

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

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

vs.

CITY OF PORTLAND,
Respondent,

and

COLUMBIA RIVERKEEPER, OREGON PHYSICIANS
FOR SOCIAL RESPONSIBILITY,
and PORTLAND AUDUBON,
Intervenors-Respondents.

LUBA No. 2022-089

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Steven G. Liday filed the petition for review and reply brief and argued on behalf of petitioners. Also on the briefs were William L. Rasmussen and Miller Nash LLP.

Lauren A. King filed the respondent's brief and argued on behalf of respondent.

Maura C. Fahey filed the intervenor-respondent's brief and argued on behalf of intervenors-respondents.

1
2 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
3 Member, participated in the decision.

4
5 AFFIRMED

09/29/2023

6
7 You are entitled to judicial review of this Order. Judicial review is
8 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal the city council's adoption of Ordinance No. 190978, which amends the city's zoning ordinance to regulate (1) the establishment of new bulk fossil fuel terminals (FFT's), and (2) the expansion of existing FFT's.

FACTS

This is the third time we have considered the city's adoption of zoning code amendments regulating FFT's. We first considered the city's adoption of FFT amendments in *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017) (*CPBT I*), *aff'd in part, rev'd in part, and rem'd*, 289 Or App 739, 412 P3d 258 (*CPBT II*), *rev den*, 363 Or 390 (2018). In *CPBT I*, we reviewed Ordinance No. 188142, which the city adopted on December 14, 2016 (2016 FFT Amendments). We explained that prior to adoption of the 2016 FFT Amendments, the city's zoning code regulated all freight terminals under the general land use category of "Warehouse and Freight Movement" under standards that do not limit the size or number of such terminals. 76 Or LUBA at 21. The 2016 FFT Amendments provided that, thereafter, FFT's would be regulated as "Bulk Fossil Fuel Terminals." We determined that the amendments violated the dormant Commerce Clause of the United States Constitution, were inconsistent with the city's obligations under Statewide Planning Goal 12 (Transportation), and were not supported by an adequate factual base as required by Statewide Planning Goal 2 (Land Use Planning).

1 In *CPBT II*, the Court of Appeals reversed our decision that the
2 amendments violated the dormant Commerce Clause and that the amendments
3 were inconsistent with Goal 12. The court affirmed our determination that the
4 amendments were not supported by an adequate factual base. 289 Or App at 760.
5 We remanded the decision back to the city for consideration of compliance with
6 the adequate factual base requirement of Goal 2, consistent with the court's
7 opinion. *Columbia Pacific v. City of Portland* (LUBA No 2017-001, Oct 5, 2018)
8 (*CPBT III*).

9 In 2019, the city council readopted the FFT amendments (the 2019 FFT
10 Amendments) and made additional findings. The 2019 FFT Amendments were
11 appealed to us in *Columbia Pacific v. City of Portland*, 81 Or LUBA 683 (2020)
12 (*CPBT IV*). We remanded the city council's decision after concluding that certain
13 findings were not supported by an adequate factual base or did not adequately
14 address applicable comprehensive plan policies.

15 Following our remand,

16 "A general notification of the June 30, 2022, City Council public
17 hearing on the remand of [2019 FFT Amendments] was sent to the
18 City's legislative notice list, the fossil fuel terminal property owners,
19 and the parties to the appeal.

20 "On June 30, 2022, the Portland City Council held a public hearing
21 and received testimony on the re-adoption of the fossil fuel terminal
22 zoning restrictions. The record was open for written testimony until
23 July 7, 2022.

24 "The City conclude[d] that large fossil fuel terminals represent a risk
25 to people, property and the natural environment that the City

1 Council [found] as a compelling reason to limit future risk by
2 limiting the size of new facilities and prohibiting the expansion of
3 fossil fuel storage tank capacity at existing facilities. Continuing to
4 allow an unlimited increase in storage capacity at FFTs in a
5 moderate to high-risk area would be less supportive of the 2035
6 Comprehensive Plan [(CP)] than adopting [this ordinance].” Record
7 18 (internal numbering omitted).

8 On August 24, 2022, the city council adopted Ordinance 190978 (the 2022 FFT
9 Amendments). This appeal followed.¹

10 **FIRST ASSIGNMENT OF ERROR**

11 Portland City Code (PCC) 33.740.020(A)(1) provides that the planning
12 commission “must hold at least one public hearing before recommending action
13 on a legislative matter.” PCC 33.740.020(E) provides:

14 “1. If a Commission decides that no action is appropriate, the
15 matter is terminated. There is no appeal of the Commission’s
16 decision. If the City Council initiated the legislative action, the
17 Commission must submit a report to the City Council on its

¹ In an order issued June 13, 2023, we instructed the parties to advise us of any related, pending proceedings, pursuant to OAR 661-010-0012(7). In a June 20, 2023 filing, the parties advised us that there is a

“pending related matter before the United States District Court, District of Oregon – *State of Montana, et al. v. City of Portland*, Case No. 3:23-cv-00219-YY. The parties in the related matter are the State of Montana, Western Energy Alliance, Pacific Propane Gas Association, Idaho Petroleum Marketers and Convenience Store Association, Inc., and Christensen, Inc.[,] as Plaintiffs, and the City of Portland as Defendant. The matter involves a challenge to the same land use decision that is on review in this appeal and raises the same or a closely related issue as Petitioners’ Fourth Assignment of Error in this appeal.” Notice of Related Matter 1-2.

1 recommendation not to act.

2 “2. If the last Commission reviewing a legislative action
3 recommends approval, a report and recommendation will be
4 forwarded to City Council.”

5 Petitioners’ first assignment of error is that the city council failed to follow
6 the procedures in PCC 33.740.020(A)(1). ORS 197.835(9)(a)(B) provides that
7 we must reverse or remand a decision if we find that the local government
8 “[f]ailed to follow the procedures applicable to the matter before it in a manner
9 that prejudiced the substantial rights of the petitioner[.]”

10 The city council found:

11 “[T]his re-adoption of the proposed amendments is a continuation
12 of the initial legislative proceeding. Accordingly, the City Council
13 determined that it was appropriate to bring the ordinance directly
14 back to City Council, given the extensive public process that
15 happened as part of the initial adoption of the ordinance in 2016 and
16 the re-adoption in 2019 and that no substantive changes to the
17 Zoning Code are required to address the remand issues.” Record 24.

18 Petitioners argue that the city council did not return the FFT Amendments
19 to the planning commission *because* it concluded that it was not making
20 substantive changes to the FFT Amendments. Petition for Review 12. Petitioners
21 argue that the city council erred in concluding that it had not made substantive
22 changes, and that the substantive changes made the process set out in PCC
23 33.740.020(A)(1) the appropriate process on remand.

24 First, the city responds, establishing procedural error requires that
25 petitioners identify the procedure violated, and petitioners have not identified a
26 procedure that the city violated. *Stoloff v. City of Portland*, 51 Or LUBA 560,

1 563 (2006) (petitioner must identify the procedure allegedly violated). Petitioners
2 concede that the PCC does not expressly regulate remand proceedings. Petition
3 for Review 11. We agree with the city that petitioners have not identified a
4 procedure that the city violated.

5 Second, the city and intervenors-respondents (together, respondents)
6 respond that petitioners did not object to the city council's procedure during the
7 proceedings below.

8 "LUBA has long held that where a party has the opportunity to
9 object to a procedural error before the local government, but fails to
10 do so, that error cannot be assigned as grounds for reversal or
11 remand of the resulting decision. *Torgeson v. City of Canby*, 19 Or
12 LUBA 511, 519 (1990); *Dobaj v. Beaverton*, 9 Or LUBA 237, 241
13 (1980). This obligation to object to procedural errors overlaps with,
14 but exists independently of, ORS 197.7[97](1) and 197.835(3).
15 *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393
16 (2002); *Simmons v. Marion County*, 22 Or LUBA 759, 774 n 8
17 (1992). While the 'raise it or waive it' requirement at ORS
18 197.7[97](1) has a similar purpose to the requirement that a party
19 with an opportunity to object to a procedural error must do so in
20 order to seek remand based on that error, the two requirements share
21 no antecedents and otherwise have no relationship with each other."
22 *McCaffree v. Coos County*, 79 Or LUBA 512, 517, *aff'd*, 299 Or
23 App 521, 449 P3d 594 (2019), *rev den*, 366 Or 205 (2020).

24 It is undisputed that the record remained open for seven days following the public
25 hearing before the city council. Petitioners did not object to the city council's
26 review procedure during the open record period. We agree with respondents that
27 petitioners have not established a basis for reversal or remand, because they have

1 not identified an applicable procedure violated by the city council and they did
2 not object to the procedure used by the city council during its proceedings.

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 In four subassignments of error under the second assignment of error,
6 petitioners argue that the city council made findings that are not supported by
7 substantial evidence. Petition for Review 13, 15. Goal 2 requires that a legislative
8 land use decision be supported by “an adequate factual base.” As we have
9 explained:

10 “[T]he Goal 2 requirement for an adequate factual base does not
11 exist in a vacuum. In alleging a Goal 2 factual base inadequacy at
12 LUBA, a petitioner must establish that some applicable statewide
13 planning goal or *other criterion imposes obligations* that are of such
14 nature that a factual base is required to determine if the zoning
15 ordinance amendment is consistent with the goal or other criterion.”
16 *OCAPA v. City of Mosier*, 44 Or LUBA 452, 462 (2003) (emphasis
17 added).

18 An “adequate factual base” is equivalent to the requirement that a quasi-judicial
19 decision be supported by substantial evidence in the whole record. *Restore*
20 *Oregon v. City of Portland*, 80 Or LUBA 158, 162 (2019), *aff’d*, 301 Or App
21 769, 458 P3d 703 (2020) (citing *1000 Friends of Oregon v. City of North Plains*,
22 27 Or LUBA 372, 378, *aff’d*, 130 Or App 406, 882 P2d 1130 (1994)).

23 Substantial evidence exists to support a finding of fact when the record,
24 viewed as a whole, would permit a reasonable person to make that finding. *Dodd*
25 *v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of*

1 *Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). ORS 197.835(9)(a)(C)
2 provides that we must reverse or remand a land use decision that is not supported
3 by substantial evidence in the whole record.

4 Intervenorors respond, in part, that each of the subassignments of error fails
5 because it is “contingent on Petitioners’ reframing of the effect of the
6 Amendment and the City’s findings.” Intervenor-Respondent’s Brief 18. For
7 example, with respect to the first subassignment of error, intervenors state:

8 “Petitioners argue that the City’s findings regarding the effect of the
9 Amendments on transloading facilities are not supported by [an
10 adequate factual base] because, according to Petitioners[,] the
11 Amendments restrict all transloading facilities. This argument is
12 more accurately characterized as a challenge to the City’s
13 interpretation of the Amendments, rather than a[n adequate factual
14 basis] argument, because it is based on Petitioners’
15 misunderstanding of the effect of the transloading revision to the
16 Amendments. So long as the City’s interpretation is plausible and is
17 not inconsistent with *all* of the express language or the policy or
18 purpose of the Amendments, the interpretation is entitled to
19 deference.” Intervenor-Respondent’s Brief 18 (emphasis in original,
20 internal citations omitted).

21 With respect to the second subassignment of error, intervenors state:

22 “Petitioners next argue that the City incorrectly found that the
23 Amendments prohibit new bulk fossil fuel terminals with more than
24 two million gallons of storage capacity, because the Amendments
25 allow other facilities with more than two million gallons of storage.
26 This argument similarly misconstrues the City’s findings and its
27 intent in adopting the Amendments.” Intervenor-Respondent’s Brief
28 19 (internal citation omitted).

