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

JAMES J. NICITA,
Petitioner,

and

NORTHWEST ENVIRONMENTAL
DEFENSE CENTER and PATRICIA SPADY,
Intervenors-Petitioners,

vs.

CITY OF OREGON CITY,
Respondent.

LUBA Nos. 2020-037/039

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

James J. Nicita filed petitions for review and reply briefs argued on behalf of themselves and intervenor-petitioner Patricia Spady.

Jesse A. Buss filed a petition for review and reply brief and argued on behalf of intervenor-petitioner Northwest Environmental Defense Center. Also on the brief were Jonah Sandford, Michael T. Burleson, Willamette Law Group, Northwest Environmental Defense Center, and Morris & Sullivan PC.

Carrie A. Richter filed the response briefs and argued on behalf of respondent. Also on the brief were William K. Kabeiseman and Bateman Seidel Miner Blomgren Chellis & Gram, PC.

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

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

AFFIRMED 09/21/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

In these consolidated appeals, petitioner and intervenors-petitioners (collectively, petitioners) challenge two city ordinances. LUBA No. 2020-037 is an appeal of Ordinance 19-1015, updating the city's stormwater and grading design standards (design standards). LUBA No. 2020-039 is an appeal of Ordinance 19-1014, adopting a stormwater master plan (SMP).

MOTION TO TAKE OFFICIAL NOTICE AND MOTION TO STRIKE

The city moves LUBA to take official notice of two documents: (1) the city's National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) discharge permit and (2) a concurrent Permit Evaluation Report and Fact Sheet (PER). Both documents were issued by the Oregon Department of Environmental Quality (DEQ) in March 2012 and are attached to the city's response brief to intervenor-petitioner Northwest Environmental Defense Center's (NEDC's) petition for review. Response Brief to NEDC at App-1, App-13. The city contends that the MS4 permit and the PER are official acts of an executive agency subject to official notice. *See* ORS 40.090(2) (Oregon Evidence Code 202(2)) (defining law subject to judicial notice to include the public acts of state executive departments).

LUBA may take official notice of documents that (1) have some relevance to the issues on appeal and (2) constitute officially cognizable law. However, LUBA's review is generally limited to the record. ORS 197.835(2)(a). Therefore,

LUBA has no authority to take official notice of adjudicative facts. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007); *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995).

No party opposes the motion to take official notice of the MS4 permit. The MS4 permit was issued pursuant to and implements applicable federal and state law. The MS4 permit is an "official act" of DEQ and therefore subject to official notice under ORS 40.090(2). *See Tualatin Riverkeepers*, 55 Or LUBA at 693-94 (explaining that LUBA will take official notice of MS4 permits if relevant to the appeal and cited for a permissible purpose). The city cites the MS4 permit to establish that the MS4 permit requires the city to reduce the discharge of pollutants to the maximum extent practicable (MEP). No party argues that that standard is not relevant to the issues in these appeals or that the city cites the MS4 permit for an impermissible purpose under ORS 40.090(2). The motion to take official notice of the MS4 permit is granted.

The PER "describes the basis and methodology used in developing the [MS4] permit." Response Brief to NEDC at App-15. The city explains that federal law requires that a PER accompany every NPDES permit and that the purpose of the PER is to explain to the public as well as other agencies the relevant facts, law, methods, and policies that DEQ considered when issuing the permit and the scope of the permit and its requirements. The city explains that NEDC argues that the city's decision violates Statewide Planning Goal 6 (Air, Water and Land Resources Quality) because, as discussed further below,

according to NEDC, the city's decision allows water pollution from existing and future development that will actually violate or threaten to violate water quality standards for toxic substances. NEDC Petition for Review 31-41. The city contends that the PER illustrates how DEQ interprets and applies the water quality standards—specifically, that "reduction to the [MEP] is the method by which DEQ expects to reduce the [city] pollutant loadings." Response to Motion to Strike 4.

Intervenor-petitioner Spady (Spady) opposes LUBA taking official notice of the PER and moves to strike references to the PER in the city's response brief, arguing that the PER is not subject to official notice as an "official act" of DEQ because it is not an agency decision or order.

In *Tualatin Riverkeepers*, we explained that a DEQ "Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications" is subject to official notice as an official guideline for issuing permits if it is relevant to an issue on appeal. 55 Or LUBA at 695. We observed that that document was "intended to 'guide' DEQ in its internal procedures and that the document '[did] not create rights or obligations on the part of the public or regulated entities.'" *Id.* We reasoned that, in enacting ORS 40.090(2), "the legislature did not intend to exclude 'official acts' that promulgate official but non-binding guidelines for issuing permits." *Id.*

We agree with the city that the PER has some relevance to the issues on appeal and is subject to official notice under the expansive interpretation of

"official acts" that we recognized in *Tualatin Riverkeepers* and have recognized in other cases. *See, e.g.*, *Oregon Department of Fish and Wildlife v. Lake County*, ___ Or LUBA ___, ___ (LUBA Nos 2019-084/085/093, Apr 29, 2020) (slip op at 7-8) (taking official notice of an Oregon Department of Fish and Wildlife publication regarding big game winter range habitat); *Shaff v. City of Medford*, 79 Or LUBA 317, 321 (2019) (taking official notice of a United States Center for Disease Control publication regarding bicyclist deaths associated with motor vehicle traffic).

Spady also argues that, if LUBA determines that the PER is subject to official note, the city relies on the PER for the impermissible purpose of establishing the fact that "stormwater discharges are highly variable in nature and difficult to control due to topography, land use and water differences." Response Brief to Spady 12 (quoting PER, Response Brief to NEDC at App-18).

