

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 and

13
14 METRO,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2023-052

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of King City.

23
24 Kenneth P. Dobson filed the petition for review and reply brief and argued
25 on behalf of petitioner.

26
27 Peter O. Watts filed the respondent's brief and argued on behalf of
28 respondent.

29
30 Roger A. Alfred represented intervenor-respondent.

31
32 RUDD, Board Member; RYAN, Board Chair, participated in the decision.

33
34 ZAMUDIO, Board Member, did not participate in the decision.

35
36 AFFIRMED

04/18/2024

37
38 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

1

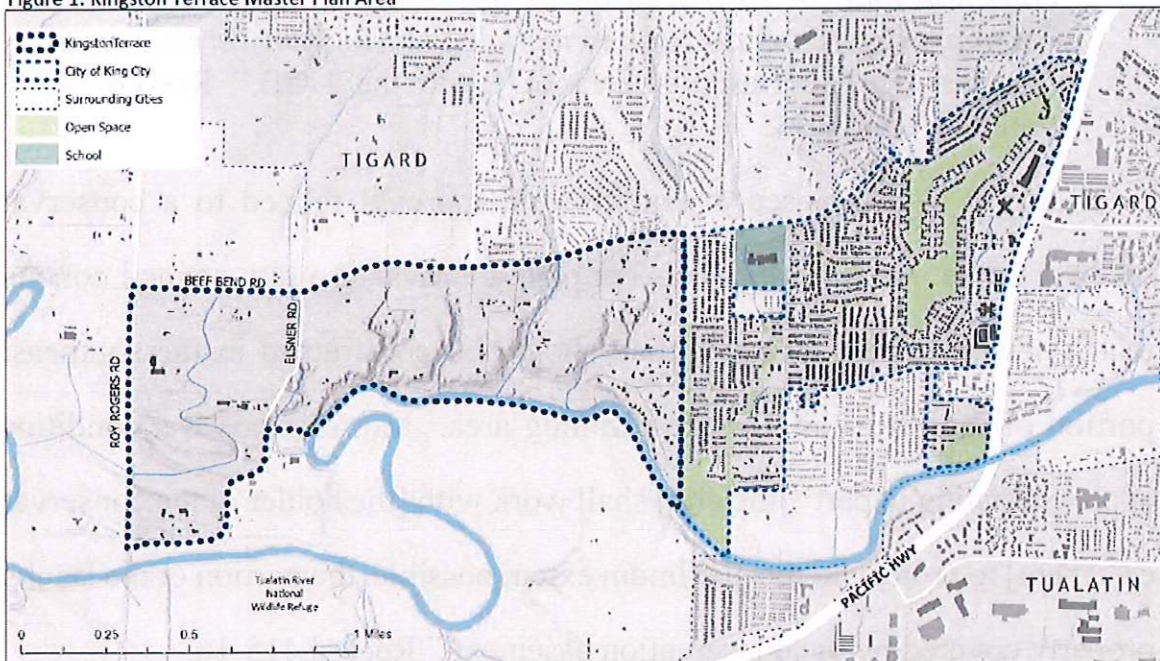
2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision adopting a transportation system
4 plan (TSP).

5 **BACKGROUND**

6 In 2018, the city council adopted a concept plan setting out the city's vision
7 for urbanization of the Kingston Terrace planning area, depicted below.¹

Figure 1. Kingston Terrace Master Plan Area



8

9 Record 237.

10 Metro, the regional planning agency, subsequently approved the city's
11 concept plan and brought the planning area into the urban growth boundary

¹ The 528-acre Kingston Terrace planning area is adjacent to the city's western boundary and 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.

1 subject to nine conditions of approval. The nine conditions of approval included
2 one requiring that the city adopt a TSP. As the city council explained:

3 “Due to its small size and lack of jurisdiction over major
4 transportation facilities, [the city did not] have a transportation
5 system plan (TSP). However, as the city [grew] and plan[ned] to
6 ultimately expand west to SW Roy Rogers Road, it [became]
7 necessary for the city to have a TSP. The TSP is a 20-year plan that
8 guides transportation investment decisions for the city. *[A TSP] is*
9 *required of most cities in the state, and completion of a TSP is a*
10 *condition that Metro placed on its approval of the urban growth*
11 *boundary expansion decision to include the Kingston Terrace area,*
12 *(formerly Urban Reserve Area 6D) into the UGB.” Record 24*
13 *(emphasis added).*

14 Metro also imposed a condition of approval related to a conservation
15 easement area. As part of its concept plan approval, the city council concluded
16 that a new east-west collector road should be constructed in the southeastern
17 portion of the Kingston Terrace planning area.² Metro imposed a condition of
18 approval stating in part “[the city] shall work with [the holder of the conservation
19 easement] to protect, to the maximum extent possible, the portion of the Bankston
20 property covered by the conservation easement.” Record 415-16.