29 Our rules provide that the petition for review must:

1 “Set forth each assignment of error under a separate heading. Each
2 assignment of error must demonstrate that the issue raised in the
3 assignment of error was preserved during the proceedings below.
4 Where an assignment raises an issue that is not identified as
5 preserved during the proceedings below, the petition shall state why
6 preservation is not required. Each assignment of error must state the
7 applicable standard of review. Where several assignments of error
8 present essentially the same legal questions, the argument in support
9 of those assignments of error shall be combined[.]” OAR 661-010-
10 0030(4)(d).

11 Petitioners expressly state in their petition for review that their second assignment
12 of error is “[t]he 2022 Ordinance is not supported by [an adequate factual base]”
13 and begin their argument with the statement:

14 “The City adopted a sweeping prohibition on new fuel-
15 transportation facilities without basic information on the operations
16 of fuel terminals, the safety of new infrastructure, or the fuel-
17 transportation system in general. The resulting gap in knowledge is
18 evident throughout the 2022 Ordinance findings. *Specifically, each*
19 *of the key findings below are unsupported by [an adequate factual*
20 *base] and reasoning.”* Petition for Review 13, 15 (emphasis added).

21 Although petitioners discuss their understanding of the characteristics of FFTs in
22 the summary of facts portion of their petition for review, petitioners do not
23 develop any assignment of error or argument that challenges a city interpretation.
24 Moreover, petitioners argue about the proper interpretation of the amendments in
25 their reply brief, but “[a] reply brief shall be confined to responses to arguments
26 in the respondent’s brief, state agency brief, or amicus brief, but shall not include
27 new assignments of error or advance new bases for reversal or remand.” OAR
28 661-010-0039. Petitioners also argue for the first time in their reply that findings
29 that incorrectly describe the operation of a decision require remand. Petitioners

1 did not, however, argue that in their petition for review.² Rather, petitioners
2 argued generally in their petition for review that the city's findings were not
3 supported by an adequate factual base. We discussed the limited scope of reply
4 briefs in *CPBT I* where we explained:

5 “‘New matters’ within the meaning of OAR 661-010-0039 include
6 (1) responses that an argument in the petition for review should fail
7 regardless of its stated merits (*i.e.*, something in the nature of an
8 affirmative defense), and (2) responses to assignments of error that
9 otherwise could not reasonably have been anticipated. *Foland v.*
10 *Jackson County*, 61 Or LUBA 264, 266-67, *aff'd*, 239 Or App 60,
11 243 P3d 830 (2010). Reply briefs that simply embellish or elaborate
12 arguments made in the petition for review, rebut direct responses to
13 the merits of arguments made in the petition for review, offer new
14 arguments in support of an assignment of error, *or advance new*
15 *bases for reversal or remand are not authorized by OAR 661-010-*
16 *0039.*” 76 Or LUBA at 20 (emphasis added).

17 Accordingly, we do not consider an interpretational challenge or assertion that
18 findings incorrectly describe the operation of a decision set forth for the first time
19 in the reply brief.

² We also observe that petitioners' reply brief includes misplaced reliance on *Paterson v. City of Bend*, 49 Or LUBA 160, 176-77 (2005). *See* Petitioners' Reply Brief 4-5. *Paterson* concerned a quasi-judicial decision and is inapposite. *Paterson* was an appeal of the approval of a tentative subdivision plan authorizing a private road. The city's code required a certain minimum width for private roads with curbs and a lesser width if no curb was provided. The hearings officer concluded that there would be curbs but the approved plan did not show curbs. In the absence of a meaningful response from the city, we remanded for the city to determine whether curbs were required, if the plan needed to be revised to reflect the correct street width, and if no curb was required, to address how storm drainage would be collected.

1 With that background, we proceed to the subassignments of error.

2 **A. First Subassignment of Error**

3 PCC 33.920.300(A) sets out the characteristics of FFTs, describing them
4 as:

5 “[E]stablishments primarily engaged in the transport and bulk
6 storage of fossil fuels. Terminal activities may also include fuel
7 blending, regional distribution, and wholesaling. Terminals have
8 access to marine, railroad, or regional pipeline to transport fuels to
9 or from the site, and either have transloading facilities for
10 transferring a shipment between transport modes, or have
11 transloading facilities and storage tank capacity in excess of 2
12 million gallons. There is minimal on-site sales activity with the
13 customer present.”

14 PCC 33.920.300(D) sets out establishments that are exempted from the FFT
15 classification. Exemptions include those distributors and wholesalers that receive
16 and deliver fossil fuels exclusively by truck; industrial, commercial, institutional,
17 and agricultural firms that exclusively store fossil fuel for use as an input; and
18 gasoline stations and other retail sellers of fossil fuel.³

³ PCC 33.920.300(D), “Exceptions,” provides:

- “1. Truck or marine freight terminals that do not store, transport or distribute fossil fuels are classified as Warehouse [a]nd Freight Movement uses.
- “2. Truck or marine freight terminals that have storage capacity of 2 million gallons or less are classified as Warehouse [a]nd 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:

- “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 PCC 33.140 Table 140-1, “Employment and Industrial Zone Primary
2 Uses,” identifies uses that are permitted, permitted with limitations, allowed with
3 a conditional use permit, or prohibited in the city’s Employment and Industrial
4 zones. FFTs are allowed in most of the Employment and Industrial Zones subject
5 to limitations set out in PCC 33.140.100(B)(15), that is:

6 “a. Existing [FFTs]. [FFTs] that existed on [August 31, 2022] are
7 allowed, but the total amount of fossil fuel that can be stored on the
8 site in storage tanks is limited to the fossil fuel storage tank capacity
9 that existed on [August 31, 2022]. Total fossil fuel storage tank
10 capacity on the site in excess of the capacity that existed on [August
11 31, 2022] is prohibited. Adding storage tank capacity exclusively
12 for renewable fuels or to comply with the Renewable Fuel Standard
13 (PCC Chapter 16.60 Motor Vehicle Fuels) is not considered an
14 increase in capacity. Storing coal on the site is prohibited.

15 “b. New [FFTs] are prohibited.”

16 Petitioners argue in their first subassignment of error that “[t]he City
17 repeatedly and incorrectly states in its findings that the revised 2022 FFT
18 Amendments ‘allow new intermodal fossil fuel terminals with a storage capacity
19 up to 2 million gallons * * *.’”⁴ Petition for Review 15 (citing Record 157, 178,
20 230). Petitioners maintain:

⁴ This sentence in the petition for review references Petition for Review n 6. Footnote 6 provides additional citations to the city council’s findings. The footnote, in its entirety, states “*See also* Rec[ord] 34 (‘The amendments only prohibit new bulk fossil fuel terminals with more than 2 million gallons of liquid fossil fuel storage capacity.’); Rec[ord] 20 (‘The amendments * * * limit new terminal development to 2 million gallons of fossil fuels storage tank capacity.’).” Petition for Review 15 n 6.

1 “The 2022 FFT Amendments prohibit all new fuel terminals that
2 have ‘transloading facilities for transferring a shipment between
3 transport modes, or have transloading facilities and storage tank
4 capacity exceeding 2 million gallons.’ PCC 33.920.300. At a
5 minimum, the City failed to provide evidence or explain how the
6 FFT amendments do not ‘restrict transloading facilities’ and ‘do not
7 limit transloading facilities or multimodal infrastructure’ despite the
8 plain language in the code stating otherwise.” Petition for Review
9 17.

10 The city responds that petitioners (1) fail to develop their argument
11 explaining why the cited findings are not supported by an adequate factual base,
12 and (2) fail to address the context of the findings in which the statements were
13 made. Respondent’s Brief 15. For the reasons explained below, we agree with
14 the city.

15 However, we first explain our understanding of the terms “multimodal,”
16 “intermodal,” and “transloading facilities.” Although the parties do not define the
17 terms “multimodal,” “intermodal,” and “transloading facility,” in their
18 arguments, the terms are found throughout the parties’ briefing and in the city
19 council’s findings addressing CP policies. We define these terms before we use
20 them in analyzing the arguments.

21 “Multimodal” and “intermodal” are not defined in PCC Chapter 33 or the
22 CP’s Glossary but historically were defined in the Portland 2035 Transportation
23 System Plan (2018) (TSP).⁵ The TSP explains that it

⁵ OAR 661-010-0046(1) provides that we “may take official notice of relevant law defined in ORS 40.090.” ORS 40.090(7) provides that judicially noticed law includes a city’s comprehensive plan as defined in ORS 197.015. The term

1 “helps implement the City’s [CP] in addition to the region’s 2040
2 Growth Concept by supporting a transportation system that makes
3 it more convenient for people to walk, bicycle, use transit, and drive
4 less to meet their daily needs. *The TSP also recognizes that the*
5 *transportation system must help grow and sustain the City’s*
6 *economic health by accommodating the needs of businesses and*
7 *supporting Portland’s role in the international economy.” TSP at 7-*
8 *8 (emphasis added).*

9 The TSP defines “Freight Intermodal Facility” as “an intercity facility where
10 freight is transported between two or more modes (e.g., truck to rail, rail to ship,
11 truck to air, etc.).” TSP at 319. The TSP defines “multimodal” as

12 “[h]aving a variety of modes available for any given trip, such as
13 being able to walk, ride a bicycle, take a bus, or drive to a certain
14 destination. In a transportation system, multimodal means providing
15 for many modes within a single transportation corridor.” TSP at
16 322.⁶

17 The term “transloading facility” is used in the text amendment defining
18 FFTs but is not defined therein or in the TSP. PCC 33.910.010, “Defining

“comprehensive plan” includes a generalized coordinated policy statement of the governing body of a local government “that interrelates all functional and natural systems and activities relating to the use of lands,” including transportation systems. ORS 197.015(5). We take official notice of the TSP on our own motion.

⁶ The definitions of “multimodal” and “infrastructure,” and the quoted explanation of the purpose of the TSP, are the same in the 2018 and 2020 versions of the document. We do not find a definition of “intermodal” in the 2020 version of the TSP. Metro’s 2018 Regional Transportation Plan at G-16 includes the following definition: “Intermodal facilities – A transportation element that allows passenger and/or freight connections between modes of transportation. Examples include airports, rail stations, marine terminals, and rail-yards that facilitate the transfer of containers or trailers. See also passenger intermodal facility and freight intermodal facility definitions.”

1 Words,” explains: “Words used in the zoning code have their normal dictionary
2 meaning unless they are listed in 33.910.030 below. Words listed in 33.910.030
3 have the specific meaning stated, unless the context clearly indicates another
4 meaning.” Neither PCC 33.910.030 nor *Webster’s Third Int’l Dictionary* include
5 a definition of “transloading” or “transloading facility.” *Webster’s Third Int’l*
6 *Dictionary* does, however, define both “trans” and “load.” When used as a prefix,
7 “trans” may mean “across, beyond, on or to the other side, through[.]” *Webster’s*
8 at 2425. “Load” may mean “whatever is put in a ship or vehicle or airplane for
9 conveyance[.]” *Id.* at 1325. Taken together, we understand “transload” to mean
10 the process of moving a product from one type of container or conveyance
11 mechanism to another. An example of transloading is a crane lifting a container
12 from a rail and placing it on a truck or ship. However, the term transloading, as
13 we understand it, does not only apply to intermodal transfer. Transloading
14 facilities can move goods from rail to rail or truck to truck and move material
15 from an active transport mode, like truck or train, to a temporary storage facility.
16 In their brief, intervenors point to testimony from a city planner, who was the
17 project manager for this project, explaining that “transloading facilities” include
18 “the pipes and the systems and the offloading racks that enable a terminal to
19 transfer the fuel from one mode of transportation, say rail, to a storage tank and
20 then to another mode of transportation, a pipe out to a dock to a barge.”
21 Intervenor-Respondent’s Brief 8 (quoting Record 7666).

1 This understanding is consistent with the city council's findings which
2 describe the city's transportation system:

3 "[T]he multimodal freight system is a mix of public and private
4 infrastructure. Whereas most of the roadways are publicly owned
5 and maintained, pipelines and rail infrastructure are privately
6 owned. The marine terminals are a mix of public (Port of Portland)
7 and private ownership. * * * The FFTs are privately owned with
8 *specialized multimodal infrastructure such as pipelines, marine*
9 *docks, and rail loading facilities (also referred to as transloading*
10 *facilities).*" Record 178 (emphasis added).