An adjudicative fact is a fact "[g]enerally known within the territorial jurisdiction of the trial court" or a fact that can be determined "by resort to sources whose accuracy cannot reasonably be questioned." ORS 40.065 (OEC 201(b)). A court may take notice of adjudicative facts pursuant to ORS 40.065. For example, a court may take judicial notice of demographic, geographic, anatomical, and scientific facts. *See, e.g.*, *Volny v. City of Bend*, 168 Or App 516, 519 n 2, 4 P3d 768 (2000) (taking judicial notice of the fact that the population of the city of Bend substantially exceeds 2,500); *SAIF v. Calder*, 157 Or App 224, 227, 969 P2d 1050 (1998) (explaining that the fact that the coracobrachial

ligament as a ligament of the arm involved in flexion is an adjudicative fact subject to judicial notice); *State v. Corey*, 123 Or App 207, 211, 859 P2d 560 (1993) (taking judicial notice of the fact that Rhododendron is a community in Clackamas County approximately 35 miles from the city of Portland).

Unlike a court, LUBA does not take notice of adjudicative facts. *See Tualatin Riverkeepers*, 55 Or LUBA at 692 ("LUBA may not take official notice of facts within documents that are subject to notice under OEC 202, if notice of those facts is requested for an adjudicative purpose (*i.e.*, to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion that is at issue in the challenged decision).").

Spady misapprehends the purpose for which the city quotes and relies on the PER. The full quote in the city's response brief is as follows:

> "The law recognizes that stormwater discharges are highly variable in nature and difficult to control due to topography, land use and weather differences (i.e., intensity and duration of storms.) Therefore, the law establishes an adaptive management process for reducing these discharges, and the [co]permittees are required to regularly review and refine their best management practices to reduce pollutants to the maximum extent practicable. The goal of the renewed permit is a net reduction in pollutant loadings over the five-year permit term. Therefore, no permit provisions are being proposed that would be expected to cause a decrease in water quality for the purpose of this antidegradation review." Response Brief to Spady 12 (quoting PER, Response Brief to NEDC at App-18).

The city relies on the PER to illustrate the applicable DEQ water quality program mechanics and, specifically, to support its response that the DEQ

standards regulating city discharge of pollutants are not strictly numeric. Instead, the applicable mechanism is reduction of pollutants to the MEP through the use of best management practices (BMPs). The city relies on the PER to support its response that the challenged SMP and design standards are consistent with those DEQ requirements. Those matters are not adjudicative facts and, instead, describe the water quality legal framework, standards, and mechanisms for compliance that guided the city's decisions. We are not prohibited from considering the PER for the purposes proposed by the city. The city does not rely on the PER, and we will not consider the PER, to establish any adjudicative fact not in the record.

The city's motion to take official notice of the PER is granted. Spady's motion to strike is denied.

BACKGROUND

The MS4 permit program is administered by DEQ to ensure municipal compliance with the federal Clean Water Act (CWA). DEQ has also promulgated state water quality policies and standards, including the antidegradation policy at OAR 340-041-0004(1):

> "The purpose of the Antidegradation Policy is to guide decisions that affect water quality to prevent unnecessary further degradation from new or increased point and nonpoint sources of pollution, and to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses."

Much of Oregon City was developed before stormwater standards were adopted. The SMP explains:

> "Areas of the city that have been developed in the last 20 years generally have included the implementation of water quality treatment facilities. This includes roughly the southern third of the city. The areas developed during the 1950s through the 1990s are less likely to include water quality treatment, as the City's design standards requiring treatment were adopted in 1999. The oldest portion of the city that was developed prior to 1950 does not include water quality treatment facilities. These untreated areas include most of the industrial and commercial areas north of downtown, in the vicinity of Abernethy Creek and the Clackamas River. Over time some of the areas not originally serviced with water quality facilities may have been retrofit with public facilities to meet regulatory guidelines, when public projects or private redevelopment projects were constructed, but those areas are small compared to the total drainage area." Record 107.

The city has no centralized stormwater treatment facility. The city is growing, which requires expansion of the city's stormwater system. The city explains that the SMP is based, in part, on information in a 2015 water quality assessment, which evaluated the level of water quality treatment that the city should aim to achieve for pollutants that have been assigned a total maximum daily load (TMDL) based on receiving water bodies exceeding water quality criteria for that pollutant. Three bacterial TMDLs apply to the city discharges. Record 107.[1]

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[1] The SMP explains:

The SMP explains that an increase in city water quality treatment that would be required to achieve TMDL target wasteload allocations for bacteria "may not be attainable." Record 107.[2] The city's MS4 permit requires the city to increase water quality treatment across the city, thereby improving water quality for a wide range of pollutants. Increased water quality treatment will occur through various mechanisms including future development and redevelopment. Record 108.

The city's MS4 permit requires the city to reduce the discharge of water pollutants to the MEP. To that end, the city is required to adopt a stormwater

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> "As part of the water quality standards program, [DEQ] is required to conduct a water quality assessment of the state's water bodies every 2 years. If a water body is found to have pollutant levels that exceed water quality standards, it is placed on what is referred to as a 303(d) list. Once on the 303(d) list, a water body is in line for the development of a TMDL requirement. A TMDL requirement will specify limits on allowable loads from each discharger. Three TMDLs have been developed that apply to Oregon City. These include bacterial TMDLs for the Clackamas River, the Middle Willamette River Direct, and the Middle Willamette River tributaries." Record 106-07.