21 On March 22, 2023, the planning commission held a public hearing,
22 considered public testimony, and recommended city council adoption of the TSP.

² Traffic modeling conducted by the city as part of concept plan development indicated that absent a new east-west collector road, SW Beef Bend Road would need to be expanded to five lanes from SW Roy Rogers Road east to Highway 99. Record 82.

1 On May 17, 2023, the city council held a public hearing to consider the planning
2 commission recommendation, take public testimony, apply approval criteria, and
3 consider findings. On June 14, 2023, the city council’s decision approving the
4 TSP became final. This appeal followed.

5 **MOTION TO TAKE OFFICIAL NOTICE**

6 On March 8, 2024, the city filed its motion to take official notice of city
7 Ordinance 2023-02 (the Kingston Master Plan Ordinance), and “Washington
8 County Community Development Code Sections 385 (Private Use Airport
9 Overlay District) and 386 (Private Use Airport Safety Overlay District) (together,
10 the ‘Airport Overlay’).” Motion to Take Official Notice 1.

11 OAR 661-010-0046(2)(a) provides that a motion to take official notice
12 must identify why the requested item is subject to official notice under ORS
13 40.090, why the material is relevant to an issue on appeal, and what the material
14 is intended to establish. The city explains that the Kingston Master Plan
15 Ordinance is part of the city’s comprehensive plan, and the Airport Overlay is
16 part of the county’s zoning code. These documents are each subject to official
17 notice under ORS 40.090(7) as either “[a]n ordinance, comprehensive plan or
18 enactment of any county or incorporated city in this state, or a right derived
19 therefrom.” The city explains that these items are relevant to an issue on appeal
20 and submitted to show how the county and city have addressed planning
21 regulations related to petitioner’s airport, the subject of petitioner’s third
22 assignment of error. The motion is unopposed and is granted.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner’s third assignment of error is that the findings fail to discuss a
3 road or roads crossing over petitioner’s airstrip and compliance with state land
4 use law applicable to airports. Specifically, petitioner argues:

5 “In this case, the TSP calls for roads to cross a privately owned
6 airstrip called Meyer Riverside. Rec. 358. Despite the presence of
7 this airstrip, and the fact that the proposed road extensions would
8 cut through the landing strip, *the findings fail to mention the*
9 *requirements of ORS 836.600 et seq., let alone determine whether*
10 *the proposed encroachments are allowed under the statute and its*
11 *implementing regulations.”* Petition for Review 33 (emphasis
12 added).

13 Petitioner does not identify an applicable standard of review. OAR 661-010-
14 0030(4)(d).

15 For the reasons described below, we agree with the city that petitioner does
16 not develop this assignment of error sufficiently for our review. Respondent’s
17 Brief 18; *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220
18 (1982).

19 **A. ORS 836**

20 Petitioner argues that the city council “findings fail to mention the
21 requirements of ORS 836.600 *et seq.*, let alone determine whether the proposed
22 encroachments are allowed under the statute and its implementing regulations.”
23 Petition for Review 33. Petitioner argues that their airstrip is “subject to the land
24 use compatibility and planning requirements of ORS 836.010-.016 and their
25 implementing regulations.” *Id.* Petitioner does not describe a specific

1 requirement in ORS 836.600 *et seq.* or 836.010-.016 or implementing regulations
2 that the city council failed to address.

3 The city nonetheless points out that ORS 836.608(2) provides that a local
4 government shall recognize in its planning documents the location of private use
5 airports and take certain steps in relation to those airports. Subsequent to the city
6 council's adoption of the TSP, the city council adopted the Kingston Terrace
7 Master Plan (KTMP). We affirmed the city council's adoption of the KTMP in
8 *Meyer v. City of King City*, ___ Or LUBA ___ (LUBA No 2023-059, Feb 14,
9 2024) (*Meyer Master Plan Appeal*). The city identifies KTMP findings that the
10 city council made addressing the airstrip.³ Motion to Take Official Notice Ex A
11 9. Assuming petitioner intended to reference ORS 836.608(2), we agree with the
12 city that petitioner has not identified any requirement that recognition of the
13 airport be in the TSP rather than the KTMP or that the city take unspecified steps
14 in relation to the airport before the city applies city zoning to the property.