11 The TSP defines "infrastructure" to include features such as pump stations,
12 defining "infrastructure" as:

13 "*Necessary municipal or public services, provided by the*
14 *government or by private companies and defined as long-lived*
15 *capital assets that normally are stationary and can be preserved for*
16 *a significant number of years. Examples are streets, bridges, tunnels,*
17 *drainage systems, water and sewer lines, parks, pump stations and*
18 *treatment plants, dams, and lighting systems. Beyond transportation*
19 *and utility networks, Portland includes buildings, green*
20 *infrastructure, communications, and information technology as*
21 *necessary infrastructure investments that serve the community.*"
22 TSP at 320 (emphases added).

23 Based on the city council's statement that FFTs "have specialized multimodal
24 infrastructure such as pipelines, marine docks, and rail loading facilities (also
25 referred to as transloading facilities)," we understand "transloading facilities" to
26 mean the assets, such as pump stations (referenced in the definition of
27 infrastructure), pipelines, docks, and rail loading facilities used to move fuel
28 between transport systems. Record 178. It also appears to us that the city council
29 uses the terms "specialized multimodal infrastructure" and "transloading

1 facilities” interchangeably. *Id.* (“The FFTs are privately owned with specialized
2 multimodal infrastructure such as pipelines, marine docks, and rail loading
3 facilities (also referred to as transloading facilities).”). With that definitional
4 foundation, we turn to the city council’s findings and the parties’ arguments.

5 Again, petitioners argue that the city council incorrectly found that the
6 amendments allow new intermodal fossil fuel terminals with a storage capacity
7 up to two million gallons. Petitioners quote an excerpt of a sentence within the
8 findings as lacking substantial evidentiary support, or as we explain above, more
9 appropriately, an adequate factual base. Although petitioners argue in their first
10 subassignment that the city makes “key findings based on [its]
11 mischaracterization of the code,” petitioners do not discuss these findings, simply
12 citing Record 157, 178, and 230.⁷ This argument is undeveloped and provides no
13 basis for remand.

14 Findings 248 and 249 state that the amendments help to advance certain
15 watershed policies in the CP by prohibiting new FFTs in the watersheds. Record

⁷ Petitioners also cite record pages and policy numbers in Petition for Review n 7 and n 8. Footnote 7 cites Record pages that contain, by number and title, CP Policies 3.67, 3.72, 6.23, 6.41, 9.7, 9.32, 9.35, 9.36, CP Goal 9.I, Guild’s Lake Industrial Sanctuary Plan (GLISP) Policy 1 and 2, GLISP Objectives 2, 2.1, and 4. *See* Petition for Review 16 n 7.

Similarly, footnote 8 cites Record pages that contain, by number and title, CP Policies 6.22, 9.30, 9.31, 9.32, 9.35, 9.36, and GLISP Objective 1. Petitioners do not develop any argument with respect to these policies in the petition for review and we will not address the policies.

1 157. Petitioners do not develop any argument challenging those findings or
2 otherwise explain how the city council erred in finding that not allowing FFTs in
3 the identified watersheds helps to advance watershed policies in the CP or how
4 that is inconsistent with terminals being allowed elsewhere. This argument
5 provides no basis for remand.

6 Finding 276 addresses a CP policy titled “Multimodal goods movement”
7 and finds in part that “[t]he amendments allow new intermodal fossil fuel
8 terminals with fossil fuel storage tank capacity up to 2 million gallons and
9 terminals of any size that transport fuel exclusively by truck.” Record 178.
10 Similarly, the city council’s findings regarding numerous multimodal
11 transportation system policies includes the same conclusion concerning the
12 allowance for some FFTs. Record 230. Again, petitioners do not explain how the
13 city council erred in its findings.

14 Petitioners assert that the amendments “prohibit all new fuel terminals that
15 have ‘transloading facilities for transferring a shipment between transport modes,
16 or have transloading facilities and storage tank capacity exceeding 2 million
17 gallons.’” Petition for Review 17 (quoting PCC 33.920.300). As intervenors
18 point out, the exceptions to the FFT prohibitions identified by the city council
19 allow *some* new FFTs by setting out exceptions in PCC 33.920.300(D). *See* n 3.

20 Petitioners’ assertion is incorrect, and we reject it. As intervenors explain:

21 “The Amendments allow new fuel terminals that have less than 2
22 million gallons of storage capacity and transloading facilities, so
23 long as those transloading facilities are not used ‘for transferring a

1 shipment between transport modes.’ R[ecord] 272. The
2 Amendments also allow transloading facilities at terminals that fall
3 within the list of exceptions to the [FFT] use category. R[ecord]
4 265.” Intervenor-Respondent’s Brief 18-19.

5 Petitioners also argue “[a]t a minimum, the City failed to provide evidence
6 or explain how the FFT amendments do not ‘restrict transloading facilities’ and
7 ‘do not limit transloading facilities or multimodal infrastructure’ despite the plain
8 language in the code stating otherwise.” Petition for Review 17. As explained
9 above, the amendments allow for some FFTs and FFTs include transloading
10 facilities. Petitioners, having failed to discuss the findings, have not established
11 an argument that the findings related to the transloading facilities are unsupported
12 by substantial evidence or lack an adequate factual base.

13 The 2022 FFT Amendments include numerous exemptions to the
14 restrictions imposed. *See* PCC 33.920.300(D). For example, neither
15 “[d]istributors and wholesalers that receive and deliver fossil fuel exclusively by
16 truck” nor “[t]he storage of fossil fuels for exclusive use at an airport, surface
17 passenger terminal, marine, truck or air freight terminal, drydock, ship or barge
18 servicing facility, rail yard, or as part of a fleet vehicle servicing facility” are
19 FFTs. PCC 33.920.300(D)(4), (7). Petitioners have not explained why substantial
20 evidence or an adequate factual base does not support the identified findings.

21 In *CPBT IV* we explained that

22 “[t]he city council adopted extensive findings explaining its
23 rationale for adopting the 2019 FFT amendments. Intervenor-
24 petitioner provides a list of twenty-two findings addressing
25 compliance with various PCC provisions, CP policies, and Goal 2,

1 which petitioners and intervenor-petitioner contend include
2 improper balancing. Intervenor-Petitioner's [Brief] 13-14; Petition
3 for Review 17. We agree with the city and intervenor-respondent
4 (collectively, respondents) that simply listing twenty-two
5 challenged findings by number fails to adequately develop an
6 argument that those findings are inadequate." 81 Or LUBA at 701.

7 Similarly, we will not develop petitioners' argument for them. *Deschutes*
8 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

9 The first subassignment of error is denied.

10 **B. Second Subassignment of Error**

11 Petitioners' second subassignment of error is that substantial evidence does
12 not support the city council's conclusion that the 2022 FFT Amendments block
13 all new fuel terminals with more than two million gallons of fossil fuel storage
14 capacity. Petitioners contend that the 2022 FFT Amendments allow new
15 *monomodal* fossil fuel storage facilities within the city without a tank size
16 limitation and, as a result, there is not substantial evidence that the amendments
17 prohibit new FFTs with more than two million gallons of liquid fossil fuel
18 storage.⁸ Petitioners cite Record 20, 16, and 34 as support for their subassignment
19 of error. Petition for Review 17.

⁸ Petitioners identify no specific section of the findings being challenged but maintain that unlike the 2016 and 2019 FFT Amendments, the 2022 FFT Amendments

"altered the second category of terminals described in PCC 33.920.300(A) so that sites with fuel storage capacity exceeding two million gallons must also 'have transloading facilities' to qualify as a Bulk Terminal. *In other words, new fossil fuel storage facilities*

1 The city again responds that petitioners cite numerous findings but (1) fail
2 to develop an argument explaining why the findings are inadequate, and (2) fail
3 to consider the challenged language in the context of the other findings or policies
4 to which the challenged statement responds.

5 The findings at Record 16 are general and do not address specific criteria.
6 Given the reference to storage capacity in petitioners' subassignment, petitioners
7 may be challenging the finding that the amendments "are a regulatory approach
8 to limit the size of new fossil fuel terminals and prohibit the expansion of fossil
9 fuel storage tank capacity at existing fossil fuel terminals, *with limited*
10 *exceptions*[".]” Record 16 (emphasis added). Later findings at Record 16 state that
11 the “amendments create a new land use category with development standards that
12 limit the size of new terminals and prohibit the expansion of fossil fuel storage
13 tank capacity, *with some exceptions*, at existing terminals, but allow for their
14 continued operation as a limited use.” *Id.* (emphasis added). Contrary to
15 petitioners' assertions, the city council did not find that the amendments block all
16 FFTs with more than two million gallons of storage capacity.

*are allowed within the City, regardless of storage capacity, so long
as they are monomodal.”* Petition for Review 18-19 (emphasis
added).

As we explain above, petitioners do not assert a misconstruction of law
assignment of error.

1 Record 34 includes a discussion of Goal 12. Petitioners assert that the
2 findings were not supported by an adequate factual base. The findings at Record
3 34 include:

4 “The amendments only prohibit new bulk fossil fuel terminals with
5 more than 2 million gallons of liquid fossil fuel storage capacity.
6 New fuel terminals with less than 2 million gallons of fossil fuel
7 storage (and unrestricted amounts of jet fuel and renewable fuel) are
8 considered a Warehouse and Freight Movement use and continue to
9 be allowed in Portland’s employment and industrial zones (PCC
10 33.140, Table 140-1. *The amendments limit the expansion of fossil*
11 *fuel storage tank capacity at the existing FFTs. The amendments*
12 *allow for new intermodal links and new storage tanks for jet fuel,*
13 *renewable fuel, and other types of fuel identified in the exceptions*
14 *in PCC 33.920.300[(D)].” (Emphasis added.)*

15 The finding does not state that the amendments prohibit all new FFTs with more
16 than two million gallons of liquid fossil fuel storage. There is an adequate factual
17 base for the city council to conclude that the amendments allow some new FFTs.
18 Petitioners do not develop their arguments in this subassignment of error.

19 Lastly, Petitioners cite to Record 20, which contains the heading “Impact
20 Statement” and follows the heading “Official Record (Efiles)” and the name of
21 the city auditor. *See* Record 19. Petitioners do not explain why the “Impact
22 Statement” contains city council findings that are not supported by substantial

1 evidence or an adequate factual base.⁹ We agree with the city that petitioners have
2 failed to develop their argument and it provides no basis for remand.

3 The second subassignment of error is denied.

4 **C. Third Subassignment of Error**

5 Petitioners' third subassignment of error is that the city council's findings
6 that the amendments limit risk are not supported by an adequate factual base.
7 Petitioners argue:

8 "The City repeatedly states throughout the 2022 Ordinance and
9 findings that '[t]he purpose of the ordinance is to begin to
10 proactively address the safety risks due to earthquakes by not
11 making the problem worse by continuing to allow the unlimited
12 expansion of fossil fuel storage tank capacity.' *E.g.*, Rec[ord] 30,
13 68, 89. The City repeatedly finds that the FFT Amendments 'limit
14 future risk by limiting the size of new fossil fuel terminals and
15 prohibiting the expansion of fossil fuel storage tank capacity at
16 existing fossil fuel terminals, with limited exceptions for jet and
17 renewable fuels.' *E.g.*, Rec[ord] 29, 90, 101." Petition for Review
18 18 (first brackets in original, subsequent brackets added).

19 Petitioners then point to Finding 231 as a "representative example" of a
20 finding lacking supportive evidence. Petition for Review 19 (citing Record 146).
21 Finding 231 addresses Goal 7.C, of Chapter 7 of the CP, which is "Goal 7.C.
22 Resilience. Portland's built and natural environments function in complementary
23 ways and are resilient in the face of climate change and natural hazards." Record

⁹ The "Impact Statement" is not part of Exhibit A "Findings of Fact," beginning at Record 22, or the city council's more general findings starting at Record 13.