[2] Wasteload allocation is a type of water quality-based effluent limitation. *See* OAR 340-041-0002(67) (defining "wasteload allocation"). A wasteload allocation "determines the portions of the receiving water's loading capacity that are allocated to existing point sources of pollution, including all point source discharges regulated under the Federal Water Pollution Control Act Section 402 (33 USC Section 1342)." OAR 340-042-0040(4)(g).

management plan, which, in turn, calls for an SMP.[3] The challenged SMP replaces the city's 1988 Drainage Master Plan and plans for stormwater-related capital improvements, including new storm drains. The SMP addresses aging infrastructure through surveying and inventorying the capacity and condition of the existing conveyance system to identify rehabilitation and replacement opportunities where appropriate. In addition, the SMP sets out a number of BMPs to reduce pollutants in stormwater discharges to the MEP, including design requirements for new development and redevelopment.

Also to implement the MS4 permit requirement that the city reduce the discharge of water pollutants to the MEP, the city developed the design standards, which provide requirements for site assessment and planning, stormwater source controls, erosion and settlement controls, conveyance system design, and stormwater management facility design. The challenged design standards replace a set of design standards that the city adopted in 2015.

Petitioners challenge the SMP and design standards in these appeals.

STANDARD OF REVIEW

The challenged decisions are legislative decisions. We explained the applicable standard of review in *Restore Oregon v. City of Portland*:

"LUBA's standard of review of a decision that amends a

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[3] The city's Stormwater *Management* Plan calls for the creation of a Stormwater *Master* Plan (SMP). *See* Response Brief to NEDC 4 (citing Record 30).

comprehensive plan is set out at ORS 197.835(6). LUBA is required to reverse or remand the amendment if 'the amendment is not in compliance with the goals.' *Id.* LUBA is also required to reverse or remand a decision that amends a land use regulation if, as relevant here, '[t]he regulation is not in compliance with the comprehensive plan.' ORS 197.835(7)(a).

"Because the challenged decision[s are] legislative rather than * * * quasi-judicial decision[s], there is no generally applicable requirement that the decisions be supported by findings, although the decision and record must be sufficient to demonstrate that applicable criteria were applied and 'required considerations were indeed considered.' *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16, n 6, 38 P3d 956 (2002). With respect to evidence, Statewide Planning Goal 2 (Land Use Planning) requires that a decision that amends a comprehensive plan or land use regulation must be supported by an adequate factual base. An 'adequate factual base' is equivalent to the requirement that a quasi-judicial decision be supported by substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff'd*, 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)." ___ Or LUBA ___, ___ (LUBA Nos 2018-072/073/086/087, Aug 6, 2019) (slip op at 6-7), *aff'd*, 301 Or App 769, 458 P3d 703 (2020).

NEDC'S FIRST ASSIGNMENT OF ERROR

NEDC argues that the city failed to establish that the SMP complies with Goal 6.

A. Goal 6, Generally

Goal 6 is "[t]o maintain and improve the quality of the air, water and land resources of the state." Goal 6 provides, in part: "All waste and process

discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards."

In *Citizens for Florence v. City of Florence*, we described the Goal 6 inquiry as follows:

> "When a property's plan and zone designations are changed to allow a particular use, Goal 6 requires the local government to adopt findings explaining why it is reasonable to expect that applicable state and federal environmental quality standards can be met by the proposed use. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 583 (1995). By its terms, Goal 6 requires consideration of the cumulative effects of proposed future development and existing development, and prohibits plan amendments allowing future development that alone or combined with existing development will violate or threaten to violate state or federal environmental standards, including water quality. *See 1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 406, *aff'd*, 130 Or App 406, 882 P2d 1130 (1994) (the city must consider cumulative impacts of waste and process discharges from uses to be established by a plan amendment and the existing discharges from existing sources).
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> "Thus, where a local government's watershed is already in violation of applicable state or federal environmental standards, the local government cannot amend its plan to allow future development that will compound that violation without either finding that Goal 6 is satisfied or taking an exception to Goal 6." 35 Or LUBA 255, 281-82 (1998).

More recently, in *Friends of the Applegate v. Josephine County*, we explained:

> "The function served by Goal 6 is not to anticipate and precisely duplicate state and federal environmental permitting requirements. The function of Goal 6 is much more modest. Goal 6 requires that

> the local government establish that there is a *reasonable expectation* that the use that is seeking land use approval will also be able to comply with the state and federal environmental quality standards that it must satisfy to be built." 44 Or LUBA 786, 802 (2003) (emphasis in original).

To establish that a land use regulation amendment implicates Goal 6, a petitioner must establish "some minimal basis for suspecting that the land use regulation amendment will have impacts on [water] quality that would threaten to violate" applicable standards. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116, 146 (2009).

NEDC's Goal 6 arguments rely on an incorrect understanding of how Goal 6 operates. We address the general scope and limit of Goal 6 here and reiterate it in the analyses of the assignments of error below.

First, Goal 6 comes into play when a decision authorizes future development that alone or combined with existing development will violate or threaten to violate state or federal environmental standards. The challenged decisions do not authorize any new development or increased intensity of development. The challenged decisions regulate the stormwater impacts of development within the city. Accordingly, Goal 6 is not implicated by the challenged decisions.

Second, Goal 6 does not provide a legal standard that is independent of what the state and federal water quality programs require—programs that DEQ administers. Instead, Goal 6 works in concert with those standards to ensure that land use planning and regulations prohibit discharges from development that

"threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards."

For example, in *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488, 513 (2016), *aff'd*, 284 Or App 314, 391 P3d 1007 (2017), we rejected an argument that Goal 6 was violated where the intervenor-petitioner did not identify anything in the record that demonstrated that it was unreasonable for the city to expect that applicable state and federal environmental quality standards could be met.