³ The city cites a reference to the airport in the KTMP stating:

“The airport is established as a Privately Owned Private Use Airport with Three or More Based Aircraft in Appendix N of the 2003 Airport Land Use Compatibility Guidebook issued by the Oregon Department of Aviation. * * * King City will establish a Private Use Airport Safety Overlay Zone for Meyer’s Riverside Airport upon request of the owner of the property and airport.” Respondent’s Brief 20.

1 Although petitioner argues that the city council was required to comply
2 with certain statutes and rules because roads in the TSP *will potentially* limit or
3 interfere with airstrip operations *in violation of ORS 836.008(3)(a)*, there is no
4 ORS 836.008(3)(a).⁴ Petition for Review 34. The city suggests that petitioner
5 may have intended to cite ORS 836.608(3)(a) which addresses imposition of
6 limitations on and allowance for growth of uses at certain airports. Respondent’s
7 Brief 19. We agree with the city that petitioner has not developed an argument
8 that the TSP location of a road or roads crossing an airstrip places a limit on the
9 airport or its growth in violation of ORS 836.608(3)(a).

10 This subassignment of error is denied.

11 **B. OAR 660-013-0070**

12 Petitioner argues that the TSP is required “to establish an Airport Safety
13 Overlay Zone as required by OAR 660-013-0070[.]” Petition for Review 34.
14 OAR 660-013-0070(1) provides, in part, “A local government shall adopt an
15 Airport Safety Overlay Zone to promote aviation safety by prohibiting structures,
16 trees, and other objects of natural growth from penetrating airport imaginary
17 surfaces.”

18 Respondent directs our attention to Washington County’s Airport Overlay
19 zoning regulations currently applicable to an area including petitioner’s airport.

⁴ As mentioned above, petitioner also cites ORS 836.010-.016. There is no ORS 836.016.

1 Petitioner does not argue that the listed regulations must be addressed by the city
2 as part of the TSP or identify any timing requirement for airport overlay zoning.

3 This subassignment of error is denied.

4 **C. Other**

5 In their introduction to their third assignment of error, petitioner sets the
6 stage broadly as follows:

7 “Oregon law requires that cities with planning authority in areas
8 containing airports adopt comprehensive plan and land use
9 regulations for airports consistent with the requirements of ORS
10 836.600 through 836.630 and its implementing regulations set forth
11 at OAR 660-013. *OAR 660-013-0030(2)*. The Transportation
12 Planning Rule also requires that the ‘transportation system shall
13 minimize conflicts ... between modes of transportation.’ *OAR 660-*
14 *012-0035(2)(d)*. Similarly, the TPR requires that ‘[l]ocal
15 governments shall adopt land use or subdivision regulation,
16 consistent with federal and state requirements, to protect
17 transportation facilities.’ *OAR 660-012-0045(2)*.” Petition for
18 Review 32 (emphases added).

19 OAR 660-013-0030(2) begins: “A city or county with planning authority
20 for one or more airports, or areas within safety zones or compatibility zones
21 described in this division, shall adopt comprehensive plan and land use
22 regulations for airports consistent with the requirements of this division and ORS
23 836.600 through 836.630.” OAR 660-012-0045(1) requires that local
24 governments amend their land use regulations to implement the TSP. OAR 660-
25 012-0045(2) provides, in part, that “[l]ocal governments shall adopt land use or
26 subdivision ordinance regulations, consistent with applicable federal and state

1 requirements, to protect transportation facilities, corridors, and sites for their
2 identified functions.” Petitioner does not develop an argument that the city was
3 required to adopt airport land use regulations at the same time as the TSP is
4 adopted and prior to city annexation and rezoning. As determined previously,
5 petitioner does not develop an argument that specific, required comprehensive
6 plan provisions must be housed in the TSP.