1 145 (boldface omitted). Petitioners contend that evidence related to the safety of
2 existing tanks is not evidence to support the city council’s conclusion that
3 construction of new tanks should be restricted. Petitioners argue:

4 “For example, in finding 231, the City states:

5 ““The FFTs have significant seismic risks because an
6 estimated 91 percent of the actively used storage tanks in the
7 [Critical Energy Infrastructure (CEI)] Hub were built prior to
8 1993, before modern seismic technology existed[.] * * * The
9 tanks built before 1993 are expected to spill all of their
10 contents during an earthquake while tanks built after 2004 –
11 when liquefaction of soft soils was incorporated into City of
12 Portland requirements for seismic design – will release 10
13 percent of their contents. Rec[ord] 146.’

14 “This is an accurate description of the analysis in the [2016 Critical
15 Infrastructure Hub Study, the 2012 DOGAMI Earthquake Risk
16 Study for Oregon’s Critical Energy Infrastructure Hub report, the
17 2019 Portland State University Critical Energy Infrastructure Hub
18 Fuel Tank Seismic Assessment, and the 2022 Multnomah
19 County/City of Portland Impacts of a Cascadia Subduction Zone
20 Earthquake on the CEI Hub studies]. Each were focused on
21 analyzing the risk posed by existing infrastructure in the CEI Hub,
22 and all highlighted the critical importance of a facility’s age. *The*
23 *City fails to explain, however, why the risk posed by the decades-old*
24 *facilities is relevant to determining the safety impacts of new fuel*
25 *tanks. If anything, these studies cut against the City’s findings and*
26 *highlight the importance of permitting new tank infrastructure.”*
27 Petition for Review 19 (emphasis added).

28 Petitioners argue that a reasonable person would not rely on studies of existing
29 facilities to reach conclusions about the safety of future facilities. Petitioners
30 point out that future tanks could replace the old tanks and that (1) relocating fuel
31 terminals to locations outside the city’s CEI Hub, and (2) increasing storage in

1 modern tanks, are strategies emphasized in the studies relied upon by the city
2 council. Petitioners also argue that the city council was required to address the
3 evidence of minimal risk from tank failure reflected by:

4 “[T]he only facts in the record concerning the safety of an actual
5 proposed modern facility, those that relate to [a project proposed in
6 2016, the propane terminal] project. The City explained in the 2016
7 BPS staff report (adopted as 2016 Ordinance findings) that the
8 quantitative risk assessment study prepared for the [propane
9 terminal project] showed that the highest off-site risk level for the
10 propane facility was one fatality in 1,000 years and one fatality in
11 100 million years for the nearest residential zone.” Petition for
12 Review 21.

13 Lastly, petitioners argue that the city “does not explain how banning new
14 intermodal facilities with transloading infrastructure – even without on-site fuel
15 storage – decreases the risk posed by the existing fuel tanks in the CEI Hub.”
16 Petition for Review 21. This is a findings challenge. Petitioners also argue, as
17 they argued to the city, that allowing facilities that directly transfer product
18 between transportation modes, without the use of storage tanks, would improve
19 safety and that the choice to ban these activities does not decrease risk related to
20 rail transportation. Petitioners point to an assertion in the record that the risk of
21 derailment in the city is reduced by congestion and numerous siding destinations
22 and a statement in the 2016 staff report that the amendments were not anticipated
23 to substantially affect the volume of petroleum transported by rail to Puget Sound
24 refineries. Petition for Review 22 (quoting Record 623). Petitioners argue that

1 intermodal facilities without storage would in fact be beneficial because they do
2 not require storage tanks.

3 Respondents answer that the city council did not find, as petitioners argue,
4 that the 2022 FFT amendments increased safety, but rather found that the
5 amendments limit risk. For example, the city council found:

6 “Continuing to allow the increase in fossil fuel storage in a high-risk
7 area increases the risk to the surrounding industrial district and the
8 Willamette River. The [FFT] amendments limit future risk by
9 limiting the size of new fossil fuel terminals and prohibiting the
10 expansion of fossil fuel storage tank capacity at existing fossil fuel
11 terminals, with limited exceptions.” Record 29.

12 The city explains that the city council found that the amendments are the first
13 step in ensuring that the situation does not get worse by allowing an unlimited
14 increase in fossil fuel storage tank capacity in a seismic high-risk area. The city
15 points out that the city council prohibited new large FFTs “because most of
16 Portland’s industrial districts, especially sites with access to the river, are in areas
17 with high liquefaction probability” and that included in the studies relied upon
18 by the city council was a recommendation to relocate facilities out of the CEI
19 Hub and outside of Portland. Respondent’s Brief 17. Respondents also point out
20 that the 2022 FFT amendments allow the replacement and reconfiguration of
21 existing fossil fuel tanks in order to facilitate seismic and safety upgrades. The
22 city also points to evidence in the record that new tanks would release 10 percent
23 of their contents in a seismic event. The city also responds that petitioners do not
24 explain the relevance of risk data associated with a project proposed in 2016.

1 Intervenor further argue that there are no other suitable relocation sites within
2 the city.

3 We agree with respondents that the city council's conclusion that the 2022
4 FFT Amendments limit risk is supported by substantial evidence, that is, an
5 adequate factual base. We also agree with the city that petitioners do not explain
6 the relevance of the study related to the proposed propane terminal. The city
7 council was not required to address the 2016 propane terminal project in its
8 findings.

9 We also agree with intervenors that the city council was not required to
10 find that restricting facilities without storage limits risk associated with storage
11 facilities. Petitioners argue that allowing the facilities without storage would
12 result in a greater limitation of risk because the ability to directly transfer product
13 between modes would reduce the need for storage. That petitioners believe a
14 different regulatory strategy would better achieve the city council's objectives is
15 not a basis for reversal or remand. Moreover, the city responds to this argument
16 by pointing out that the city council "properly concluded grounded in an adequate
17 factual base that prohibiting unlimited expansion of storage *or facilities that*
18 *exclusively transload between modes will limit risk.*" Respondent's Brief 18
19 (emphasis added). Petitioners acknowledge that the city's planning staff
20 explained to the city council that transloading facilities without storage were
21 included in the amendments because of the desire to not allow new terminals that
22 could directly transfer fuel between modes. Petition for Review 21 (citing Record

1 7666). The city explains that though some degree of risk remains, the Court of
2 Appeals concluded in *CPBT II* that the amendments “place limits on the extent
3 of that risk and promote local health and safety.” Respondent’s Brief 19 (citing
4 *CPBT II*, 289 Or App at 752). The Court of Appeals concluded that the prior
5 amendments

6 “also seek to reduce the risk of potential explosions, accidents, and
7 fire at large fossil-fuel terminals and to reduce the similar risk of a
8 catastrophic accident from the larger trains that transport fossil fuels
9 to the terminals. In addition, the amendments seek to protect local
10 public health and limit exposure to coal containing heavy metals
11 linked to cancer, birth defects, and other problems. In considering
12 the amendments, the city noted the recent 2016 derailment of a train
13 carrying oil through the Columbia Gorge, which led to a large oil
14 spill, fire, and the evacuation of a significant portion of the city of
15 Mosier.” *CPBT II*, 289 Or App at 752.

16 As intervenors point out, the city council adopted findings setting out
17 reasons it decided to adopt the 2022 FFT Amendments and these findings are not
18 limited to risk associated with storage. “These justifications include the City’s
19 climate goals; the risks that fossil fuels pose to safety, health, and livability; risk
20 of train derailments; and the threats of fossil fuel infrastructure to human health,
21 cultural heritage, and environmental quality.” Intervenor-Respondent’s Brief 23
22 (citing Record 13-19).¹⁰ Intervenors explain that “[t]he fact that some aspect of

¹⁰ The city council’s general findings include:

1 the Amendments may have no effect on the risk posed by existing terminals, or
2 that some configuration of the prohibited facilities may present a lower risk than
3 bulk storage, does not render the City's finding erroneous or the supporting
4 evidence insubstantial." Intervenor-Respondent's Brief 22. We agree with
5 intervenors that the decision of whether to allow intermodal facilities without
6 tanks is for the city council to make.

"Coal contains toxic heavy metals, including mercury, arsenic[,] and lead, and exposure to these toxic heavy metals is linked to cancer, birth defects[,] and other health problems.

"A Union Pacific train carrying oil from North Dakota to Tacoma derailed in Mosier, Oregon on June 3, 2016, spilling 42,000 gallons of crude oil, igniting a fire, and leading to the evacuation of one-quarter of the town's residents.

"Tribal communities in Oregon and Washington have expressed concerns about the safety risks of fossil fuel infrastructure and the related threats to human health, cultural heritage, and environmental quality.

"The City's 2015 Climate Action Plan (adopted by Resolution 37135) identifies the need to establish a 'fossil fuel export policy that considers lifecycle emissions, safety, economics, neighborhood livability[,] and environmental impacts' (Climate Action Plan, action 3G, page 69).

"In Resolutions 36959 and 3962 adopted in 2012, the Council expressed opposition to coal trains traveling through Portland until a programmatic, comprehensive, and area-wide Environmental Impact Statement and comprehensive Health Impact Assessment are completed." Record 14-15 (internal numbering omitted).

1 The city council's decision is supported by substantial evidence, that is, an
2 adequate factual base.

3 The third subassignment of error is denied.

4 **D. Fourth Subassignment of Error**

5 The city council explains in its findings that, "[a]s currently used, clean
6 fuels are a blend of fossil and renewable fuels. Under the definition of fossil fuels
7 in the amendments, these cleaner, blended fuels are considered fossil fuels until
8 they reach a 95 percent renewable content." Record 137. PCC 33.920.300(A)
9 recognizes fuel blending as an activity that may occur at FFTs. Petitioners' fourth
10 subassignment of error is that the city council's finding at Record 23, 40, 133,
11 and 326, that there is sufficient storage capacity for blending clean fuels, is not
12 supported by substantial evidence. Petitioners do not discuss the specific findings
13 at issue but argue that the city concluded in error that the 2022 FFT Amendments
14 will not interfere with blending of cleaner fuels because those fuels are included
15 in United States Energy Information Association (US EIA) forecasts of fossil
16 fuels, the forecasts do not predict an increase in demand generally, and increased
17 demand for blended fuels will be offset by lower consumption of traditional fossil
18 fuels. Petitioners maintain that this reasoning is flawed because additional tanks
19 are needed to blend and then segregate the blended fuels. Petitioners argue that
20 the 2022 FFT amendments "do not allow these separate tanks because all
21 commercially usable blends have more than 5 percent fossil fuel content and thus
22 are considered fossil fuels under the FFT Amendments." Petition for Review 23.

1 Petitioners point out that industry representatives testified before the city council
2 that the amendments would block additional storage tanks necessary for blending
3 traditional fossil fuels with renewable fuel to meet local, state, and federal fuel
4 requirements, and that in 2016, city staff acknowledged that additional tanks
5 would be needed for blending. Petitioners argue that without countervailing
6 evidence to that provided by industry experts, the city council's decision is not
7 supported by substantial evidence.

8 The city responds that the city council addressed petitioners' concern by
9 adopting an exception to the storage restriction for certain fuels. PCC
10 33.140.100(B)(15)(a) provides that "[a]dding storage tank capacity exclusively
11 for renewable fuels or to comply with the Renewable Fuel Standard (PCC
12 Chapter 16.60 Motor Vehicle Fuels) is not considered an increase in capacity."
13 In a July 7, 2022 memo addressing testimony received in response to the
14 proposed amendments, city staff advised the city council that:

15 "The code amendments are consistent with the [fuel-transportation
16 consulting firm] analysis in that the code allows for expansion of
17 storage tank capacity for the fuels (renewables and jet fuel) that are
18 expected to grow in demand and does not regulate the other aspects
19 of the terminal operations, such as new marine and rail facilities.