Differently, in *Citizens for Renewables v. Coos County*, ___ Or LUBA ___, ___ (LUBA No 2020-003, Feb 11, 2021) (slip op at 23-27), we sustained an assignment of error and remanded the county's decision because the county's conclusion that the challenged post-acknowledgment plan amendment (PAPA) satisfied Goal 6 was not supported by substantial evidence. We agreed with the intervenor-respondent that the county was not required to determine that the disputed pipeline development would definitely satisfy all applicable state and federal environmental quality standards to find that the PAPA complied with Goal 6. Instead, the county needed to establish a reasonable expectation that the pipeline development would be able to comply with the state and federal environmental quality standards that it had to satisfy to be built. However, we agreed with the petitioners that a DEQ denial of the intervenor-respondent's application for a CWA certification demonstrated that it was not reasonable for the county to expect that applicable state and federal environmental quality

standards could be met. The intervenor-respondent pointed out that the DEQ denial was without prejudice and that they might be able to obtain the required approvals in the future. We reasoned that those facts did not undermine the DEQ denial to the extent that a reasonable person would instead rely entirely on the intervenor-respondent's evidence that the pipeline development was unlikely to cause water quality violations to support a conclusion that the intervenor-respondent would be able to comply with the state and federal environmental quality standards that it had to satisfy to build the pipeline.

In essence, NEDC argues that Goal 6 is a super standard in addition to and above state and federal regulatory programs and that the city cannot comply with Goal 6 in adopting the SMP and design standards without establishing that those regulations will prohibit any discharge of pollutants for which the receiving waters already exceed state and federal standards. The city responds, and we agree, that Goal 6 does not require that the SMP and design standards prohibit discharges that might degrade water quality independent of what the federal and state laws and implementing standards require.

NEDC asks that we reconsider our articulated Goal 6 inquiry and adopt a more stringent standard of reviewing local government compliance with Goal 6. In support of that argument, NEDC cites two LCDC orders: *Klamath Irr. Dist. v.*

Klamath Cty, 2 LCDC 167 (1978) (*Klamath I*), and *Klamath Irr. Dist. v. Klamath Cty*, 3 LCDC 327 (1980) (*Klamath II*).[4]

In *Klamath I*, the petitioner sought review of the county's decision granting conditional approval of a preliminary plat for a 16-acre, 52-lot subdivision, arguing, in part, that the lack of provisions or plans for storm drainage facilities conflicted with Goal 6. The petitioner argued that the plat approval raised the larger issue of the absence of storm drainage facilities within a larger, rapidly growing urban and suburban area. The petitioner argued that the county was required, but had failed, to develop a storm drainage system for the already-developed suburban area within its jurisdiction and that the county had failed to require an adequate storm drainage system for the platted area, which was a rural, agricultural area that would be subdivided and developed with residences.

LCDC listed potential detrimental stormwater impacts of residential development and reasoned: "A subdivision approval which does not address and solve these problems in such a way as to eliminate the prospect that the future development in question will create, increase, or contribute to threats of violation

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[4] LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.825(1). However, between the passage of Senate Bill 100 in 1973 and LUBA's creation in 1979, LCDC, the circuit courts, and the Court of Appeals shared authority to review such decisions. *Former* ORS 197.300(1) (1975), *repealed by* Or Laws 1979, ch 772, § 26; ORS ch 28, 34; ORS 183.480; ORS 183.484. Selected LCDC opinions from 1973 to 1980 are published in a three-volume Oregon LCDC Decisions reporter.

of applicable state or federal environmental regulations is in conflict with Goal [6]." *Klamath I*, 2 LCDC at 171. LCDC concluded that the county's preliminary plat approval did not violate Goal 6 because the approval was conditioned on the applicant later establishing that it would not violate Goal 6 through a county-approved drainage plan, which would be subject to public process and appeal.

The applicant subsequently submitted to the county a stormwater control plan, which the county approved. In *Klamath II*, the petitioner appealed that approval, arguing that the drainage plan was inadequate and the subdivision approval should be overturned as inconsistent with Goal 6.

LCDC agreed with the petitioner that the applicant had failed to establish, based on substantial evidence, that discharges from the subdivision drainage system would meet applicable water quality standards. LCDC also agreed with the petitioner that the county's findings were inadequate to establish compliance with Goal 6.

NEDC argues that "LCDC interpreted and applied Goal 6 strictly, holding that it required the construction of drainage facilities 'clearly adequate to completely prevent any increase in rate or quantity of runoff and any decrease in the quality of existing runoff[.]'" NEDC Petition for Review 21 (quoting *Klamath I*, 2 LCDC at 170). Intervenor argues that LUBA should adopt LCDC's more stringent interpretation of what Goal 6 requires because LCDC adopted Goal 6.

As we understand it, NEDC argues that the SMP and design standards violate Goal 6 because the city currently discharges water that exceeds the TMDL for bacteria. NEDC's Goal 6 argument is unpersuasive.

First, the city responds, and we agree, that the challenged decisions do not change any zoning designations or authorize any new uses. Thus, the challenged decisions do not authorize any specific development, new uses, or increased development density that could result in increased levels of discharge. Instead, the challenged decisions set out how the city plans to manage stormwater and related pollution from development within the city under current planning and zoning. As explained above, Goal 6 prohibits plan amendments that allow "future development" that alone or combined with existing development will violate or threaten to violate state or federal environmental standards, including those for water quality. *See* Goal 6 ("All waste and process discharges *from future development*, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards." (Emphasis added.)). The challenged decisions do not approve or allow future development that will add to the city's existing water quality violations. Instead, the SMP and design standards impose limits to improve the quality of water that is discharged from development in the city.