7 Petitioner also references OAR 660-012-0035 in its introduction but does
8 not address the city’s findings in response to OAR 660-012-0035, which include:

9 “The TSP was developed in collaboration with Washington County
10 to support land uses in the area as they generally will transition from
11 rural to urban over the planning period. The plan calls for
12 improvement of existing rural highways to urban streets containing
13 multi-modal improvements. The street designs proposed in the plan
14 are intended to reduce potential conflicts and safety issues between
15 different transportation modes primarily by addressing the needs to
16 separated facilities and safe crossing and intersection designs. While
17 the automobile will continue to be the dominant form of
18 transportation in this suburban context, the proposed system
19 improvements are focused on improving the viability of active
20 transportation.” Record 44.

21 Petitioner’s introduction to their third assignment of error does not develop
22 arguments sufficiently for our review.

23 This subassignment of error is denied.

24 The third assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 **A. Overview**

3 Petitioner’s second assignment of error is that the decision does not comply
4 with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas,
5 and Open Spaces). As petitioner observes, ORS 197.835(6) provides that we will
6 reverse or remand an amendment to a comprehensive plan if it is not in
7 compliance with the statewide planning goals.

8 Goal 5 is “[t]o protect natural resources and conserve scenic and historic
9 areas and open spaces.” Petitioner argues that “[a] local government that amends
10 its land use ordinances must comply with Goal 5 whenever the amendment would
11 ‘affect a Goal 5 resource,’” and that a Goal 5 resource is affected because the
12 TSP allows a new use. Petition for Review 29. Petitioner maintains that “the TSP
13 establishes the specific layout of roadways crossing into areas with both regional
14 and local Goal 5 resources, thereby allowing a new conflicting use.” *Id.*

15 Petitioner also argues that the city council’s Goal 5 findings are
16 inadequate because they refer to reliance on a future program based on Metro’s
17 Title 13 model ordinance, and Title 13 does not protect locally significant
18 resources. Petition for Review 31. Petitioner also argues, “[a]lthough the City
19 later adopted a Goal 5 program for locally significant wetlands, it still has not
20 adopted a program to protect other locally significant Goal 5 resources, such as
21 wildlife habitat and aggregate resources previously identified by Washington
22 County.” Petition for Review 32.

1 We have explained:

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

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

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

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

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

29 **B. Conflicting Use**

30 Petitioner argues that the TSP allows a new use by establishing “the
31 specific layout of roadways crossing into areas with both regional and local Goal

1 5 resources[.]” Petition for Review 29. In its response, the city argues that the
2 applicable county code provisions currently allow roads in the relevant area and
3 the TSP does not allow new uses. Respondent’s Brief 17. In *Terra Hydr Inc. v.*
4 *City of Tualatin*, we concluded:

5 “The Wetland Protection and Natural Resources Protection Overlay
6 districts are apparently part of the city’s Goal 5 program to protect
7 these two inventoried resources. We agree with the city that because
8 the city’s program to protect these inventoried resources expressly
9 allows trails or public bicycle and pedestrian ways within the
10 resources areas, that the TSP does not authorize a new ‘conflicting
11 use’ for purposes of OAR 660-023-0250(3)(b). Petitioners have not
12 demonstrated that adoption of the TSP requires additional analysis
13 under Goal 5 or the Goal 5 rule.” 68 Or LUBA 279, 299 (2013).

14 Petitioner does not argue that roads are currently prohibited under the
15 applicable county zoning and therefore does not establish that *new* conflicting
16 uses are allowed. Petitioner asserts generally that the layout of roadways in the
17 TSP crosses “into areas with both regional and local Goal 5 resources[.]” Petition
18 for Review 29. Petitioner has not identified specific resources on an
19 acknowledged resource list impacted by specific TSP roads. We agree with the
20 city that petitioner has not developed an argument that the decision allows “new
21 uses that could be conflicting uses with a *particular Goal 5 resource site on an*
22 *acknowledged resource list.*” Respondent’s Brief 17; OAR 660-023-0250(3)(b)
23 (emphasis added).

1 **C. Implementation of Goal 5 Program**

2 Petitioner argues that “Goal 5 and its implementing regulations require
3 local governments to identify, inventory, and develop programs to protect certain
4 types of natural resources, including riparian corridors and wildlife habitat.”
5 Petition for Review 30. Petitioner argues that the city council’s findings that Goal
6 5 is met are deficient because they focus almost exclusively on regional resources
7 and largely ignore local resources. *Id.* Petitioner maintains that the city relies on
8 Metro’s Title 13 model ordinance to comply with Goal 5, but Title 13 does not
9 protect locally significant resources. Petition for Review 31. Petitioner also
10 argues that the city council findings of Goal 5 compliance are premature because
11 the City had not yet published or adopted rules to protect Goal 5 resources. We
12 disagree with petitioner.