20 "The [fuel-transportation consulting firm's] analysis does not
21 provide any detailed data to indicate the scale of the need. Nothing
22 in the article contradicts the [Bureau of Planning and Sustainability
23 (BPS)] analysis of US EIA forecasts that indicates that future
24 petroleum consumption in 2050 is expected to be less than past
25 historic peak consumption, and with allowed added storage tank
26 capacity for jet fuel and renewable fuel, the existing terminals will

1 be adequate to serve the future regional market.” Record 7516.

2 Both the city and intervenors explain that the city council addressed the need to
3 accommodate the blending activity. The city council responded to the testimony
4 of industry experts by revising the 2022 FFT Amendments to allow additional
5 storage to comply with the city’s Renewable Fuels Standard, which requires
6 blending of biodiesel and renewable diesel with fossil diesel fuels. We agree with
7 the city and intervenors that the city council’s findings concerning the adequacy
8 of storage to accommodate blended fuels are supported by substantial evidence
9 and an adequate factual base.

10 The fourth subassignment of error is denied.

11 The city council’s decision is supported by substantial evidence, that is, an
12 adequate factual base.

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioners’ third assignment of error is that the Ordinance “violates” the
16 CP. Petition for Review 25.

17 We understand petitioners to argue that LUBA should remand the decision
18 because the 2022 FFT Amendments are “not in compliance with” the CP as
19 required by ORS 197.835(7)(a).¹¹ In order to establish that the 2022 FFT

¹¹ ORS 197.835(7)(a) provides that we shall reverse or remand an amendment to a land use regulation or adoption of a new land use regulation if “[t]he regulation is not in compliance with the comprehensive plan [.]”

1 Amendments are not in compliance with the CP, petitioners must first establish
2 that the cited CP policies apply to the 2022 FFT Amendments, in the sense that
3 the city's decision implicates those policies and that the city was required to
4 consider them. We will:

5 "[A]ffirm a local government's interpretation of its comprehensive
6 plan and land use regulations, unless [we determine] that the local
7 government's interpretation:

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

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

12 "(c) Is inconsistent with the underlying policy that provides the
13 basis for the comprehensive plan or land use regulation; or

14 "(d) Is contrary to a state statute, land use goal or rule that the
15 comprehensive plan provision or land use regulation
16 implements." ORS 197.829(1).

17 Where the city council's interpretation of CP policies is directed at a single term
18 or statement, we determine whether the interpretation plausibly accounts for the
19 text and context of the statement. *CPBT IV*, 81 Or LUBA at 708. Further,

20 "to the extent that the interpretation is directed at multiple
21 statements that may be in conflict, the inconsistency determination
22 is a function of two inquiries: (1) whether the interpretation in fact
23 is an interpretation, *i.e.*, a considered determination of what was
24 intended that plausibly harmonizes the conflicting provisions or
25 identifies which ones are to be given full effect; and (2) the extent
26 to which the interpretation comports with the 'express language' of
27 the relevant provisions (including, necessarily, those provisions
28 that, according to the interpretation at issue, are to be given full

1 effect).” *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776
2 (2010).

3 If petitioners establish that the cited CP policy applies to the city council’s
4 decision, then petitioners must establish why the 2022 FFT Amendments do not
5 comply with the CP policy. Where petitioners argue that the city council’s
6 decision is not supported by an adequate factual base, the subassignments of error
7 are subject to the standard of review set out in our discussion of the second
8 assignment of error.

9 With that background, we proceed to the subassignments of error and deny
10 them for the reasons explained below.

11 **A. First Subassignment of Error**

12 Petitioners’ first subassignment of error is that the 2022 FFT Amendments
13 are not in compliance with CP policies 8.104 through 8.111, policies concerned
14 with emergency preparedness and response, and 8.126, which is concerned with
15 coordinated energy infrastructure.

16 **1. CP Policies 8.104 through 8.111**

17 The city council found that policies “8.104 through 8.111 * * * address the
18 provision of public safety and emergency response services and not development
19 on private land. These policies do not apply.” Record 169. The city argues that
20 the city council’s interpretation that CP policies 8.104 through 8.111 do not apply
21 is consistent with the preamble to these CP policies which provides:

22 **“Public Safety and emergency response**

23 **“Coordinated, effective, and efficient public safety and emergency**

1 response services are essential for a safe and resilient city. They help
2 the community prepare for and respond to medical and fire
3 emergencies, hazards, and natural- and human-made disasters. The
4 policies in this section reflect the variety of public safety and
5 emergency response services provided by the City that must be
6 maintained and enhanced as the city grows, including police, fire
7 and rescue, emergency communications and emergency
8 management.” CP at GP8-24 (boldface in original).

9 Petitioners maintain that, contrary to the city council’s conclusions, CP
10 policies 8.104 through 8.111 apply to the city’s adoption of the FFT
11 Amendments.

12 **a. CP Policy 8.104**

13 CP Policy 8.104 is:

14 **“Policy 8.104 Emergency preparedness, response, and recovery**
15 **coordination.** Coordinate land use plans and public facility
16 investments between City bureaus, other public and jurisdictional
17 agencies, *businesses*, community partners, and other emergency
18 response providers, to ensure coordinated and comprehensive
19 emergency and disaster risk reduction, preparedness, response, and
20 recovery.” CP at GP8-24. (boldface in original, emphasis added).

21 Petitioners argue that the city council’s interpretation that CP policy 8.104
22 does not apply is inconsistent with the plain language of the CP. Petitioners argue
23 that CP policy 8.104 requires coordination with businesses in order to ensure
24 coordinated and comprehensive emergency and disaster risk reduction,
25 preparedness, response and recovery. CP policy 8.104 calls for the coordination
26 of land use plans between City bureaus and businesses and therefore, contrary to
27 the city council’s interpretation, concerns development on private land. We agree
28 with petitioners that the city council’s interpretation of CP policy 8.104 as not

1 applying to development on private land is inconsistent with the express language
2 of the provision, which includes the word “businesses,” and we do not defer to
3 it. CP policy 8.104 applies to the FFT Amendments and the 2022 FFT
4 Amendments must comply with it.

5 “For legislative land use decisions, the city may rely on findings as well as
6 arguments in its brief and accessible material in the record to establish that
7 applicable legal standards are satisfied.” *Home Builders Assoc. v. City of Eugene*,
8 78 Or LUBA 441, 451 (2018) (citing *Citizens Against Irresponsible Growth v.*
9 *Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002); *see also*
10 *Redland/Viola/Fischer’s Mill CPO v. Clackamas County*, 27 Or LUBA 560, 563-
11 64 (1994) (citing *Von Lubken v. Hood River County*, 22 Or LUBA 307, 314
12 (1991) (explaining that a respondent may “provide in their briefs argument and
13 citations to facts in the record adequate to demonstrate that the challenged
14 legislative decision complies with applicable legal standards”)).

15 The city responds in its brief that the FFT Amendments comply with CP
16 policy 8.104 because the record demonstrates that city staff met with fuel
17 terminal businesses to discuss operation of the amendments beginning in 2016
18 and continuing through the 2022 FFT Amendments. “Prior to filing the remand
19 ordinance, the [BPS] held a meeting with the fossil fuel terminal property owners
20 and the parties to the previous appeals to discuss the proposed amendments.”
21 Record 171. We agree with the city that these meetings are evidence of
22 coordination of the city’s land use planning with businesses and are an adequate

1 factual base to conclude that the amendments comply with CP policy 8.104.
2 Thus, the city's conclusion that Policy 8.104 does not apply is harmless and does
3 not provide a basis for remand.

4 **b. CP Policy 8.110**

5 CP policy 8.110 is:

6 **“Policy 8.110 Community preparedness.** Enhance community
7 preparedness and capacity to prevent, withstand and recover from
8 emergencies and natural disasters *through land use decisions* and
9 public facility investments.” CP at GP8-25 (boldface in original,
10 emphasis added).

11 Petitioners challenge the city council's finding that CP policy 8.110 is not
12 applicable because the policy addresses provision of public safety and emergency
13 response services and not development on private land. According to petitioners,
14 CP policy 8.110 relates not to city services but rather the preparedness of the
15 community and its ability to prevent, withstand, and recover from natural
16 disasters through land use decisions. Petitioners argue that the terminal owners
17 and operators are “undoubtedly important members of the community, especially
18 regarding the preparation and response to natural disasters.” Petition for Review
19 30. Accordingly, we understand petitioners to argue, CP policy 8.110 applies and
20 the 2022 FFT Amendments do not comply with the policy.

21 CP policy 8.110 specifically calls for enhancement of community
22 preparedness through land use decisions. We agree with petitioners that the city

1 council's finding that the policy does not apply is inconsistent with the policy
2 language referencing land use decisions.

3 Respondents respond that that evidence in the record demonstrates that the
4 2022 FFT Amendments comply with the policy. As respondents point out, the
5 2022 FFT Amendments allow for an existing facility to apply for approval for
6 seismic upgrades to existing facilities, minimizing disruptions, and enhancing
7 ability to recover from disasters. *See* Record 5718, 10871-73. The amendments
8 comply with CP policy 8.110. Thus, the city's conclusion that CP policy 8.110
9 does not apply is harmless and does not provide a basis for remand.

10 **c. CP Policy 8.111**

11 CP policy 8.111 is:

12 **"Policy 8.111 Continuity of operations.** Maintain and enhance the
13 City's ability to withstand and recover from natural disasters and
14 human-made disruptions in order to minimize disruptions to public
15 services." CP at GP8-25 (boldface in original).

16 Petitioners argue that the city council's interpretation that CP policy 8.111
17 does not apply to the 2022 FFT Amendments is incorrect because the policy
18 requires maintenance and enhancement of the ability to recover from natural
19 disasters and adequate fuel supply is necessary following a disaster in order to
20 minimize disruptions to public services. The city council's interpretation that
21 compliance with this policy is not required because the policy concerns the
22 provision of public safety and emergency response services and not development

1 on private land is not inconsistent with the express language of the policy, and
2 we defer to it.

3 **d. CP Policy 8.126**

4 CP policy 8.126 is:

5 **“Policy 8.126 Coordination.** Coordinate with energy providers to
6 encourage investments that ensure reliable, equitable, efficient, and
7 affordable energy for Portland residents and businesses.” CP at
8 GP8-27 (boldface in original).

9 There is no dispute that CP policy 8.126 applies. The city council found
10 that the CP defines “encourage” as “to promote or foster using some combination
11 of voluntary approaches, regulations, or incentives.” Record 170. The city
12 council discussed competing interests and found:

13 “The [FFT] amendments designate existing FFTs as a limited use,
14 as opposed to a prohibited or nonconforming use, allows the
15 terminals to continue to operate and invest in facilities that reduce
16 the risks and improve their ability to withstand a major earthquake.
17 Further, the use limitations (33.140.100[(B)(17)(a)]) provide
18 flexibility to FFTs to replace and reconfigure existing storage tank
19 capacity to increase safety. These changes support the retention of
20 existing fossil fuel terminals by designating them as a limited use
21 that supports opportunities for growth through exceptions, such as
22 jet or renewable fuels that will encourage investments that ensure
23 reliable, equitable, efficient, and affordable energy for Portland
24 residents and businesses.” Record 171.

25 Petitioners argue that the city council could have taken other approaches
26 to better accomplish its goals and that the city has failed to address emergency
27 fuel supply. Whether there may be different approaches to meet the city’s
28 objectives is not the applicable standard and as discussed above, the 2022 FFT

1 Amendments allow seismic upgrade investments and investments in renewable
2 fuel. The amendments comply with the policy.