Second, even if we agreed with NEDC that LCDC has prescribed a different and stricter Goal 6 standard than our case law has set out, NEDC has

not established that we are bound to follow LCDC's decisions or that we should overrule our prior Goal 6 decisions.

The legislature has instructed that LUBA decisions "be made consistently with sound principles governing judicial review," which includes the principle of *stare decisis*. ORS 197.805. The Supreme Court explained that principle in *Farmers Ins. Co. v. Mowry*:

> "[T]his court's obligation when interpreting constitutional and statutory provisions and when formulating the common law is to reach what we determine to be the correct result in each case. If a party can demonstrate that we failed in that obligation and erred in deciding a case, because we were not presented with an important argument or failed to apply our usual framework for decision or adequately analyze the controlling issue, we are willing to reconsider the earlier case. Similarly, this court is willing to reconsider cases when the legal or factual context has changed in such a way as to seriously undermine the reasoning or result of earlier cases." 350 Or 686, 698, 261 P3d 1 (2011) (citations omitted).

LCDC decided *Klamath I* and *Klamath II* long before our more recent Goal 6 decisions. NEDC has not asserted, let alone demonstrated, that the Goal 6 legal or factual context has changed in such a way as to seriously undermine the reasoning of our controlling Goal 6 decisions, or that we missed an important argument or failed to adequately analyze the issue in those cases. We decline NEDC's invitation to revisit our Goal 6 case law. We proceed to apply our previously articulated Goal 6 standard.

B. Toxics Standards

NEDC argues that, even applying the reasonable expectation standard, the city's decisions violate Goal 6 because the city has failed to adopt findings, supported by substantial evidence, explaining why it is reasonable to expect that state and federal standards can be met. NEDC argues that the SMP contains no plan for achieving compliance with state toxics standards. NEDC argues that those standards are set out in ORS 468B.025(1)(b) and made applicable through OAR 340-041-0033.[5]

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[5] ORS 468B.025 provides:

> "(1) Except as provided in ORS 468B.050 or 468B.053, no person shall:
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> > "(a) Cause pollution of any waters of the state or place or cause to be placed any wastes in a location where such wastes are likely to escape or be carried into the waters of the state by any means.
> >
> > "(b) Discharge any wastes into the waters of the state if the discharge reduces the quality of such waters below the water quality standards established by rule for such waters by the Environmental Quality Commission.
>
> "(2) No person shall violate the conditions of any waste discharge permit issued under ORS 468B.050.
>
> "(3) Violation of subsection (1) or (2) of this section is a public nuisance."

OAR 340-041-0033(1) provides:

> "Toxic substances may not be introduced above natural background levels in waters of the state in amounts, concentrations, or

In *Tualatin Riverkeepers v. Dept. of Environ. Quality*, the Court of Appeals explained that ORS 468B.025 does not contain numeric standards. "Instead, it lists several activities that 'no person shall' engage in." 235 Or App 132, 139-40, 230 P3d 559, *rev den*, 349 Or 173 (2010). NEDC explains that the court recognized a "permit shield"—that is, if a discharger has a permit, then the discharger is shielded from liability for what would otherwise be unlawful discharges, so long as the discharge complies with the permit. However, NEDC argues that the court in *Tualatin Riverkeepers* did not address Oregon's toxics standards and that no NPDES MS4 permit shield applies to those standards. In support of that argument, NEDC cites OAR 340-045-0080(1), which provides, in part:

> "A permittee in compliance with [an NPDES] permit during its term is considered to be in compliance for purposes of enforcement, with Sections 301, 302, 306, 307, 318, 403, and 405(a)-(b) of the [CWA] and ORS 468B.030, 468B.035, and 468B.048, and implementing rules, applicable to effluent limitations, including effluent limitations based on water quality basin standards, and treatment systems operation requirements. This section does not apply to:
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> "(a) Toxic effluent standards and prohibitions imposed under Section 307 of the CWA, and OAR Chapter 340, Division 41[.]"

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combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety, or welfare or aquatic life, wildlife or other designated beneficial uses."

NEDC argues that the city failed to make findings based on substantial evidence that there is a reasonable expectation that city stormwater discharges will not violate the toxics limitations and standards at OAR 340-041-0033. NEDC argues that the SMP must require additional water quality sampling to ensure compliance with the toxics standards. NEDC contends that the city cannot establish compliance with Goal 6 because it cannot establish compliance with the toxics standards. According to NEDC, because segments of the Willamette River exceed the toxics standards, that river has no capacity to assimilate additional toxic pollutants; thus, any discharge from the city will exceed the toxics standards and violate OAR 340-041-0033. NEDC argues that *any* development will exacerbate existing conditions, so the challenged decisions violate Goal 6.

As explained above, Goal 6 requires that discharges from future development, when combined with discharges from existing development, not violate state or federal standards. The challenged decisions do not authorize future development or any discharges. Moreover, Goal 6 provides no basis for reversal or remand to remedy existing violations of environmental standards. *Swyter v. Clackamas County*, 40 Or LUBA 166, 176-77 (2001); *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52, 65, *aff'd*, 178 Or App 185, 35 P3d 1122 (2001). NEDC's argument regarding violations of the toxics standards provides no basis for reversal or remand.

NEDC's first assignment of error is denied.

