilities
28 are a defining characteristic of [FFTs], however, the ordinance * * *
29 does not regulate transloading facilities and only limits new fossil
30 fuel storage tank capacity. Existing fossil fuel storage tank capacity
31 can be reconfigured. Other aspects of terminal infrastructure

(pipelines, docks, transloading facilities) are not regulated by this ordinance. Renewable fuels and aviation fuels are exempt from these regulations. Only three storage tank upgrades with significant capacity expansion have occurred in the past 10 years under development standards that allowed for the unlimited capacity expansion. Therefore, there is no evidence that allowing for storage tank capacity expansion is an incentive that will encourage safety and seismic upgrades. Nothing in state land use law requires local jurisdictions to allow expansion of a use to make safety upgrades.”

Id.

The city council considered the alternative of allowing expansion of storage capacity. The city council simply rejected petitioners’ argument that allowing expansion would increase investment in seismic upgrades, and concluded that the amendments limit risk. Petitioners’ disagreement with the city council’s ultimate decision is not a basis for reversal or remand because the city council met its burden to consider alternatives and explain its rationale.

Petitioners’ first assignment of error, third subassignment of error, is denied.

Petitioners’ and intervenor-petitioner’s first assignments of error are denied.

Petitioners’ third assignment of error is sustained, in part.

PETITIONERS’ FOURTH ASSIGNMENT OF ERROR

Article I, section 9, clause 3, of the United States Constitution sets forth the Commerce Clause; that is, the power of Congress to regulate commerce among the states.

“The dormant Commerce Clause is the negative implication of that

1 provision, as developed through case law, that ‘denies the States the
2 power unjustifiably to discriminate against or burden the interstate
3 flow of articles of commerce.’” *CPBT II*, 289 Or App at 745
4 (quoting *Oregon Waste Systems, Inc. v. Department of*
5 *Environmental Quality of Ore.*, 511 US 93, 98, 114 S Ct 1345, 128
6 L Ed 2d 13 (1994)).”.

7 ORS 197.835(9)(a)(E) provides that LUBA shall reverse or remand a land use
8 decision if LUBA finds that the local government “[m]ade an unconstitutional
9 decision[.]” Petitioners argue that the 2019 FFT amendments are unconstitutional
10 because they violate the Dormant Commerce Clause, favoring in-state purchasers
11 and end users over their out-of-state counterparts. Respondents argue that (1)
12 petitioners are precluded from relitigating the question of whether the
13 amendments violate the Dormant Commerce Clause because the issue was raised
14 and resolved in *CPBT II*, and (2) the 2019 FFT amendments do not violate the
15 Dormant Commerce Clause. For the reasons explained below, we reject this
16 assignment of error.

17 Intervenor-respondents argue that issue preclusion bars petitioners’
18 Dormant Commerce Clause assignment of error. We have explained:

19 “When an issue has been decided in a prior proceeding, the prior
20 decision on that issue may preclude relitigation of the issue if five
21 requirements are met: (1) the issue in the two proceedings is
22 identical; (2) the issue was actually litigated and was essential to a
23 final decision on the merits in the prior proceeding; (3) the party
24 sought to be precluded had a full and fair opportunity to be heard on
25 that issue; (4) the party sought to be precluded was a party or was in
26 privity with a party to the prior proceeding; and (5) the prior
27 proceeding was the type of proceeding to which preclusive effect
28 will be given.” *Lawrence v. Clackamas County*, 40 Or LUBA 507,
29 519 (2001) (*Lawrence I*), *aff’d*, 180 Or App 495, 43 P3d 1192 (2002)

1 (*Lawrence II*) (citing *Nelson v. Emerald People's Utility Dist.*, 318
2 Or 99, 104, 862, P2d 1293 (1993)).

3 Intervenors-respondents point out that, although we concluded in *Lawrence I* that
4 issue preclusion does not apply to land use proceedings, the Court of Appeals in
5 *Lawrence II* did not resolve “the broad question of whether local land use
6 decisions are the type of decisions to which preclusive effect may be accorded[.]”
7 180 Or App at 504.

8 We need not resolve the question of whether preclusive effect is properly
9 applied to a Court of Appeals decision concerning a legislative land use decision.
10 As intervenors-respondents note, the factors for finding issue preclusion include
11 that petitioners were parties or parties in privity in the prior appeal. However,
12 petitioner Oregon Business & Industry (OBI) was not a party in the prior action.
13 Privity includes “those who control an action although not parties to it; those
14 whose interests are represented by a party to the action; and successors in interest
15 to those having derivative claims.” *Thomas v. U.S. Bank National Association*,
16 244 Or App 457, 473, 260 P3d 711 (2011) (emphasis omitted). Although the
17 same attorney that represented petitioners in *CPBT I* and *II* also represents
18 petitioners here, intervenors-respondents have not established that OBI
19 controlled the prior action or is a successor in interest to a prior petitioner, and
20 they do not argue that OBI has the same interest in the outcome as the prior
21 petitioners. Accordingly, we will not consider extension of issue preclusion to
22 land use proceedings in this case and proceed to decide the merits of petitioners’
23 argument.