3 The first subassignment of error is denied.

4 **B. Second Subassignment of Error**

5 CP policy 6.48 provides that the city will “[l]imit fossil fuels distribution
6 and storage facilities to those necessary to serve the regional market.” CP at GP6-
7 15. It is undisputed that CP policy 6.48 applies to the 2022 FFT Amendments.
8 The city council concluded that “regional market” means “Oregon, parts of
9 Southwest and Eastern Washington, as well as parts of Idaho in recognition that
10 Portland’s fossil fuel terminals currently handle 90 [percent] of the fossil fuels
11 consumed in Oregon and serve those other areas.” Record 136-37. The city
12 explains:

13 “Council considered the nuances of fuel distribution and demand.
14 Council considered evidence on the impact to the natural gas
15 market. R[ecord 53, 136-140,] 8100. Council considered evidence
16 that encompassed national, regional and state level forecasts for a
17 variety of different fossil fuels, including propane. R[ecord 136-
18 140,] 8026. The evidence in the record included State of Oregon
19 forecasts from two different departments—Office of Economic
20 Analysis (‘OEA’) and Oregon Department of Transportation
21 (‘ODOT’). R[ecord 137, 9092,] 9396. In response to testimony, the
22 Council considered new evidence on the impacts to easter[n]
23 Oregon and Washington, as well as Idaho. R[ecord 139,] 7491.
24 Petitioners fail to challenge or rebut any of the evidence in the
25 record.

26 “Next, Council considered the unique infrastructure needs based on
27 evidence in the record. The 2022 Amendments allow existing
28 terminals to expand, replace or reconfigure existing fossil fuel tanks.

1 Further, the Amendments allow expanded capacity for several fuels,
2 including renewable fuels or fuels that meet Portland's renewable
3 standard." Respondent's Brief 25.

4 The city council concluded that CP policy 6.48 is met because

5 "based on the totality of the record, Council finds that this
6 combination of factors – forecasted surplus fossil fuel storage
7 capacity in Oregon; the exceptions for additional storage tank
8 capacity for jet fuel and renewables to accommodate the large share
9 of future growth in forecasted demand; only a small portion of
10 Idaho's fossil fuels come through Portland; and alternative sources
11 of fossil fuels from terminals and pipelines outside of Portland –
12 means that the amendments properly limit storage to what is
13 necessary to serve the regional market and will not decrease the
14 availability of fuel to the region (broadly defined), and will not
15 hinder emergency response, and will not harm consumers in
16 Oregon, Idaho, or Washington in the future." Record 140.

17 Petitioners argue that the city's conclusion that the FFT Amendments
18 comply with CP policy 6.48 is not supported by an adequate factual base and that
19 its findings are inadequate. First, petitioners contend that the city improperly
20 relied upon studies concluding that based on existing demand, existing terminals
21 are sufficient to meet the needs of the regional market. Petitioners argue:

22 "Fuels 'necessary to serve the regional market' means sufficient
23 supply to meet the region's needs by fuel products. That [the FFT's]
24 collective storage capacity parallels the total demand for all fuels is
25 irrelevant to the customer that cannot obtain the type of fuel
26 necessary for their use and or regulatory circumstances. Multiple
27 industry representatives and experts told the City that additional
28 capacity was needed for blending tanks and segregation of fuel types
29 in order to supply sufficient quantities of these different blended fuel
30 products. The City did not present evidence to rebut this but again
31 relied entirely on forecasts for the overall demand." Petition for
32 Review 32-33.

1 Petitioners argue that the evidence in the record is that there is not a single
2 market to meet fuel needs, and that the city's conclusion fails to evaluate the
3 sufficiency of specific fuels to meet specific needs. Petitioners also argue:

4 "[T]he City repeatedly states that the FFT Amendments are
5 necessary because of the risks posed by an imminent earthquake.
6 The City claims that upwards of 90 percent of the existing terminals
7 will experience significant damage (if not total destruction) during
8 this event. The studies the City relies on state that it will take months
9 or years to rebuild infrastructure to restore the supply of fuel.
10 Rec[ord] 5687. Yet, the City did not address this threat that it
11 describes as imminent in concluding that there was sufficient
12 terminal infrastructure to meet future demand. If it had, the
13 inescapable conclusion is that additional modern infrastructure is
14 necessary" Petition for Review 33-34.

15 The city responds, and we agree, that the city council's conclusion that CP
16 policy 6.48 is met is supported by an adequate factual base, and that the findings
17 are adequate to explain why the city reached the conclusion that it reached. The
18 council found that "The 2022 BPS Regional Demand for Liquid Fossil Fuels
19 memo documented an expected surplus capacity in Oregon based on future total
20 petroleum consumption being less than the historic peak consumption in addition
21 to exceptions to additional storage tank capacity for jet fuel and renewable fuel."
22 Record 139.

23 Further, the findings state:

24 "The BPS memo documented that only a small portion of Idaho's
25 petroleum fuels are transported through Portland via barges on the
26 Columbia/Snake River system, and there are multiple options
27 available to meet future demand in Idaho, including other Lower
28 Columbia River ports, pipeline terminals in Pasco and Spokane, in

1 addition to the pipeline terminals in Boise and Pocatello that connect
2 to refineries in Salt Lake City, Utah.” *Id.*

3 The city also responds, and we agree, that CP policy 6.48 does not require
4 consideration of earthquakes, that the amendments allow seismic upgrades, and
5 that emergency preparedness is addressed in prior policies raised by petitioners.

6 The second subassignment of error is denied.

7 **C Third Subassignment of Error**

8 CP policy 6.7 is:

9 **“Competitive advantages.** Maintain and strengthen the city’s
10 comparative economic advantages including access to a high-
11 quality workforce, business diversity, competitive business climate,
12 and multimodal transportation infrastructure.” CP at GP6-7
13 (boldface in original).

14 It is undisputed that CP policy 6.7 applies to the 2022 FFT Amendments.

15 The city council made extensive findings addressing CP policy 6.7. *See* Record
16 118-121. These findings include the following:

17 “Maintain and strengthen access to a high-quality workforce. The
18 term ‘access’, which is defined in the 2035 Comprehensive Plan,
19 means the ability to make use of. Council interprets this policy to
20 support education and training programs that create a high-quality
21 workforce as well as actions to improve the local quality of life that
22 helps to retain and attract skilled workers. Council finds that overall,
23 these regulations will not impact the access to a high-quality
24 workforce. The regulations will maintain access to a high-quality
25 workforce because the 11 FFTs employ a small number of direct
26 employees, compared to the overall industrial sector of the economy
27 as a whole. Further, the regulations maintain the current direct
28 workforce by designating the FFTs as a limited use that allows the
29 terminals to continue to operate. The regulations also maintain the
30 indirect workforce of contractors that may be needed to maintain the

1 FFTs by allowing for the continued operation, maintenance and
2 limited opportunities for growth. LUBA specifically called out the
3 relationship between the FFTs and the products they supply to other
4 businesses and the potential impact on the workforce. As explained
5 in [CP p]olicy 6.48, Council finds that the existing fossil fuel storage
6 tank capacity in Portland, with the allowed exceptions, is adequate
7 to serve the future regional market, and will continue support a
8 strong and growing economy, including a high-quality workforce.

9 “Council interprets the policy direction to strengthen access to a
10 high-quality workforce to mean promoting education and training
11 programs that increase the number of trained employees that are
12 available to work at Portland businesses. The zoning regulations
13 (limit opportunities for new or expanded FFTs) do not directly
14 impact education and training programs, therefore this factor does
15 not apply.

16 “Maintain and strengthen business diversity – The City Council
17 interprets the term ‘diversity,’ which is not defined in the 2035
18 Comprehensive Plan, means variety for the purposes of this policy.
19 Portland’s adopted 2016 Economic Opportunities Analysis shows
20 that Portland has a diversified economy with businesses and
21 employment opportunities across four major areas – industrial
22 districts, the Central City, neighborhood commercial districts, and
23 health and education institutions. Specifically, Portland has adopted
24 policies and zoning code restrictions to preserve its industrial lands
25 and businesses. The [FFT] amendments do not include map
26 changes, nor do they allow for new incompatible land uses, that
27 could undermine the business retention and expansion in Portland’s
28 industrial districts, which in turn supports Portland’s business
29 diversity across the city as a whole. The regulations support the
30 retention of the existing FFTs by designating them as a limited use
31 that allows the terminals to continue to operate; invest in upgrades;
32 and support opportunities for growth through exceptions, such as for
33 jet or renewable fuels to the storage tank capacity restrictions.
34 Therefore, the regulations maintain the current business diversity in
35 Portland.

36 “The Council recognizes that the regulations do not strengthen

1 business diversity in that they limit opportunities for new or
2 expanded FFTs. However, FFTs make up a small fraction of the
3 businesses in Portland (11 out of 130,000 businesses). Furthermore,
4 even if the City were to allow unlimited expansion of FFTs, there is
5 no evidence that this would strengthen business diversity. Council
6 finds business diversity is strengthened by encouraging new and
7 innovative sectors and the regulations have been carefully crafted to
8 allow for new terminal facilities with less than two million gallons
9 of fossil fuel storage tank capacity or expanded storage capacity for
10 renewable fuels, Council expects to be a growing market given
11 policy direction to cleaner, renewable fuels such as the DEQ Clean
12 Fuels Program. Also, the regulations do not apply to business that
13 store and utilize fossil fuels as an input.

14 “Maintain and strengthen competitive business climate – The City
15 Council interprets the term ‘business climate,’ which is not defined
16 in the 2035 Comprehensive Plan, means the perceived hospitality of
17 the City to the needs and desires of businesses located in, or
18 considering a move to, Portland. Council finds that the term business
19 climate is difficult to measure and largely depends on the
20 perceptions of different business sectors. Based on previous
21 testimony from members of the business community, the regulations
22 could weaken Portland’s business climate because Portland could
23 be seen as a city that over-regulates businesses. The City has
24 considered this testimony and has mitigated this impact by narrowly
25 crafting the regulations to affect one type of business, but at the same
26 time support the retention of existing fossil fuel terminals by
27 designating them as limited use that allows the terminals to continue
28 to operate and invest in upgrades and supporting opportunities for
29 growth through exceptions, such as for jet or renewable fuels, to the
30 storage capacity restrictions. Further, the regulations maintain a
31 competitive business climate because they have been narrowly
32 crafted to provide sufficient fossil fuel storage tank capacity to meet
33 the modest forecasted growth in demand for liquid fossil fuels,
34 especially for jet fuel that may be needed to support a growing
35 economy.

36 “Maintain and strengthen multimodal transportation infrastructure –
37 The term ‘multimodal,’ which is defined in the 2035 Transportation

1 System Plan, means providing for many modes of travel within a
2 single transportation corridor. Portland's comparative advantage is
3 the many different modes (road, rail, marine and pipeline) that are
4 available to move goods and people within and through the city. The
5 FFTs rely on interstate pipelines, marine terminals, and roads to
6 receive and distribute fossil fuels and other products. The
7 regulations maintain the multimodal transportation infrastructure by
8 designating the existing FFTs as a limited use that allows the
9 terminals to continue to operate; invest in upgrades (including
10 maintaining and enhancing their privately-owned multimodal
11 infrastructure); and support opportunities for growth through
12 exceptions, such as jet or renewable fuels, to the storage capacity
13 restrictions. The [FFT] amendments do not amend the Citywide
14 System Plan or the Transportation System Plan, therefore the City
15 continues to plan for public infrastructure investments to maintain
16 and strengthen the citywide multimodal transportation system. The
17 potential impacts to the multimodal transportation infrastructure are
18 addressed in more detail under the 2035 Comprehensive Plan
19 findings for policies 9.30, 9.31 and 9.32." Record 119-21.

20 We understand petitioners to argue that the city council's finding that the
21 2022 FFT Amendments comply with the policy is not supported by an adequate
22 factual base. Petitioners maintain:

23 "The evidence and analysis do not account for the different
24 demand/need for individual fuel products, role/capacity of
25 specialized infrastructure, changes in technology/individual product
26 demand/aging infrastructure affecting the need for new or relocated
27 facilities, or the impacts of a future earthquake the FFT
28 Amendments are meant to address. These types of real-world details
29 must be addressed." Petition for Review 35-36.