NEDC'S SECOND ASSIGNMENT OF ERROR

The design standards set out technical construction requirements for stormwater-related improvements associated with new development, including new roads, parking lots, roofs, and other impermeable surfaces. NEDC argues that the city failed to establish that the design standards comply with Goal 6. NEDC argues that the Oregon City Comprehensive Plan (OCCP) does not provide specific policies governing the design standards' compliance with Goal 6; thus, Goal 6 applies directly to the design standards. ORS 197.835(7)(b).[6]

The city does not dispute that we should review the challenges to the design standards under ORS 197.835(7)(b). Response Brief to NEDC 28. Accordingly, for purposes of our analysis of this assignment of error, we assume that Goal 6 applies directly to the city's adoption of the design standards.

As we explained in our resolution of NEDC's first assignment of error, Goal 6 does not create an applicable standard independent of state and federal regulations. The city explains that the design standards are "an essential

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[6] ORS 197.835(7) provides, in part:

> "The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
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> "* * * * *
>
> "(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

component of the city's MS4 permit" and set standards for discharges permitted under the state and federal requirements for municipal discharges. Response Brief to NEDC 29. The SMP explains: "To meet another NPDES MS4 permit requirement, the City adopted updated stormwater standards for new development and redevelopment in 2015. These standards require developers to prioritize low-impact development and they require new development and redevelopment projects to manage surface runoff from impervious areas to mimic natural patterns." Record 31.

The findings explain that the design standards at issue in these appeals are intended to provide greater clarification and instruction to applicants. Consistent with the city's MS4 permit, the design standards require the reduction of pollutants in stormwater to the MEP. Record 384. The design standards employ a stormwater management hierarchy that prioritizes impervious area reduction techniques and the infiltration of runoff. A developer must show that the strategies higher in the hierarchy are not feasible before selecting a lower-level strategy.

The challenged design standards do not allow any new land uses or more intense land uses. The design standards provide that "[n]o project or development shall directly or indirectly discharge to the public storm system any quantity of stormwater, pollutant, substance, or wash water that will violate the discharger's permit (if one is issued), the City's NPDES MS4 permit, [the Oregon City

Municipal Code (OCMC)], or other environmental laws or regulations." Record 385.

NEDC argues that the design standards violate Goal 6 because they allow for some untreated discharges. Specifically, the design standards require water treatment for only 80 percent of stormwater from new development. Record 413 ("Water quality facilities shall be designed to capture and treat 80 percent of the average annual runoff volume to the MEP with the goal of 70 percent total suspended solids removal."). NEDC argues that the design standards permit noncompliance with the toxics standards and other water quality standards by allowing additional untreated pollutants to enter the Willamette River.

The city points out that the criteria for sizing treatment facilities is not set by the city but, instead, is governed by DEQ through the MS4 permit. The design standards set out a number of BMPs to reduce pollutants in stormwater discharges to the MEP, including design requirements for new development and redevelopment. Because the use of BMPs as set forth in the city's MS4 permit is sufficient to satisfy water quality standards with respect to DEQ, it is sufficient to satisfy the city's obligations with respect to Goal 6. In other words, as explained above, Goal 6 does not impose a legal standard that is independent of what the state and federal water quality programs require—programs that DEQ administers. Instead, Goal 6 works in concert with those other standards to ensure that land use planning and regulations ensure that discharges from development do "not threaten to violate, or violate applicable state or federal environmental

quality statutes, rules and standards." The design standards protect water quality from pollution discharges from new development and redevelopment, and provide a reasonable expectation that the applicable state and federal standards will be met when development occurs.

NEDC's second assignment of error is denied.

SPADY'S ASSIGNMENT OF ERROR

In one assignment of error with five subassignments of error, Spady argues that the city's decisions violate Statewide Planning Goal 2 (Land Use Planning), which 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." We address the subassignments of error in order.

A. Goal 2, Part III

Goal 2, Part III, provides that "[g]overnmental units shall review the guidelines set forth for the goals and either utilize the guidelines or develop alternative means that will achieve the goals. All land-use plans shall state how the guidelines or alternative means utilized achieve the goals." Spady argues that the city violated Goal 2, Part III, in adopting the SMP because the SMP neither (1) contains the express language of Goal 6, that the city's stormwater discharges "shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules or standards," nor (2) provides "alternative means" of achieving that portion of Goal 6, such as by requiring compliance with specific

statutes and regulations like DEQ's water quality standards at OAR chapter 340, division 41.

The city responds by citing OCMC 13.12.060, 15.48.050, and 17.47.040, which provide that "nothing in th[e OCMC] chapter[s governing stormwater management; grading, filling, and excavating; and erosion and sediment control] shall relieve any party from the obligation to comply with any applicable federal, state or local regulations or permit requirements." The city also points to a provision in the design standards that "[n]o project or development shall directly or indirectly discharge to the public storm system any quantity of stormwater, pollutant, substance, or wash water that will violate the discharger's permit (if one is issued), the City's NPDES MS4 permit, OCMC, or other environmental law or regulations." Record 385. The city argues that those provisions comprise "alternative means" of achieving Goal 6 and that they will do more to ensure compliance with applicable state and federal environmental quality statutes, rules, and standards than if the city had simply parroted the text of Goal 6 in the SMP because, unlike the SMP, those provisions will apply to limited land use decisions and building permit decisions.

Spady replies that those provisions are insufficient because Goal 2, Part III, requires that "[a]ll *land-use plans* shall state how the guidelines or alternative means utilized achieve the goals." (Emphasis added.) Spady points out that, unlike the SMP, the quoted OCMC and design standard provisions are not part

of the OCCP, and they are therefore not part of the city's "land-use plan" for purposes of Goal 2, Part III.

