

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

3  
4                   MICHAEL MEYER,  
5                   *Petitioner,*

6  
7                   vs.

8  
9                   CITY OF KING CITY,  
10                  *Respondent.*

11  
12                  LUBA No. 2023-059

13  
14                  FINAL OPINION  
15                  AND ORDER

16  
17                  Appeal from City of King City.

18  
19                  Kenneth P. Dobson filed the petition for review and reply brief and argued  
20 on behalf of petitioner.

21  
22                  Peter O. Watts filed the respondent's brief and argued on behalf of  
23 respondent.

24  
25                  RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board  
26 Member, participated in the decision.

27  
28                  AFFIRMED

02/14/2024

29  
30                  You are entitled to judicial review of this Order. Judicial review is  
31 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a city council decision adopting a master plan and incorporating the master plan into the city’s comprehensive plan.<sup>1</sup>

**BACKGROUND**

The 528-acre Kingston Terrace planning area (Kingston Terrace) is located south of SW Beef Bend Road and north of the Tualatin River and the Beef Bend Natural Area, and includes a portion of SW Elsner Road. The planning area is adjacent to the city’s western boundary and in 2011, Metro, the regional planning agency, designated the planning area as urban reserve.<sup>2</sup>

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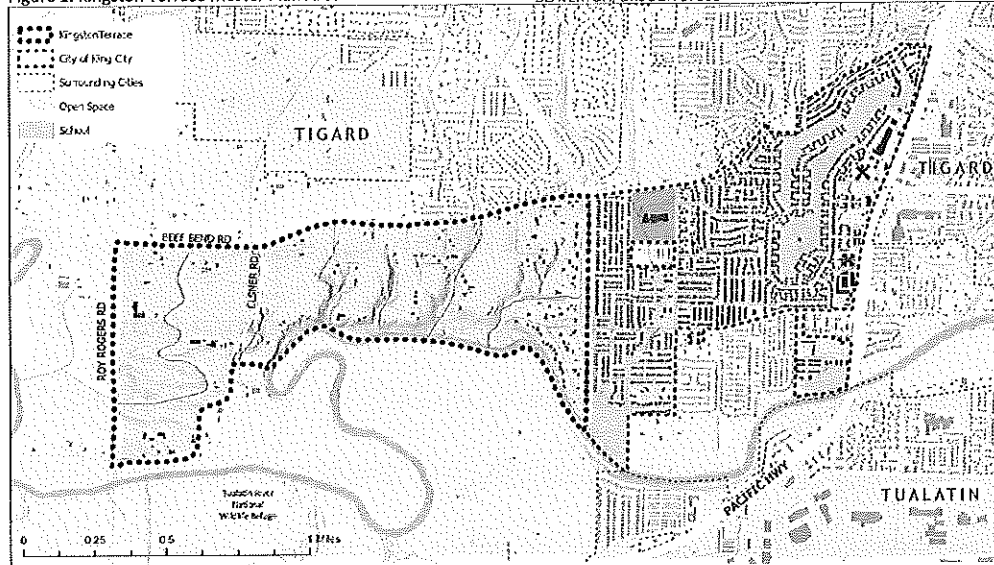
<sup>1</sup> Petitioner identifies the appealed land use decision as “that land use decision of Respondent City of King City dated July 19, 2023, adopting Ordinance 2023-02 adopting the Kingston Terrace Master Plan and Ordinance 2023-03 amending the Comprehensive Plan to support the Kingston Terrace Master Plan.” Notice of Intent to Appeal 1. The city issued one Notice of Decision. Record 6.

<sup>2</sup> OAR 660-021-0010(1) defines “urban reserve” as “lands outside of an urban growth boundary that will provide for:

- “(a) Future expansion over a long-term period; and
- “(b) The cost-effective provision of public facilities and services within the area when the lands are included within the urban growth boundary.”

9600 SW NIMBUS AVENUE, SUITE 100  
BEAVERTON, OREGON 97008

Figure 1. Kingston Terrace Master Plan Area



LUBA No. 2023-059 / Record 36

1

2 Record 36.

3 In 2018, the city council adopted a concept plan setting out the city’s vision  
 4 for urbanization of the Kingston Terrace planning area. Traffic modeling  
 5 conducted by the city as part of concept plan development indicated that absent  
 6 a new east-west collector road, SW Beef Bend Road would need to be expanded  
 7 to five lanes from Roy Rogers Road east to Highway 99. Determining that this  
 8 expansion of SW Beef Bend Road would require the demolition of multiple  
 9 residences, including several multifamily structures, the city council concluded  
 10 that a new east-west collector should be constructed within the planning area  
 11 instead of expanding SW Beef Bend Road.

1           The Columbia Land Trust holds a conservation easement of approximately  
2 12 acres in the southeastern portion of the Kingston Terrace planning area on a  
3 parcel of land owned by the Bankston family (Bankston property). Record 117.  
4 The city council identified a portion of the conservation easement area as the  
5 future location of the collector road. Metro subsequently approved the city’s  
6 concept plan and brought the planning area into the urban growth boundary via  
7 Metro Ordinance 18-1427 (Ordinance 18-1427). Ordinance 18-1427 includes a  
8 condition of approval requiring that the city “work with the Columbia Land Trust  
9 to protect, to the maximum extent possible, the portion of the Bankston property  
10 covered by the conservation easement.” Record 85.