30 For the reasons set out in our resolution of the second subassignment of
31 error, we agree with the city that the policy does not require the analysis desired
32 by petitioners.

1 The fourth subassignment of error is denied.

2 **D. Fifth Subassignment of Error**

3 CP Transportation Policies include:

4 **“Policy 9.30 Multimodal goods movement.** Develop, maintain,
5 and enhance a multimodal freight transportation system for the safe,
6 reliable, sustainable, and efficient movement of goods within and
7 throughout the city.

8 “* * * * *

9 **“Policy 9.32 Multimodal system and hub.** Maintain Portland’s
10 role as a multimodal hub for global and regional movement of goods
11 [and e]nhance Portland’s network of multimodal freight corridors.”
12 CP at GP9-12 (boldface in original).

13 It is undisputed that the above policies apply to the 2022 FFT
14 Amendments. The city found that both policies are met for a variety of often
15 overlapping reasons. With respect to CP policy 9.30, the city council found:

16 “First, the City Council interprets [CP p]olicy 9.30 to primarily
17 direct public investment in Portland’s multimodal freight
18 infrastructure. The City Council interprets the verb ‘enhance,’ which
19 is not defined in the 2035 Comprehensive Plan, to mean to intensify
20 or improve. The [FFT] amendments do not amend the Citywide
21 System Plan or the Transportation System Plan, therefore the City
22 continues to plan for public infrastructure investments to *develop,*
23 *maintain and enhance the multimodal transportation infrastructure*
24 *to support the movement of goods within and through Portland.*”
25 Record 178 (emphasis added).

26 The italicized language mirrors CP policy 9.30. With respect to CP policy 9.32,
27 the city council made substantially the same initial findings, replacing the
28 italicized language with language mirroring the language in CP policy 9.32:

1 “therefore the City continues to plan for public infrastructure investments to
2 maintain and enhance the multimodal transportation infrastructure to support
3 the movement of goods within and through Portland as a multimodal hub for
4 regional and global trade.” Record 180 (emphasis added).

5 For both CP policies 9.30 and 9.32, the city council also found:

6 “However, unlike other parts of the transportation system, the
7 multimodal freight system is a mix of public and private
8 infrastructure. Whereas most of the roadways are publicly owned
9 and maintained, pipelines and rail infrastructure are privately
10 owned. The marine terminals are a mix of public (Port of Portland)
11 and private ownership. Therefore, City Council considered the
12 impact that the FFT amendments could have on private investment
13 in multimodal infrastructure. The FFTs are privately owned with
14 specialized multimodal infrastructure such as pipelines, marine
15 docks and rail loading facilities (also referred to as transloading
16 facilities). The FFT amendments regulate only one type of business
17 (FFTs) that make up a small part of the multimodal infrastructure
18 system.” Record 178, 180.

19 For CP policy 9.30, the city council went on to find that the FFT
20 amendments are consistent with “Develop, maintain, and enhance a multimodal
21 freight transportation system for the safe, reliable, sustainable, and efficient
22 movement of goods within and throughout the city.” The city council found this
23 is because,

24 “[f]or example, in the 2020 Portland Harbor Marine Cargo Forecast,
25 petroleum liquid bulk cargo accounts for 8 [percent] to 14 [percent]
26 of the total volume of cargo flowing through the Portland Harbor
27 (without accounting for automobiles or container cargo volumes).
28 The FFT amendments regulate one part (fossil fuel storage tanks) of
29 the FFTs and do not limit transloading facilities or multimodal

1 infrastructure. The existing FFTs are designated as a limited use that
2 allows for the continued operation, maintenance and improvement
3 of the multimodal infrastructure and fossil fuel storage tank capacity
4 at the FFTs. The amendments do not limit expansion of pipeline
5 infrastructure, marine terminals or rail facilities. The amendments
6 allow new intermodal fossil fuel terminals with a fossil fuel storage
7 tank capacity up to 2 million gallons and terminals of any size that
8 transport fuel exclusively by truck.

9 “LUBA found that the City erred by not considering the role FFTs
10 play in serving or supplying fossil fuels and other products to other
11 businesses. Council considers this issue under [CP p]olicies 6.48
12 and 9.32 and finds that the existing fossil fuel storage tank capacity
13 in Portland, with the allowed exceptions, is adequate to serve the
14 future regional market, and, therefore, the other industrial uses will
15 continue to be adequately served.” Record 178-79.

16 With respect to CP policy 9.32, the city council found that the FFT
17 amendments are consistent with “Maintain Portland’s role as a multimodal hub
18 for global and regional movement of goods [and e]nhance Portland’s network of
19 multimodal freight corridors” because:

20 “The FFT amendments regulate one part (fossil fuel storage tanks)
21 of the FFTs and do not limit transloading facilities or multimodal
22 infrastructure. The existing FFTs are designated as a limited use that
23 allows for the continued operation, maintenance and improvement
24 of the multimodal infrastructure and fossil fuel storage tank capacity
25 at the FFTs. The ordinance does not limit transloading facilities,
26 docks or pipelines – facilities that are key components of the
27 multimodal freight transportation system. The amendments support
28 Oregon’s largest seaport and largest airport by including a specific
29 exemption to allow for additional fossil fuel storage tank capacity
30 for exclusive use at an airport, surface passenger terminal, marine,
31 truck or air freight terminal, drydock, ship or barge servicing
32 facility, or rail yard. (See [CP p]olicies 6.20 through 6.22)[.] The
33 amendments do not limit expansion of pipeline infrastructure,
34 marine terminals or rail facilities. The amendments allow new

1 intermodal fossil fuel terminals with a fossil fuel storage tank
2 capacity of up to 2 million gallons and terminals of any size that
3 transport fuel exclusively by truck.

4 “The City acknowledges the role that FFTs play in serving other
5 businesses and the regional economy to sustain the movement of
6 goods. This role is the main reason that the City has opted to
7 designate the existing FFTs as a limited use that allows for the
8 continued operation, maintenance and improvement of the
9 multimodal infrastructure at the FFTs.” Record 180.

10 Petitioners argue that the city council’s findings that CP policies 9.30 and
11 9.32 are met are not supported by an adequate factual base.

12 Petitioners argue, again, that the city council mischaracterizes the 2022
13 FFT Amendments because, according to petitioners, they prohibit all new
14 intermodal fuel terminals regardless of size. Petition for Review 37. This
15 argument is similar to the argument we rejected in the second assignment of error,
16 and we reject it here for the same reason.

17 CP policy 9.30 refers to the city’s “*multimodal* freight transportation
18 system” and CP policy 9.32 refers to the city’s role as a “*multimodal* hub.”
19 Petitioners argue that forecasts of regional demand are not sufficient evidence to
20 rely on to conclude that the amendments

21 “will not impact *the mode of transportation* because it does not
22 account for the real-world aspects of terminal operations, the fuel-
23 transportation marketplace, and anticipated future events (e.g.,
24 different demand/need for individual fuel products, role of
25 specialized infrastructure, changes in technology/individual product
26 demand/aging infrastructure affecting the need for new or relocated
27 facilities, or the impacts of a future earthquake the FFT
28 Amendments are meant to address).” Petition for Review 37
29 (emphasis added).

1 For the reasons set forth in our resolution of the second subassignment of error,
2 we reject this argument.

3 Lastly, petitioners argue that there is not an adequate factual base for the
4 city council's conclusion that the 2022 FFT Amendments comply with the
5 direction in CP policy 9.32 to maintain the city's role as a multimodal hub for
6 movement of goods and enhance the network of multimodal freight corridors,
7 because fuel may come from outside the region in the future.

8 The city responds that the city council concluded that this policy is met
9 because intermodal terminals with less than two million gallons of storage are
10 allowed. Multiple smaller terminals in different ownerships are possible. The city
11 council also found that there will not be a change in transportation modes because
12 of flat growth in usage and any increase in demand can be met from supply from
13 other distribution points. *See* Record 178-83. The evidence provides an adequate
14 factual base for the city council's decision that the amendments comply with the
15 policies.

16 The fifth subassignment of error is denied.

17 **E. Sixth Subassignment of Error**

18 The CP contains policies and objectives to implement the Guild's Lake
19 Industrial Sanctuary Plan (GLISP).¹² These include:

¹² As we explained in *CPBT IV*:

1 **“GLISP Policy 2** Maintain, preserve and improve the intermodal
2 and multimodal transportation system to provide for the smooth
3 movement of goods and employees into and through the [GLIS].”

4 **“Objective 2.1** Maintain, protect, and enhance the public and
5 private multimodal transportation investments in the GLIS,
6 including rail and marine terminal facilities, to ensure its continued
7 viability as a major center for the import and export of industrial
8 products in the state of Oregon.” GLISP at 38.

9 It is undisputed that these policies apply to the decision.

10 The city council addressed the policy and objective at Record 199-201.

11 The city council’s findings include that the CP defines

12 “‘maintain’ to mean keep what you have; conserve; preserve;
13 continue. The [FFT] amendments do not include map changes, nor
14 do they allow for new incompatible land uses, therefore, these
15 changes will continue to provide the same opportunities for
16 investment to provide for the continued movement of goods through
17 the GLIS. * * * The [FFT] amendments do not amend the Citywide
18 System Plan or the Transportation System Plan, therefore the City
19 continues to plan for public infrastructure investments in the area to
20 provide for the continued viability as a major industrial center in
21 Oregon.” Record 200.

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

‘[t]he GLIS contains the majority of the industrially zoned land in Northwest Portland and is one of the few remaining large urban industrial districts in the United States.’” 81 Or LUBA at 714.

1 The city council also found that it interprets “enhance”

2 “to mean to intensify or improve. The City Council finds that not
3 every decision is required to enhance investments in the multimodal
4 transportation system. The [FFT] regulations apply to only one type
5 of business that makes up a minority part of the businesses found in
6 GLIS. The City Council finds that the ordinance maintains the GLIS
7 [as] a major import and export freight hub by designating the
8 existing FFTs as a limited use, as opposed to a non-conforming use,
9 that allows the terminals to continue to operate and invest in
10 upgrades and supports opportunities for growth through exceptions,
11 such as jet or renewable fuels, to the storage capacity restrictions. *
12 * * The amendments support Oregon’s largest seaport and largest
13 airport by including a specific exemption to allow for additional
14 fossil fuel storage tank capacity for exclusive use at an airport,
15 surface passenger terminal, marine, truck or air freight terminal,
16 drydock, ship or barge servicing facility or rail yard. The
17 amendments protect the private multimodal investments at the FFTs
18 by allowing for the maintenance, replacement and reconfiguration
19 of existing fossil fuel storage tank capacity.” Record 200-201.

20 Petitioners argue that the city council’s findings are inadequate because
21 the findings do “not account for the real-world aspects of terminal operations, the
22 fuel-transportation marketplace, and anticipated future events.” Petition for
23 Review 39. Petitioners also argue that the city council’s decision that the 2022
24 FFT Amendments comply with these policies is not supported by an adequate
25 factual base, because the evidence is insufficient to support the city council’s
26 conclusion that overall terminal capacity in the GLISP is sufficient to meet
27 demand.

28 The city responds that the GLISP area of the city is included in the regional
29 analysis and therefore the market needs of businesses within the area were

1 considered. Respondent's Brief 31. The city also responds that new intermodal
2 facilities are allowed in the GLISP within specific parameters. We agree with the
3 city that this evidence provides an adequate factual base for the city council's
4 decision that the amendments comply with the policies.

5 The sixth subassignment of error is denied.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

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

11 "The dormant Commerce Clause is the negative implication of that
12 provision, as developed through case law, that 'denies the States the
13 power unjustifiably to discriminate against or burden the interstate
14 flow of articles of commerce.'" *CPBT II*, 289 Or App at 745
15 (quoting *Oregon Waste Systems, Inc. v. Department of*
16 *Environmental Quality of Ore.*, 511 US 93, 98, 114 S Ct 1345, 128
17 L Ed 2d 13 (1994)).