We have previously explained that Goal 2 does not "exist in a vacuum" and does not impose obligations independent of other applicable statewide planning goals or criteria. *OCAPA v. City of Mosier*, 44 Or LUBA 452, 462 (2003). The Goal 6 guidelines state that "methods and devices for implementing" Goal 6 include "land use controls and ordinances." Goal 6, Guideline B(1)(2). The SMP acknowledges the existence and binding nature of the design standards and the design standards refer to the relevant OCMC chapters. Record 30, 371. Spady does not dispute that future development will have to comply with those provisions. We conclude that the SMP does not violate Goal 2, Part III.

This subassignment of error is denied.

B. Goal 2, Part I

Goal 2, Part I, provides:

> "All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents."

Spady argues that Goal 2, Part I, requires that the SMP contain an inventory for Goal 6 because Goal 2, Part I, requires an inventory for "each" applicable statewide planning goal. Spady acknowledges that the text of Goal 6

does not require an inventory and that there are no administrative rules implementing Goal 6. Spady contends that the Goal 2 inventory requirement applies even if an individual goal does not explicitly require an inventory. Spady points out that Statewide Planning Goal 3 (Agricultural Lands) does not contain an inventory requirement in its text. However, OAR 660-033-0030(1) requires local governments to inventory agricultural land.

Spady argues that the inventory must enable the city to determine whether each proposed development would "threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards," as prohibited by Goal 6. Spady argues that the Goal 6 inventory must provide information on the water bodies within the city and the water quality statuses of those water bodies. Spady asserts that the Goal 6 inventory must identify every regulated pollutant; instream numeric standards for each pollutant; and actual, sampled instream pollutant loads for all receiving water bodies in the city.

Spady also argues that the SMP violates Goal 2, Part I, because it does not include an "evaluation of alternative courses of action." Spady argues that, in concluding that it may not be able to achieve TMDL wasteload allocations, the city did not evaluate available alternative courses of action implementing different treatment methods and design criteria for stormwater and sewer systems

described in various statutes and DEQ regulations governing water quality and sewage treatment and disposal systems.[7]

Lastly, Spady argues that, because the SMP includes only recommendations, and does not include any mandatory policies, the SMP does not include any "ultimate policy choices," in violation of Goal 2, Part I.

As explained above, Goal 2 does not impose obligations independent of other applicable statewide planning goals or criteria. Thus, the issue is not whether Goal 2 independently requires a Goal 6 inventory, evaluation of alternatives, and ultimate policy choices. Rather the issue is whether Spady has established that Goal 6 or some other criterion requires those things. We conclude that they have not.

While a detailed Goal 6 inventory may be a useful tool for the city and others who are concerned with water quality within the city, Spady has not established that such an inventory is required by Goal 6 or any other source of law. As we explained above, Goal 6 is limited to ensuring that local government

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[7] The SMP explains:

> "The City's Wasteload Allocation Attainment Assessment, completed in 2016, identified the level of water quality treatment that would be required in order to achieve TMDL wasteload allocations for bacteria. That study showed that TMDL wasteload allocations may not be attainable goals. However, the wasteload allocation is currently representative of a target for only one pollutant (bacteria)." Record 107.

land use planning action will comply with applicable environmental regulations—here, federal and state water quality standards, as administered by DEQ. Nothing in Goal 6 or any implementing standard requires a detailed inventory of water quality within the city.

Similarly, nothing in Goal 6 requires an evaluation of alternatives within the SMP. Goal 6 requires the city to consider the cumulative effects of proposed future development and existing development, and prohibits plan amendments allowing future development that alone or combined with existing development will violate or threaten to violate state or federal environmental standards, including those for water quality. Goal 6 does not permit the city to evaluate whether to allow water quality violations—it prohibits planning activities that result in water quality violations without a Goal 6 exception. In that instance, the exception process may require an evaluation of alternatives, but Goal 6 itself does not require such an evaluation. Goal 6 also does not require the city to make findings on alternative means of preventing pollution discharges.

Finally, Goal 6 does not require the city to express ultimate policy choices with respect to water quality. Those policy choices are made at the federal and state levels.[8] Goal 6, Guideline B(3), provides: "Programs should manage land conservation and development activities in a manner that accurately reflects the

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[8] To be sure, the city may choose to express policy preferences for environmental quality that exceed the applicable state or federal standards, but that is not required by Goal 6.

community's desires for a quality environment and a healthy economy and is consistent with state environmental quality statutes, rules, standards and implementation plans." The SMP works in conjunction with DEQ's comprehensive water quality management program. As we explained above, that is consistent with what Goal 6 requires. Nothing in Goals 2 or 6 imposes more onerous obligations on the city with respect to implementing or enforcing DEQ water quality regulations.

In sum, Spady has not established that, together, Goals 2 and 6 require an inventory, evaluation of alternatives, or ultimate policy choices with respect to water quality. Accordingly, Spady's Goal 2 argument provides no basis for remand.

This subassignment of error is denied.

C. Goal 2 Consistency

Goal 2 requires that local comprehensive plans and land use regulations be internally consistent. *NWDA v. City of Portland*, 47 Or LUBA 533, 550 (2004), *rem'd in part on other grounds*, 198 Or App 286, 108 P3d 589, *rev den*, 338 Or 681 (2005). The text of Ordinance 19-1014, adopting the SMP, states that the SMP "*assumes* that all future stormwater improvements will be developed consistent with the [design standards]." Record 12 (emphasis added). Spady argues that, because the text of the SMP itself does not affirmatively *require* that development take place consistent with the design standards, the design standards and SMP are not consistent with each other.