11           In 2020, the city began its master planning process for the Kingston  
12 Terrace planning area. During the fall of 2022, the draft master plan was  
13 prepared. In early 2023, revisions were made to the draft master plan. On April  
14 26, 2023, the planning commission held a public hearing and recommended that  
15 the city council approve and adopt the master plan. On June 21, 2023, the city  
16 council held a public hearing “to consider the [p]lanning [c]ommission  
17 recommendation, hear public testimony, apply applicable decision-making  
18 criteria, and consider appropriate findings and conclusions in support of the  
19 adoption” of the master plan. Record 24-25. The city council adopted the master  
20 plan and amended its comprehensive plan to include the master plan. This appeal  
21 followed.

1 **FIRST ASSIGNMENT OF ERROR**

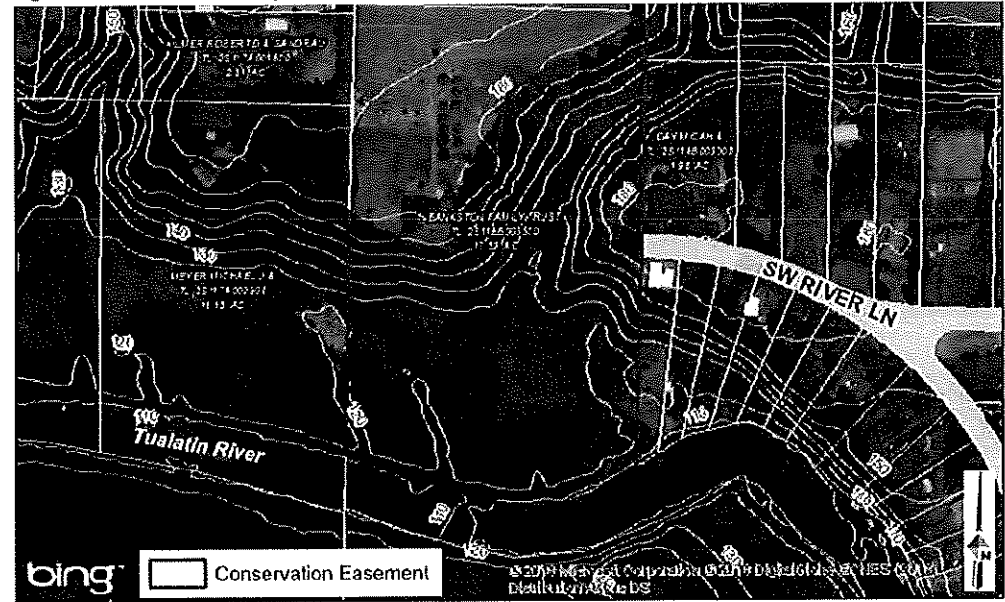
2 **A. Overview**

3 The conservation easement is located

4 “in the southeastern portion of the planning area (Rural Character  
5 Neighborhood) that includes portions of the Tualatin River  
6 floodplain, adjacent forested bluffs along a tributary stream, and  
7 associated riparian areas. The conservation easement agreement  
8 states that the protected property includes:

- 9 “• Forest and forested wetlands that provide wildlife habitat for  
10 birds and animals
- 11 “• Several creeks that provide cool water to the Tualatin River  
12 and habitat for fish and amphibians
- 13 “• Riparian forest and floodplain that shade the river and hold  
14 the soil from eroding into the river
- 15 “• View of undeveloped natural area from the Tualatin River for  
16 river users[.]” Record 117.

Figure 7. Bankston Family Trust Conservation Easement



17 Source: DOWL

1 Record 5062.

2 Metro staff described the easement’s stated purpose as:

3 “largely to preserve and protect enumerated ‘conservation values’  
4 (e.g., wildlife habitat, natural, scenic, and open space qualities, etc.)  
5 by: confining development, management, and use of the property to  
6 certain activities and prohibiting activities that significantly impair  
7 or interfere with the conservation values. The easement is also  
8 intended to protect the ‘relatively natural’ habitat of fish, wildlife,  
9 and plants and to preserve certain open space for scenic enjoyment  
10 of the general public.” Record 258.

11 The city council adopted findings explaining that the approved master plan  
12 “proposes an extension of SW Fischer Road to complete an  
13 east/west collector street from Highway 99 to Roy Rogers Road.  
14 The collector is anticipated to be a two-lane street that spans over  
15 the northern portion of the conservation easement where it is  
16 narrowest and where the least valuable resources within the  
17 conservation easement exist.” Record 85.

18 Petitioner’s first assignment of error is that the master plan does not comply with  
19 Ordinance 18-1427’s condition of approval providing:

20 “The Columbia Land Trust holds a conservation easement over  
21 portions of the Bankston property, which King City’s concept plan  
22 identifies as the intended location for a key transportation facility  
23 serving the expansion area. King City shall work with the Columbia  
24 Land Trust to protect, to the maximum extent possible, the portion  
25 of the Bankston property covered by the conservation easement.”

26 **B. Standard of Review**

27 Petitioner identifies ORS 197.835(8) as the applicable standard of review.

28 Petition for Review 14. ORS 197.835(8) provides that we will reverse or remand

1 a local government decision applying a land use regulation if the decision is not  
2 in compliance with an applicable provision of the land use regulation.

3 The city relies on *Restore Oregon v. City of Portland* as authority for its  
4 proposition that ORS 197.835(6) is the *sole* applicable standard of review for  
5 amendments to local comprehensive plans. 301 Or App 769, 458 P3d 703 (2020).  
6 ORS 197.835(6) provides that the board shall reverse or remand a comprehensive  
7 plan amendment if the amendment is not in compliance with the goals. The city  
8 argues that because the city council’s decision is an amendment to the  
9 comprehensive plan, we may only reverse or remand the decision if the  
10 amendments are not in compliance with the goals.<sup>3</sup> Response Brief 1-2, 7.