1 The first question in the Dormant Commerce Clause analysis is whether
2 the 2019 FFT amendments are facially discriminatory. Discrimination in the
3 context of the Dormant Commerce Clause

4 “means differential treatment of in-state and out-of-state economic
5 interests that benefits the former and burdens the latter. If a
6 restriction on commerce is discriminatory, it is virtually *per se*
7 invalid.” *Oregon Waste Systems*, 511 US at 99.

8 The city council found that the text of the 2019 FFT amendments is “similar to
9 the changes adopted in 2016, except for a few minor adjustments to reconcile the
10 [FFT amendments] with subsequent changes to the Zoning Code that have been
11 adopted since 2016.” Record 18, 178. Petitioners do not argue that the 2019 FFT
12 amendments differ substantively from the 2016 FFT amendments. The court held
13 in *CPBT II* that the 2016 FFT amendments were not facially invalid because they
14 do not treat similar in-state and out-of-state economic interests differently. 289
15 Or App at 747-50. Thus, the 2019 FFT amendments remain nondiscriminatory
16 on their face.

17 Further, a precursor to finding that the Dormant Commerce Clause is
18 discriminatory is a determination that the allegedly competing economic interests
19 involve a comparison of substantially similar entities. *CPBT II*, 289 Or App at
20 746 (citing *General Motors Corp. v. Tracy*, 519 US 278, 298, 117 S Ct 811, 136
21 L Ed 2d 761 (1997)). If there is no competition, actual or prospective, between
22 the favored and disfavored entities, there is no local preference. PCC
23 33.920.300(D)(5) excludes from the 2019 FFT amendments “[i]ndustrial,

1 commercial, institutional, and agricultural firms that exclusively store fossil fuel
2 for use as an input.” Petitioners argue that the amendments allow a “new fuel
3 tank of unlimited size for local end users, while an identical large fuel tank
4 holding identical fuel is prohibited for interstate commerce.” Petitioners’ Petition
5 for Review 41. Petitioners have not, however, identified similarly situated
6 competitors. The plain language of the amendments makes no distinction
7 between Oregon and out-of-state businesses storing fuel as an input. The court
8 explained in *CPBT II* that the city and Oregon have no local refineries or sources
9 of fossil fuel and, as a result, the amendments cannot disfavor out-of-state
10 exporters as compared to nonexistent in-state producers, refiners, or distributors.
11 289 Or App at 748-49. In sum, the amendments establish a cap on the volume of
12 bulk fossil fuels stored in Portland, without regard to the origin or destination of
13 the fuels.

14 Having determined that the 2019 FFT amendments are not facially invalid,
15 we turn to their effects.

16 “[N]ondiscriminatory regulations that have only incidental effects
17 on interstate commerce are valid unless ‘the burden imposed on such
18 commerce is clearly excessive in relation to the putative local
19 benefits.” *Oregon Waste Systems*, 511 US at 99 (quoting *Pike v.*
20 *Bruce Church, Inc.*, 397 US 137, 142, 90 S Ct 844, 25 L Ed 2d 174
21 (1970)).

22 The court held in *CPBT II* that petitioners did not meet their burden to establish
23 that the claimed burdens on interstate commerce were clearly excessive in
24 relation to the putative local benefits. The court held that the amendments provide

1 legitimate putative local benefits including limiting the number of FFTs in a
2 moderate to high risk earthquake liquefaction zone, reducing the risk of potential
3 large explosions and catastrophic accidents, and protecting local public health.
4 289 Or App at 752.

5 “If a legitimate local purpose is found, then the question becomes
6 one of degree. And the extent of the burden that will be tolerated
7 will of course depend on the nature of the local interest involved,
8 and on whether it could be promoted as well with a lesser impact on
9 interstate activities.” *Pike*, 397 US at 142.

10 Petitioners have not developed an argument that the 2019 FFT amendments are
11 overly burdensome on interstate commerce, and their argument that any safety
12 benefits are illusory is not persuasive. Petitioners argue:

13 “[T]he FFT Amendments prohibit moving fuel tanks out of the
14 liquefaction zone and reduce the number of safety upgrades that
15 would occur at the terminals. Further, the displacement of fuel
16 transport to truck and other non-pipe and terminal-based methods
17 would increase carbon footprint from fuel transport. In comparison,
18 the FFT Amendments’ prohibition of any new interstate
19 transportation or interstate facilities is clearly excessive.”
20 Petitioners’ Petition for Review 51.

21 The city council’s findings explain that few seismic upgrades occurred prior to
22 the 2019 FFT amendments, and they therefore conclude that there is no evidence
23 that the amendments will reduce safety upgrades. Record 28.¹⁷ The amendments
24 further a legitimate goal of limiting the number of FFTs in a moderate to high

¹⁷ It is unclear whether the inability to locate FFTs in Portland results in an inability to locate FFTs anywhere in Oregon.

1 liquefaction zone. Petitioners have not established that, if the amendments cause
2 fuel transport to move to trucks and other non-pipe and terminal methods, those
3 methods will excessively burden interstate commerce, or that any other impacts
4 on interstate commerce will be excessive.

5 Petitioners' fourth assignment of error is denied.

6 The city's decision is remanded.