The city responds that, contrary to Spady's argument, the SMP does require compliance with the design standards, citing Record 31, 139, and "elsewhere." Response Brief to Spady 14. We have reviewed the cited record pages and agree with Spady that, while they allude to the fact that city has had stormwater and grading design standards for some time, and while they state that the design standards themselves require compliance from new development, the SMP itself does not require such compliance.

However, we conclude that the fact that the SMP relies on the design standards yet does not itself require compliance with those standards does not demonstrate any inconsistency between the two documents for purposes of Goal 2. Spady does not dispute that the design standards themselves require that new development comply with their provisions. As noted, the SMP acknowledges the mandatory nature of the design standards. There is no inconsistency between the SMP and the design standards.

This subassignment of error is denied.

Spady's assignment of error is denied.

PETITIONER'S FIRST ASSIGNMENT OF ERROR

A. ORS 197.835(7)(b)

ORS 197.835(7) provides:

> "The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
>
> "(a) The regulation is not in compliance with the comprehensive plan; or

> "(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

In their first assignment of error, petitioner argues that the city's findings do not identify ORS 197.835(7)(b) as an applicable criterion and are therefore inadequate. *See Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992) ("Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards.").

The city responds, and we agree, that petitioner's argument relies on an incorrect standard of review. In the challenged legislative decisions, the city was not required to make specific findings that certain statutes were applicable to its decisions. Petitioner's findings argument provides no basis for reversal or remand.

As NEDC argued in its second assignment of error, petitioner argues that the OCCP does not contain policies that "provide the basis" for the design standards and that the design standards were therefore required to comply with the goals. Petitioner discusses a number of OCCP policies addressed in the city's findings and argues that, for various reasons, none of them "provide the basis" for the design standards that the city adopted.

The city disputes that those OCCP policies do not "provide the basis" for the design standards but argues that, even if no OCCP policies "provide the basis" for the design standards, the city adopted alternative findings addressing the

standards' compliance with the goals. We agree. Accordingly, petitioner's argument provides no basis for reversal or remand.

Petitioner's first assignment of error is denied.

PETITIONER'S SECOND ASSIGNMENT OF ERROR

A. Consistency

In their first subassignment of error, petitioner incorporates Spady's subassignment of error that the SMP violates Goal 2, Part I, because it neither (1) contains the express language of Goal 6 nor (2) provides "alternative means" of achieving Goal 6. Petitioner argues that, if the SMP complied with either of those options, then the design standards themselves would have to comply with the same option or else they would violate the Goal 2 internal consistency requirement. Similarly, petitioner argues that, had the SMP included an "evaluation of alternative courses of action," as required by Goal 2, Part I, then the design standards would have to include such an evaluation, as well. Because the design standards do none of this, petitioner argues that the design standards violate the Goal 2 consistency requirement.

We conclude above that the SMP does not violate Goal 2, Part I. Thus, petitioner's argument—which is premised on Spady's argument that the SMP violates Goal 2, Part I—provides no basis for reversal or remand.[9]

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[9] In their reply brief, petitioner cites for the first time ORS 197.175(2)(e), which provides that local governments must "[m]ake land use decisions and limited land use decisions subject to an unacknowledged amendment to a

This subassignment of error is denied.

B. Exceptions

As noted, Goal 6 requires that local comprehensive plans comply with state and federal environmental quality standards. The 1982 OCCP provided: "The policy of the City is to assure compliance with all applicable state and federal environmental standards, including noise standards." The city adopted a revised comprehensive plan in 2004. Like the 1982 OCCP, Policy 6.1.2 of the 2004 OCCP requires compliance with "regional, state, and federal standards for air quality." However, the 2004 OCCP contains no similar compliance requirement with respect to water quality. Petitioner argues that, in adopting the 2004 OCCP, the city took an illegal exception to Goal 6.

To the extent that petitioner is challenging the city's adoption of the 2004 OCCP, we agree with the city that the time for challenging the 2004 OCCP passed years ago and that petitioner's argument is beyond the scope of this appeal.

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comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment." Petitioner argues in their reply brief that, because the design standards implement the SMP, and because the design standards were adopted before the SMP was acknowledged, the design standards must independently comply with Goal 2, Part I. That argument is different from the one that petitioner makes in their petition for review, which is predicated on the Goal 2 consistency requirement. LUBA will not address arguments that arise for the first time in the reply brief. *Crowley v. City of Hood River*, ___ Or LUBA ___, ___ (LUBA No 2019-054, July 9, 2020) (slip op at 14), *rev'd and rem'd on other grounds*, 308 Or App 44, 480 P3d 1007 (2020); *Conte v. City of Eugene*, 65 Or LUBA 326, 332 (2012).

The design standards apply to development exceeding 5,000 square feet of impermeable surface. Record 382. Petitioner argues that, because Goal 6 does not contain a similar threshold, the city took an illegal exception to Goal 6 in approving the design standards.

OAR chapter 660, division 4, interprets the Goal 2 exception process. 660-004-0000(2) provides: "An exception is a decision to exclude certain land from the requirements of one or more applicable statewide goals in accordance with the process specified in Goal 2, Part II, Exceptions." The problem with petitioner's argument, as the city points out, is that, in adopting the design standards, the city did not decide to exclude land from the requirements of Goal 6. Rather, the city concluded that the design standards comply with Goal 6, notwithstanding the 5,000-square-foot threshold. Record 1173. To the extent that petitioner means to argue that the 5,000-square-foot threshold in the design standards violates Goal 6, petitioner has not developed that argument for our review, and we will not develop it for them. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

This subassignment of error is denied.

Petitioner's second assignment of error is denied.

The city's decisions are affirmed.