11 In *Restore Oregon*, the court explained that the decision on appeal included  
12 a legislative amendment to the comprehensive plan. Citing a provision of the  
13 city’s zoning code, the court explained that “the city was required to find that the  
14 amendment is ‘consistent with the goals and policies of the Comprehensive Plan,

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<sup>3</sup> The city argues “LUBA may reverse or remand the Master Plan Ordinance and Amendment Ordinance only if the amendments are not in compliance with the goals.” Response Brief 7. The city also maintains:

“Because Metro Ordinance 18-1427 is not a statewide planning goal, even if LUBA were to conclude that the City decisions did not comply with Metro Ordinance 18-1427, LUBA still would have no basis to reverse or remand under ORS 197.835(6). See, [*Restore Oregon*] (identifying ORS 197.835(6) as the proper standard of review for amendments to local comprehensive plans.” Response Brief 2, 8.

1 Metro’s Urban Growth Management Function Plan, the Statewide Planning  
2 Goals, and any relevant area plans adopted by the City Council. PCC  
3 33.810.0050(B).” *Id.* at 774-75. The court further explained, “[a]t LUBA, Restore  
4 Oregon argued that the city had failed to make adequate findings, and failed to  
5 develop an ‘adequate factual base’ as required by Statewide Planning Goal 2, that  
6 demonstrated that the city had complied with, among other [comprehensive plan]  
7 policies, Policy 4.48.” *Id.* at 775 (footnote omitted). The court observed that  
8 Restore Oregon’s challenges required us to review the decision under ORS  
9 197.835(6), requiring compliance with the goals, *and* ORS 197.835(7)(a),  
10 requiring compliance with the comprehensive plan. *Id.* at 778.

11 Here, the city council identified the following as containing criteria  
12 applicable to its decision:

- 13 “• Oregon Statewide Planning Goals
- 14 “• Metro Regional Growth Management Functional Plan
- 15 “• Metro UGB Decision, Exhibit C to Ord 18-1427
- 16 “• King City Urban Planning Area Agreement
- 17 “• King City Comprehensive Plan.” Record 39.

18 ORS 197.015(11) defines “land use regulation” as “any local government zoning  
19 ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or  
20 similar general ordinance establishing standards for implementing a  
21 comprehensive plan.” Petitioner does not explain why Ordinance 18-1427 is a



1 land use regulation under ORS 197.015(11) and subject to our review under ORS  
2 197.835(8) (the decision applies but is not in compliance with a land use  
3 regulation). The city does not, however, argue that Ordinance 18-1427 is not an  
4 approval criterion. The city council found, and the city does not dispute, that  
5 Ordinance 18-1427 contains applicable approval criteria.<sup>4</sup> For purposes of this  
6 decision, we assume that the master plan’s compliance with the condition in  
7 Ordinance 18-1427 is subject to our review.<sup>5</sup>

8 Petitioner also argues that the city’s findings are not supported by  
9 substantial evidence in the record and that we must remand the decision under  
10 ORS 197.835(9)(a)(C). Petition for Review 17. Substantial evidence exists to  
11 support a finding of fact when the record, viewed as a whole, would permit a

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<sup>4</sup> We observe that the city council found that Goal 2 of the city’s comprehensive plan includes a policy requiring that the city ensure future legislative changes to the comprehensive plan be consistent with the goals, state law, “and the Metropolitan Service District (Metro).” Record 91.

<sup>5</sup> Further, petitioner’s first assignment of error argues, in part, that the selected road alignment is clearly in violation of the condition because “to read the term used in the ordinance – ‘maximum extent possible’ – as ‘maximum extent practical’ would violate the canon of statutory interpretation set forth at ORS 174.010 to ‘not insert what has been omitted or omit what has been inserted’ when interpreting laws” and that a Metro “planner’s interpretation of [the requirement] is not entitled to any deference.” Petition for Review 15-16. We understand the first subassignment of error to include a misconstruction of law argument within our scope of review under ORS 197.835(9)(a)(D). *See Deumling v. City of Salem*, 76 Or LUBA 99 (2017) (LUBA review of a comprehensive plan amendment decision under ORS 197.835(6), 197.835(9)(a)(C) and (D)).

1 reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172,  
2 179, 855 P2d 608 (1993). The city does not dispute the applicability of the  
3 substantial evidence standard of review. We note, however, that the city council’s  
4 decision is legislative.<sup>6</sup> Statewide Planning Goal 2 (Land Use Planning) requires  
5 that land use decisions be supported by an adequate factual base. “An ‘adequate  
6 factual base’ for a legislative land use decision ‘is synonymous with the  
7 requirement that a decision be supported by substantial evidence.’” *Restore*  
8 *Oregon*, 301 Or App at 778.

9 With that understanding, we proceed to the first subassignment of error.

10 **C. First Subassignment of Error**

11 Petitioner argues that the selected road alignment is in violation of the  
12 Ordinance 18-1427 condition of approval because it does not protect the  
13 conservation easement area to the maximum extent possible. We understand  
14 petitioner’s first subassignment of error to be that the plain text of the  
15 conservation easement condition requires complete avoidance of the easement  
16 area if possible or, at a minimum, a showing of *de minimis* impacts on the

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<sup>6</sup> “City council actions are generally legislative. \* \* \* These include amendments to the text of the comprehensive plan \* \* \*.” Record 719; King City Code 16.40.040 (2023). “[A] local government is not necessarily required to adopt findings supporting a legislative decision; nonetheless the record on appeal must be sufficient to demonstrate that ‘required considerations were indeed considered.’ *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002).” *Deumling*, 76 Or LUBA at 106.