18 Petitioners' fourth assignment of error is that the 2022 FFT Amendments
19 violate the dormant Commerce Clause. We will reverse or remand a local
20 government decision that we determine is unconstitutional. ORS
21 197.835(9)(a)(E).

1 **A. Issue Preclusion**

2 The petitioners in *CPBT I* and *CPBT IV* argued that the version of the FFT
3 Amendments at issue in those appeals violated the dormant Commerce Clause.

4 The Court of Appeals described the 2016 FFT Amendments as permitting

5 “all ‘Existing Bulk [FFTs],’ but those facilities cannot expand
6 beyond the storage capacity that they had as of the effective date of
7 the amendments. The amendments also prohibit new ‘Bulk [FFTs],’
8 essentially prohibiting new fossil-fuel terminals that store more than
9 two million gallons of fossil fuel, but permitting those that store two
10 million gallons or fewer. There are * * * exceptions, discussed later
11 in this opinion, that permit the construction of new bulk terminals
12 that hold more than two million gallons. Those exceptions include
13 allowances for construction of new bulk terminals in places like
14 airports that store airplane fuel, retail gas stations, and terminals
15 built for distributors and wholesalers who receive and deliver fuel
16 solely by trucks.” *CPBT II*, 289 Or App at 744.

17 Intervenors argue that petitioners should be precluded from raising the
18 dormant Commerce Clause argument because it was raised by the same
19 petitioners in *CPBT IV*. Intervenor-Respondent’s Brief 26. The parties agree that
20 the 2022 FFT Amendments differ from prior FFT Amendments because they
21 include a provision that fuel storage capacity can be expanded at existing
22 terminals in order to comply with the city’s Renewable Fuel Standard
23 (Renewables Provision). The 2022 FFT Amendments are not identical to the prior
24 amendments. For that reason, we disagree that petitioners are precluded from

1 challenging the 2022 FFT Amendments as a violation of the dormant Commerce
2 Clause.¹³

3 **B. First Subassignment of Error**

4 In their first subassignment of error, petitioners maintain:

5 “*The FFT Amendments are facially discriminatory.* They prohibit
6 new intermodal fuel terminals and expansion of fuel storage
7 capacity at existing terminals, unless that infrastructure is for fuel to
8 be used exclusively by local users or at local businesses/facilities.”
9 Petition for Review 42 (emphasis added).

10 Petitioners argue that although the 2022 FFT Amendment largely regulate FFTs
11 in the same manner as the 2016 and 2019 amendments,

12 “the 2022 FFT Amendments include a new provision that even more
13 explicitly discriminates against consumers located outside the City.
14 Language was added to PCC 33.920.100(B)(15) stating that fuel
15 storage capacity can be expanded at existing Bulk Terminals in
16 order to ‘comply with the Renewable Fuel Standard (PCC 16.60
17 Motor Vehicle Fuels) * * *.’” Petition for Review 44 (quoting
18 Record 270).

19 The Court of Appeals has explained:

20 “When applying the dormant Commerce Cause to a particular local
21 law, ‘the first step * * * is to determine whether [the law] regulates
22 evenhandedly with only incidental effects on interstate commerce,
23 or discriminates against interstate commerce.’ *Oregon Waste*
24 *Systems, Inc.*, 511 U.S. at 99 (internal quotation marks omitted).
25 ‘Discrimination’ under the dormant Commerce Clause ‘simply
26 means differential treatment of in-state and out-of-state economic

¹³ Intervenors argue that we should consider only the challenges to the Renewables Provision. We decline to limit our review.

1 interests that benefits the former and burdens the later.’ *Id.*” *CPBT*
2 *II*, 289 Or App at 745.

3 Discrimination assumes a comparison of substantially similar entities. There is
4 no local preference in violation of the dormant Commerce Clause in the absence
5 of actual or prospective competition between in-state and out-of-state interests.

6 The party alleging a violation of the dormant Commerce Clause bears the
7 burden of demonstrating that the amendments are discriminatory. *CPBT II*, 289
8 Or App at 746. Petitioners maintain that no court has considered the alleged
9 discrimination between (1) infrastructure used to transport fuel to users and
10 entities within the city, and (2) the same infrastructure used to transport fuel to
11 users and entities outside the city. Petition for Review 42-43. We agree with the
12 respondents that the 2022 FFT Amendments do not favor service to locally based
13 users/entities over users/entities based elsewhere. Those similarly situated are
14 treated similarly. An FFT located within the city is treated the same irrespective
15 of the homebase of the user/entity. This argument was discussed by the Court of
16 Appeals in *CPBT II* where it explained:

17 “Columbia Pacific contends that the amendments discriminate in
18 violation of the dormant Commerce Clause because United States
19 Supreme Court precedent prohibits states from providing their own
20 consumers advantages over out-of-state consumers. But, as with the
21 analysis above, those cases consider the effect of the state or local
22 statute on similarly situated economic actors – *i.e.*, in-state and out-
23 of-state consumers. In *Camps Newfound/Owatonna, Inc.*, for
24 instance, the Maine property tax at issue did not tax Maine camps
25 that served largely in-state campers, but did tax Maine camps that
26 served otherwise similarly situated out-of-state campers. That
27 resulted in a greater financial burden on out-of-state campers in

1 Maine than on in-state campers. *The amendments here do not favor*
2 *Oregon consumers when compared to out-of-state consumers. They*
3 *do not regulate the conduct of out-of-state consumers in Oregon,*
4 *nor do they regulate out-of-state consumers' conduct in their*
5 *states.”* 289 Or App at 750 (emphasis added, internal citations
6 omitted (citing *Camps Newfound/Owatonna, Inc. v. Town of*
7 *Harrison*, 520 US 564, 581, 117 S Ct 1590, 137 L Ed 2d 852
8 (1997))).

9 We agree with the city that nowhere do the amendments prohibit out-of-state
10 entities from engaging in the same activities that in-state entities are allowed to
11 pursue. A Georgia-based company owning a terminal in the city is treated the
12 same way as an Oregon-based company owning a terminal in the city. An
13 Oregonian purchasing gas at a station in the city is treated the same as a Floridian
14 purchasing gas at a station in the city.

15 Furthermore, nothing in the amendments requires that fuels meeting the
16 city's Renewable Standard only be used in the city or by local users or local
17 facilities. The 2022 FFT Amendments are not facially discriminatory.

18 The first subassignment of error is denied.

19 **C. Second Subassignment of Error**

20 Petitioners' second subassignment of error is that the 2022 FFT
21 Amendments have a discriminatory purpose, that is to block infrastructure used
22 to export fuel outside the region while not impacting local users. The city
23 concedes that the amendments do not allow new infrastructure which brings
24 fossil fuel into the city and immediately transfers it (*i.e.* does not store it) to
25 another mode of transportation. Petitioners argue that this is because the city is

1 trying to limit service to the regional market as required by CP policy 6.48 and
2 avoid harming the local economy, while rejecting fossil fuel projects proposed to
3 serve other areas.

4 Intervenor-Respondent's Brief 41. We agree with
5 intervenors that "[p]etitioners do not point to a single case, where
6 a court has found a law to be discriminatory based solely on a legislative purpose
7 or expression of intent." Intervenor-Respondent's Brief 41. We agree with
8 intervenors that "Policy 6.48 does not direct the City to 'limit fossil fuel
9 distribution and storage facilities to those that only serve the regional market.'
10 There is no prohibition on facilities serving international or interstate markets
11 outside the region." Intervenor-Respondent's Brief 40. We agree with intervenors
12 that petitioners have not shown that the amendments have a discriminatory
13 purpose or that the purpose alone violates the dormant Commerce Clause. We
14 also agree with intervenors that an intent to serve a regional market does not
15 equate to an intent to serve only Oregon. The city council explains in its findings
16 that CP policy 6.48 is met because the amendments are consistent with service to
17 a region that includes areas within Washington and Idaho. *See* Record 140.
18 Petitioners have not established a basis for reversal or remand.

19 The second subassignment of error is denied.

20 **D. Third Subassignment of Error**

21 Petitioners' third subassignment of error is that the 2022 FFT Amendments
22 have a discriminatory effect because they block interstate users but protect local
users. Petitioners contend that a local body cannot limit unwanted commerce to

1 the amount necessary to serve local interests. Intervenor-
2 Amendments allow for new terminals with less than two million gallons of
3 storage capacity, regardless of the market or end users they serve.” Intervenor-
4 Respondent’s Brief 41 (citing Record 265-72). This is consistent with the Court
5 of Appeals’ conclusion in *CPBT II*

6 “that the amendments in this case do not bar out-of-state commerce
7 from entering or operating within the state in the same manner that
8 that New Jersey law improperly prevented out-of-state commerce
9 from reaching New Jersey in *Philadelphia*. Unlike in that case, the
10 amendments do not bar the interstate delivery of out-of-state
11 products, here fossil fuels, into Oregon. Indeed, the amendments do
12 not prohibit fuel exports to or through Portland, but place
13 restrictions on the size of certain fuel terminals that may be used as
14 export facilities. As discussed, they also do not discriminate against
15 similarly situated out-of-state and in-state economic interests.”
16 *CPBT II*, 289 Or App at 749-50 (referencing *Philadelphia v. New*
17 *Jersey*, 437 US 617, 98 S Ct 2531, 57 L Ed 2d 475 (1978)).

18 We agree with respondents that the 2022 FFT Amendments do not discriminate
19 against similarly situated interests.

20 The city also responds that petitioners have failed to meet their burden to
21 plead facts plausibly suggesting substantial harm to interstate commerce. The
22 Court of Appeals explained in *CPBT II* that “[t]he burden remains on [petitioner],
23 as the party challenging the local law, to demonstrate that any burden imposed
24 by the law on interstate commerce is clearly excessive in relation to the putative
25 local benefits.” *Id.* at 751. The amendments provide legitimate putative local
26 benefits including limiting the number of FFTs in a moderate to high-risk

1 earthquake liquefaction zone, reducing the risk of potential large explosions and
2 catastrophic accidents, and protecting local public health. *Id.* at 752.

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

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

13 The Court of Appeals held in *CPBT II* that petitioners did not meet their
14 burden to establish that the claimed burdens on interstate commerce were clearly
15 excessive in relation to the putative local benefits. The United States Supreme
16 Court recently confirmed that a party asserting a dormant Commerce Clause
17 claim must “plead facts ‘plausibly’ suggesting a substantial harm to interstate
18 commerce[.]” *Nat’l Pork Producers Council v. Ross*, 598 US 356, 385, 143 S Ct
19 1142, 215 L Ed 2d 336 (2023); *see also* Respondent’s Brief 32. *Nat’l Pork*
20 *Producers Council* concerned a challenge to a California law forbidding the sale
21 of whole pork meat that came from breeding pigs (or their immediate offspring)
22 where the pigs were confined in a manner that prevented them from lying down,
23 standing up, fully extending their limbs or turning around freely. The plaintiff

1 argued that the law violated the dormant Commerce Clause because most of the
2 cost of compliance would fall on non-California based firms. The Court
3 concluded that the dormant Commerce Clause does not protect a specific method
4 of business operation and that the facts “pleaded in [the case] merely allege harm
5 to some producers’ favored ‘methods of operation’” and that “[a] substantial
6 harm to interstate commerce remains nothing more than a speculative
7 possibility.” *Id.* at 386-87.

8 We agree with the city that petitioners have not pled facts showing harm
9 to interstate commerce as a result of the 2022 FFT Amendments. Petitioners have
10 failed to meet their obligation to establish the 2022 FFT Amendments impose a
11 burden on interstate commerce.

12 The third subassignment of error is denied.

13 The fourth assignment of error is denied.

14 The decision is affirmed.