1 easement area. Petitioner argues that the dictionary definition of “protect” is “to  
2 cover or shield from exposure, injury, damage or destruction,” and that in the  
3 context of the statewide planning goals, the court has interpreted “protect” to  
4 require shielding from more than *de minimis* impacts. Petition for Review 16.  
5 Petitioner argues that the city improperly relies on an interpretation of the  
6 condition provided by Metro staff in which Metro staff opined:

7 “Condition E.8 requires that potential impacts to the conservation  
8 easement from the new road must be mitigated as much as possible.  
9 The condition does not require the City to spend any amount of  
10 public money, to lengthen vehicle trips and emergency vehicle  
11 response times, to install sewage lift stations, or to demolish existing  
12 homes in order to completely avoid the easement area. Rather, the  
13 condition compels the City to work with the Trust and to take steps  
14 that will protect the subject area as much as possible from potential  
15 impacts, while still achieving the stated purpose of Ordinance 18-  
16 1427, which is to provide additional land for development of needed  
17 housing.”<sup>7</sup> Record 259.

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<sup>7</sup> The Metro staff person’s letter states that the master plan

“demonstrate[s] a need to locate an east-west collector road with a bridge or ‘bottomless culvert’ at one of the narrowest points of the easement, impacting approximately half an acre of the 12-acre area in order to provide necessary access to the prospective housing development of the [planning area] UGB expansion area.” Record 259.

Metro staff also stated in their letter:

“In the UGB proceedings before the Metro Council in 2018, the Land Trust expressed concerns about the location of the new road as shown in the concept plan and potential impacts on the area

1 The city contends that the “Metro Council has either expressly or impliedly  
2 delegated [interpretation] authority to Metro Staff.” Response Brief 9. The city  
3 argues that the Metro staff person’s interpretation of the condition is therefore  
4 entitled to deference under ORS 197.829(1) as construed in *Siporen v. City of*  
5 *Medford*, 349 Or 247, 243 P3d 776 (2010).<sup>8</sup> ORS 197.829(1) provides that

6 “The Land Use Board of Appeals shall affirm a local government’s  
7 interpretation of its comprehensive plan and land use regulations,  
8 unless the board determines that the local government’s  
9 interpretation:

10 “(a) Is inconsistent with the express language of the  
11 comprehensive plan or land use regulation;

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protected by their easement. After considering testimony from the Land Trust, the City, and other interested parties, the Metro Council addressed this issue by adding Condition E.8.

“The condition directs the City to ‘work with the Columbia Land Trust’ in order to protect the easement ‘to the maximum extent possible.’ It is important to note that the condition does not require the City to avoid the easement area completely; rather, it requires the City and the Land Trust to attempt to work together to protect the easement area as best they can. If the intent of the Metro Council had been to prohibit the road from crossing any part of the easement, the Metro Council could have adopted a condition saying that. Instead, if the City concludes that a road alignment that crosses some part of the easement area is the only viable alternative, the City must then take steps to protect the easement from any resulting impacts ‘to the maximum extent possible.’” Record 258.

<sup>8</sup> The city cites ORS 197.828(2) as support for its argument that deference is owed to the decision. This provision sets out our standard of review for limited land use decisions and is not applicable.

1           “(b)     Is inconsistent with the purpose for the comprehensive  
2                     plan or land use regulation;

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

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

9     So-called “*Siporen* deference” is owed under ORS 197.829(1) when (1) a  
10    governing body of a local government; (2) makes an interpretation of its own  
11    land use policies; (3) that is plausible and not inconsistent with the standards set  
12    out in the statute. “[O]ne of the fundamental ideas behind applying [deference  
13    under ORS 197.829(1)] is that, when a governing body is responsible for enacting  
14    an ordinance, it may be assumed to have a better understanding than LUBA or  
15    the courts of its intended meaning.” *Siporen*, 349 Or at 258. We agree with  
16    petitioner that the opinion of a Metro staff person that the condition in a Metro  
17    ordinance is met is not a local governing body’s interpretation of its own land use  
18    ordinances and is not entitled to *Siporen* deference. *M & T Partners v. City of*  
19    *Salem*, 80 Or LUBA 221, 229-30 (2019), *aff’d sub nom, M & T Partners, Inc. v.*  
20    *Miller*, 302 Or App 159, 460 P3d 117 (2020).

21           We review the city’s interpretation to determine whether the city  
22    improperly construed the applicable law. ORS 197.835(9)(a)(D); *Miller*, 302 Or  
23    App at 170. In interpreting the condition, we will consider the text and context.  
24    *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009).

1 First, in construing the law, we are required to “ascertain and declare what  
2 is, in terms or in substance, contained therein, not to insert what has been omitted,  
3 or to omit what has been inserted; and where there are several provisions or  
4 particulars such construction is, if possible, to be adopted as will give effect to  
5 all.” ORS 174.010. The condition does not prohibit road placement within the  
6 easement area and we will not import a prohibition.

7 Second, undefined terms are given their general, ordinary meaning.  
8 Webster’s dictionary defines “possible” to include “being within or up to the  
9 limits of one’s ability or capacity as determined by nature, authority,  
10 circumstances, or other controlling factor.” *Webster’s Third New Int’l Dictionary*  
11 1771 (unabridged ed 2002). Definitions of “maximum” include “the greatest  
12 quantity or value attainable in a given case.” *Webster’s* at 1396. We do not find  
13 a *de minimis* impact on the easement area requirement in the condition, as  
14 petitioner advocates.

15 Third, the condition requires that the city “work with” the easement holder,  
16 Columbia Land Trust, to protect, “to the maximum extent possible, the portion  
17 of the Bankston property covered by the conservation easement.” Record 257-  
18 58. The text of the condition requires the city to “work with” the easement holder  
19 and there is no assertion that the city did not work with the easement holder.

20 Lastly, we consider the context. The condition is imposed in a Metro  
21 decision approving a concept plan that anticipated placement of a roadway on  
22 property that included an area subject to a conservation easement. We conclude

1 that the city did not misconstrue the condition by concluding that some  
2 measurable impact on the easement area is permissible, subject to working with  
3 the easement holder to minimize impacts.

4 The first subassignment of error is denied.

5 **D. Second Subassignment of Error**

6 Petitioner's second subassignment of error is that the city council's  
7 findings are inadequate to support the conclusion that the easement is protected  
8 to the maximum extent possible. Petitioner argues that the "findings regarding  
9 compliance with the regulation are so weak, skimpy, and illogical, that no  
10 reasonable person would rely on them in finding that the Conservation Easement  
11 was protected 'to the maximum extent possible.'" Petition for Review 17. In the  
12 second subassignment of error, petitioner also argues that the city council's  
13 decision is not supported by an adequate factual base.

14 The city council found:

15 "The collector is anticipated to be a two lane street that spans over  
16 the northern portion of the conservation easement where it is  
17 narrowest and where the least valuable resources within the  
18 conservation easement exist.

19 "The City anticipates that the bridge or bottomless culvert will  
20 impact up to 1/2-acre of the 12-acre easement. This alignment, along  
21 with protection and enhancement measures taken at the time of  
22 development, will minimize impacts to the conservation easement  
23 to the maximum extent possible. The majority of the easement that  
24 lies closer to the Tualatin River and contains high value resources  
25 will remain protected from development." Record 85.

1 The city council then proceeded to discuss several alternative road  
2 alignments. The city council’s findings explain:

3 “In 2022, as part of the [master plan] process, the City prepared the  
4 East/West Circulation Alternatives Analysis. This report was  
5 prepared to document the multi-disciplinary analysis process  
6 leading to the identification of a preferred east/west circulation  
7 alternative for the [master plan] area. Consistent with prior planning  
8 work in the study area through the Concept Plan, it was intended  
9 that this east/west circulation alternative function as a collector  
10 street to:

- 11 “• Link neighborhoods and other destinations across [the  
12 planning area] with particular focus on connecting residential  
13 areas with the proposed Main Street/Town Center
- 14 “• Connect [the planning area] to destinations within the existing  
15 city
- 16 “• Connect [the planning area] to Tigard’s River Terrace via an  
17 east/west and north /south collector street system.” Record  
18 86.

19 The city council’s findings further explain:

20 “Four alternative alignments were evaluated for the east/west  
21 collector along with a no build option. All four alternatives would  
22 connect to SW Fisher Road either directly or via SW 137<sup>th</sup> Avenue.  
23 SW Fischer Road is the only east/west street in existing King City  
24 designed to be a collector. Other possible connections, such as B and  
25 C Streets, which are private roads through a manufactured home  
26 park, a source of naturally occurring affordable housing, and SW  
27 Capulet Lane would require the demolition of multiple homes.”  
28 Record 86.





1 along the Tualatin River, would significantly impact conservation values of those  
2 properties and of the river itself.” Record 88.

3 “In response to Columbia Land Trust concerns, the City of King  
4 City has narrowed the street profile from three to two lanes and  
5 adjusted the street alignment further north to avoid the highest value  
6 resources. The street and multi-use path on the south side of the  
7 street will act as a buffer between development and the Tualatin  
8 River. In addition, the City has offered to designate the entire parcel  
9 as Recreational Open Space [ROS] as an additional layer of  
10 protection against future development.” Record 89.

11 Petitioner argues:

12 “the City’s comment on how the roadway would avoid the ‘highest  
13 value’ portion of the Conservation Easement ignores the fact that  
14 Metro’s Map of Riparian and Upland Habitat, which was included  
15 in the city’s own Natural Resources Baseline Report, shows that the  
16 entire easement consists of the highest quality Riparian and Upland  
17 habitats.” Petition for Review 20.

18 Petitioner argues that the city council statement that it has offered to zone the  
19 entire parcel as ROS as an additional layer of protection against future  
20 development is meaningless because the property is already protected by the  
21 conservation easement.

22 Petitioner argues that the city council’s decision selecting Alternative 2 is  
23 not supported by an adequate factual base when other available alignments are  
24 considered. For example, petitioner argues that under the city council’s  
25 evaluation of social and environmental justice factors, Alternative 3 would be the  
26 most desirable. Petitioner maintains that “the only significant difference between  
27 Alternative 2 and Alternative 3, at least in the mind of the City, was the idea that

1 by using Alternative 2, developers could defray some of the costs of constructing  
2 roadways by using state, regional, and local government funding.” Petition for  
3 Review 18. Petitioner argues:

4 “No reasonable person can rely on the possibility of financial  
5 benefits to private developers as a basis for finding that the  
6 Conservation Easement had been protected ‘to the maximum extent  
7 possible.’ This is especially true considering the findings do not set  
8 forth any estimated dollar figure of potential savings private  
9 developers might receive through the use of taxpayer money by  
10 extending Fischer Road through the Conservation Easement.”  
11 Petition for Review 18-19.

12 Petitioner also argues that Alternative 3N to the road alignment would  
13 avoid the easement entirely. Petition for Review 18. Petitioner argues that data in  
14 the report relied upon by the city council shows only very minor differences in  
15 travel time between Alternative 2 versus Alternative 3N. Petitioner also argues  
16 that the findings do not acknowledge that there is minimal difference between  
17 Alternative 2 versus Alternative 3N development costs or that Alternative 4  
18 would be less than a third the cost of Alternative 2. Petitioner also contends that  
19 the findings discuss increased traffic on Beef Bend Road associated with  
20 Alternative 4 as a basis for rejection, but the alternative analysis “shows only  
21 ‘nominal’ differences between the various alternatives and the ‘level of service’  
22 ratings using each of the four alternatives are identical.” Petition for Review 19.  
23 Lastly, petitioner argues that the city council’s findings ignore another potential  
24 route suggested by the public and that this failure to address an additional  
25 alternative route is grounds for remand of the decision. Petition for Review 21.

1 In sum, petitioner contends that the evidence does not support the conclusion that  
2 the differences between Alternative 2 and other alternatives are meaningful and  
3 that Alternative 2 protects the easement area to the maximum extent possible.  
4 Petition for Review 19.

5 The city responds, generally, that there is substantial evidence in the record  
6 supporting the decision. Response Brief 8. We will not reweigh the evidence  
7 where a reasonable person could reach the city council's conclusion. *Willamette*  
8 *Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, 366 (2013). For the reasons  
9 explained below, we conclude that the findings are adequate and are supported  
10 by an adequate factual base.

11 First, we note that some of petitioner's arguments are not adequately  
12 developed for our review. *Deschutes Development Co. v. Deschutes County*, 5  
13 Or LUBA 218, 220 (1982). Petitioner contends but does not develop an argument  
14 that the city was required to consider a fifth alignment proposed by the public.  
15 Petitioner argues that the city council's discussion of its ability to apply an ROS  
16 designation to the planning area "is meaningless because the entire parcel is  
17 already subject to a recorded and enforceable conservation easement that offers  
18 the same if not greater levels of protection." Petition for Review 20. Petitioner's

1 references to the implications of a fifth potential road alignment and future zoning  
2 options are conclusory.<sup>9</sup> We will not develop petitioner’s arguments for them.

3       Next, we do not agree with petitioner that a map in the record showing that  
4 the entire easement has the highest quality riparian and upland habitats  
5 necessarily means that the city council finding that the area impacted by the  
6 easement has less *relative* value is not supported by an adequate factual base.  
7 Petition for Review 20. The city found: “The majority of the easement that lies  
8 closer to the Tualatin River and contains high value resource will remain  
9 protected from development.” Record 85. We understand the city council to have  
10 also found that Alternative 2 will avoid the highest value portion of the easement,  
11 will span over the northern part of the easement where the least valuable  
12 resources within the easement exist, and that the bridge or bottomless culvert will  
13 impact up to ½ acre of the 12-acre easement. Record 85. Petitioner does not  
14 dispute that Alternative 2 avoids the majority of the easement acreage.

15       Petitioner argues that the city council could not chose Alternative 2 over  
16 Alternative 3 based primarily on savings to private developers. We do not agree  
17 with petitioner’s characterization of this finding. The city council found that  
18 government funds would be more likely to be available for certain alignments

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<sup>9</sup> For example, petitioner does not discuss the provisions of the easement or the ROS zone or the applicable process to remove either from property.

1 and petitioner does not identify any reason that the availability of public funding  
2 for public infrastructure could not be considered by the city council.

3 We also disagree with petitioner and conclude that a reasonable person  
4 could determine that travel time and cost benefits associated with the selected  
5 alignment were meaningful. Moreover, the city council did not limit its  
6 considerations to travel times and cost benefits. Petitioner does not address some  
7 of the reasons that the city set out for selecting Alternative 2. For example, the  
8 city council found,

9 “Alternative 2 would likely require less right-of-way acquisition  
10 than Alternatives 3 or 4 due to its use of existing roadway rights-of-  
11 way.

12 “\* \* \* \* \*

13 “The alignment offers both a central spine or ‘backbone’ roadway  
14 through the development linking it most directly with the Kingston  
15 Terrace Town Center and the existing city. This has advantages for:

16 “Emergency response ([the fire department] has indicated a  
17 preference for Alternative 2)

18 “Good access to many neighborhoods and new public parks

19 “Potential future regional transit service through a developed  
20 are when densities are sufficient

21 “Good connectivity and minimized travel time for active and  
22 vehicular transportation

23 “Minimization of the potential for either long cul-de-sacs or  
24 closed end roadways that require out of direction travel,  
25 discourage pedestrian and bicycle use, and may result in  
26 added utility costs[.]” Record 87-88.

1 Fundamentally, petitioner disagrees with the balancing of objectives performed  
2 by the city council. Petitioner has not met its burden to establish that a reasonable  
3 person could not reach the conclusion reached by the city council. The decision  
4 is supported by adequate findings and an adequate factual base.

5 The second subassignment of error is denied.

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner's second assignment of error is that the decision does not comply  
9 with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas,  
10 and Open Spaces).<sup>10</sup> As petitioner observes, ORS 197.835(6) provides that we  
11 will reverse or remand an amendment to a comprehensive plan if it is not in  
12 compliance with the statewide planning goals.

13 Goal 5 is "To protect natural resources and conserve scenic and historic  
14 areas and open spaces." Petitioner argues that Goal 5 and its implementing  
15 regulations require local governments to identify, inventory, and develop  
16 programs to protect certain resources and that the findings of compliance adopted  
17 by the city are deficient because they focus almost exclusively on regional  
18 resources and largely ignore locally significant resources. Petitioner also argues  
19 that "[t]he annexation will allow new conflicting uses with existing Goal 5

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<sup>10</sup> Petitioner cites our standard of review set out in ORS 197.835(6), discussed above and providing that we reverse or remand a local government decision which is not in compliance with the applicable statewide planning goals. The city does not dispute that this is an applicable standard of review.

1 resources, thereby triggering the need for a new [economic, social, environmental  
2 and energy] analysis.” Petition for Review 23.

3 We have explained:

4 “As a general rule, post-acknowledgment plan amendments  
5 (PAPAs) must comply with the statewide planning goals, including  
6 Goal 5. ORS 197.175(2); 197.835(6) and (7). The Land  
7 Conservation and Development Commission has adopted an  
8 administrative rule that specifies the circumstances in which a local  
9 government is obligated to apply Goal 5 when adopting a PAPA.  
10 OAR 660-023-0250(3) provides:

11 “Local governments are not required to apply Goal 5 in  
12 consideration of a PAPA unless the PAPA affects a Goal 5  
13 resource. For purposes of this section, a PAPA would affect a  
14 Goal 5 resource only if:

15 “(a) The PAPA creates or amends a resource list or a  
16 portion of an acknowledged plan or land use regulation  
17 adopted in order to protect a significant Goal 5 resource  
18 or to address specific requirements of Goal 5;

19 “(b) The PAPA allows new uses that could be conflicting  
20 uses with a particular significant Goal 5 resource site  
21 on an acknowledged resource list[.]’

22 “To summarize, under the above rule, a local government must  
23 apply Goal 5 if the PAPA ‘would affect a Goal 5 resource.’ As  
24 potentially relevant in this appeal, a PAPA affects a Goal 5 resource  
25 in two circumstances. First, a PAPA ‘would affect a Goal 5  
26 resource’ if it ‘amends a \* \* \* portion of an acknowledged plan or  
27 land use regulation [that was] adopted in order to protect a  
28 significant Goal 5 resource. Second, a PAPA ‘would affect a Goal 5  
29 resource’ if it allows new ‘conflicting uses.’” *Johnson v. Jefferson*  
30 *County* 56 Or LUBA 72, 96 (2008) (footnotes omitted).



1           This PAPA does not amend a portion of the comprehensive plan adopted  
2 in order to protect a significant Goal 5 resource. We agree with the city that the  
3 decision does not allow “new uses that could be conflicting uses with a particular  
4 Goal 5 resource site on an acknowledged resource list.” Response Brief 9; OAR  
5 660-023-0250(3)(b). The master plan does not allow new uses but rather is a  
6 preliminary step to city annexation and zoning of the subject area. Accordingly,  
7 petitioner is incorrect and the city is not required to repeat what petitioner  
8 describes broadly as “any of the steps in the Goal 5 planning process that are  
9 necessary to ensure that the City’s Goal 5 obligations with respect to protected  
10 resources continue to be met.” Petition for Review 25.

11           Petitioner also argues that the city council’s finding that the master plan  
12 complies with Goal 5 was “premature” because it relies on future rules the city  
13 council anticipated adopting to protect resources in the area. Petition for Review  
14 25. The decision explains:

15           “Prior to developing according to the [master plan], properties must  
16 be annexed to the city. Because a physical connection with the  
17 existing city is necessary, the general annexation and development  
18 phasing will generally progress from the current city limit to the  
19 west. Property owner interest in developing/redeveloping has been  
20 strongest along the Beef Bend corridor and the western portion of  
21 the planning area. Following adoption of the [master plan], the city  
22 will:

23           “• Clearly define the annexation process including the  
24 application and review procedure, noting that annexation will  
25 be initiated by the property owner.

1           “• Describe how property will be rezoned from  
2 Washington County to city zoning designations consistent  
3 with the [master plan].

4           “• Describe the circumstances under which development  
5 agreements would be required and what they could entail.

6           “• Provide outreach to property owners within the [master  
7 plan] area about the plan, the annexation and development  
8 process, and, what it potentially means for their property.

9           “These Community Development Code amendments are in  
10 development and will be adopted through a subsequent process.”  
11 Record 72.

12 Again, no new development is allowed by the master plan. The city council’s  
13 conclusion that *future* legislation regulating *future* development will result in  
14 compliance with Goal 5 *in the future* does not provide a basis for reversal or  
15 remand.

16           The second assignment of error is denied.

### 17 **THIRD ASSIGNMENT OF ERROR**

18           Comprehensive Plan Policy (CPP) 5(2) provides:

19           “The City will coordinate with other jurisdictional entities to protect  
20 fish and wildlife habitats by managing riparian habitat impacts,  
21 controlling erosion, and by requiring that areas of standing trees and  
22 natural vegetation along natural drainage ways, wetlands, and rivers  
23 be maintained to the maximum extent possible, while allowing the  
24 use of private property as permitted by the Comprehensive Plan.”

25 Petitioner’s third assignment of error is that the approved master plan does not  
26 comply with CPP 5(2). ORS 197.835(7)(a) provides that the board shall reverse  
27 or remand an amendment to a land use regulation or the adoption of a new land

1 use regulation if the regulation is not in compliance with the comprehensive plan.  
2 Petitioner argues that the decision must be reversed or remanded because it is not  
3 consistent with the language and purpose of the comprehensive plan and the  
4 findings in the final decision are not supported by substantial evidence in the  
5 record. Petitioner largely incorporates the same arguments from their first  
6 assignment of error as relates to avoiding development in the conservation  
7 easement. Petitioner maintains that “to the maximum extent possible” is different  
8 from the “maximum extent practicable.”

9 The city argues that petitioner wrongly cites ORS 197.835(7)(a) as the  
10 standard of review. The city argues that a “land use regulation” is defined as “any  
11 local government zoning ordinance, land division ordinance adopted under ORS  
12 92.044 or 92.046 or similar general ordinance establishing standards for  
13 implementing a comprehensive plan” and its comprehensive plan amendment is  
14 not a land use regulation. Response Brief 10-11. Accordingly, the city maintains  
15 that consistency with the comprehensive plan is irrelevant to our review, and we  
16 may only reverse or remand if the decision is inconsistent with the statewide  
17 planning goals.<sup>11</sup> The *Restore Oregon* court explained that our review of the city

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<sup>11</sup> The city argues

“whether the Master Plan Ordinance and the Amendment Ordinance are consistent with Comprehensive Plan Policy 5(2) is irrelevant. LUBA may only reverse or remand an amendment to the City’s comprehensive plan if the amendment is inconsistent with the

1 council's amendment to the city's comprehensive plan allowed us to reverse or  
2 remand pursuant to multiple provisions of ORS 197.835, including ORS  
3 197.835(7)(a). *Restore Oregon*, 301 Or App at 778. The city council stated in its  
4 decision that the comprehensive plan contained applicable approval criteria.  
5 Record 39. The city council adopted findings addressing CCP 5(2). Record 92.  
6 The city does not argue that CCP 5(2) was not applicable to the decision. For the  
7 reasons set out in our resolution of the first assignment of error, the city is  
8 incorrect in its position that ORS 197.835(6) is the only applicable standard of  
9 review.

10 Petitioner does not, however, address the language of the plan policy and  
11 does not develop an argument for our review. Petitioner asserts: "In its findings,  
12 the City stated that the proposed [master plan] complies with all sections of the  
13 City's Comprehensive Plan, including [CCP 5(2)], which states in relevant part  
14 that natural areas be 'maintained to the maximum extent possible.'" Petition for  
15 Review 27 (emphases omitted). Petitioner argues "[b]ecause the City's choice of  
16 Alternative 2 for the east-west connection does not protect natural resources to  
17 the maximum extent possible, it is inconsistent with the purpose and language of  
18 [CCP 5(2)] and the decision to adopt that route must be [reversed] or remanded."  
19 Petition for Review 29. Contrary to petitioner's argument, the plan does not  
20 require simply "that the resources be 'maintained to the maximum extent

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statewide planning goals. ORS 197.835(6). Petitioner is simply wrong to assert that ORS 197.835(7)(a) applies." Response Brief 11.

1 possible.” CCP 5(2) requires that the city *coordinate with other jurisdictional*  
2 *entities* to protect fish and wildlife habitats while allowing the use of private  
3 property consistent with the comprehensive plan (1) by managing riparian habitat  
4 impacts and controlling erosion, and (2) by requiring that areas of standing trees  
5 and natural vegetation along natural drainage ways, wetlands, and rivers be  
6 maintained to the maximum extent possible. Petitioner does not address the  
7 policy language focus on coordination with other jurisdictional entities or the  
8 requirement for maintaining certain areas along rivers to the maximum extent  
9 possible consistent with allowing the use of private property consistent with the  
10 comprehensive plan. Petitioner does not develop their argument that the decision  
11 is inconsistent with the policy.

12 Further, petitioner argues that the city council’s

13 “finding of alleged compliance with [CCP] Policy 5 relies almost  
14 exclusively on [the discussion of Goal 5 found in petitioner’s second  
15 assignment of error]. However the comprehensive plan policies are  
16 inherently different from the statewide planning goals and  
17 compliance with one does not equate to compliance with the other.  
18 Moreover, the City’s findings of compliance with Goal 5 are  
19 problematic for the various reasons discussed above in the Second  
20 Assignment of Error.” Petition for Review 29.

21 Petitioner does not develop its argument that the adopted findings are  
22 inadequate, that is, petitioner does not explain why the city council’s findings  
23 that the policy is met are not supported by an adequate factual base. The city  
24 council found CCP 5(2) compliance was addressed “in [its] response to Oregon  
25 Statewide Planning Goal 5 and Metro Title 13. Based on the findings above, the

1 [master plan] is consistent [with CCP 5(2)].” Record 92. Petitioner does not  
2 address the city’s incorporated findings, which include a finding that compliance  
3 with Metro Title 13 regulations *and* an intergovernmental agreement with Clean  
4 Water Services establish compliance with this policy. Petitioner did not address  
5 relevant city council findings and this assignment of error is not adequately  
6 developed for our review.

7 The third assignment of error is denied.

8 The decision is affirmed.