13 First, Goal 5 must be addressed in the context of the TSP if it creates or
14 amends a resource list. Petitioner does not allege that the TSP creates or amends
15 a resource list. Second, Goal 5 must be addressed in the context of the TSP if the
16 TSP is adopted in order to protect a significant Goal 5 resource or to address
17 specific Goal 5 resources. Petitioner does not assert that the TSP is adopted for a
18 Goal 5 purpose.⁵

⁵ The city points out that petitioner does not identify any specific, locally significant resource encroached upon by a road in the TSP. Petitioner states in its reply that it did not identify local resources identified on an acknowledged resource list because the city did not create such a list. Reply 4. There is no argument in the petition for review that the city was obligated to create its own

1 For the reasons described above, findings of compliance with Goal 5 are
2 not required at this stage and petitioner’s argument that the adopted findings are
3 premature does not establish a basis for remand. Furthermore, petitioner’s
4 argument that the city’s Goal 5 findings are inadequate does not address the full
5 city council findings. The city’s findings relied on more than compliance with
6 Metro’s Title 13 model ordinance and referenced an intergovernmental
7 agreement with Clean Water Services. Record 28.

8 Lastly, petitioner argues that “[a]lthough the City later adopted a Goal 5
9 program for locally significant wetlands, it has still not adopted a program to
10 protect other locally significant Goal 5 resources, such as wildlife habitat and
11 aggregate resources previously identified by Washington County.” Petition for
12 Review 32. Petitioner has not developed an argument that the city was required
13 to adopt a Goal 5 program prior to adopting the TSP.

14 For the reasons set out above, petitioner has not developed an argument
15 that the city council was required to adopt findings addressing Goal 5.

16 The second assignment of error is denied.

resource list prior to adoption of the TSP, and we will not consider arguments presented for the first time in the reply brief. *Urquhardt v. Lane Council of Governments*, 80 Or App 176, 182 (1986) (Remand is not appropriate based upon an alleged defect in a Goal 5 inventory “which is not directly or indirectly related to the plan amendment.”).

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Overview**

3 The Columbia Land Trust holds a conservation easement of approximately
4 12 acres in the southeastern portion of the Kingston Terrace planning area. The
5 city council adopted findings explaining that the TSP

6 “proposes an extension of SW Fischer Road to complete an
7 east/west collector street from Highway 99 to Roy Rogers Road.
8 The collector is anticipated to be a two-lane street that spans over
9 the northern portion of the [Columbia Land Trust Conservation
10 Easement] where it is narrowest and where the least valuable
11 resources within the conservation easement exist.” Record 82.

12 Petitioner’s first assignment of error is that the TSP does not comply with Metro
13 Ordinance 18-1427’s condition of approval providing:

14 “The Columbia Land Trust holds a conservation easement over
15 portions of the Bankston property, which King City’s concept plan
16 identifies as the intended location for a key transportation facility
17 serving the expansion area. King City shall work with the Columbia
18 Land Trust to protect, to the maximum extent possible, the portion
19 of the Bankston property covered by the conservation easement.”

20 **B. Standard of Review**

21 ORS 197.835(8) and (9)(a) provide:

22 “(8) The board shall reverse or remand a decision involving the
23 application of a plan or land use regulation provision if the
24 decision is not in compliance with applicable provisions of
25 the comprehensive plan or land use regulations.

26 “(9) In addition to the review under subsections (1) to (8) of this
27 section, the board shall reverse or remand the land use
28 decision under review if the board finds:

- 1 “(a) The local government or special district:
- 2 “(A) Exceeded its jurisdiction;
- 3 “(B) Failed to follow the procedures applicable to the
- 4 matter before it in a manner that prejudiced the
- 5 substantial rights of the petitioner;
- 6 “(C) Made a decision not supported by substantial
- 7 evidence in the whole record;
- 8 “(D) Improperly construed the applicable law; or
- 9 “(E) Made an unconstitutional decision[.]”

10 Petitioner identifies the applicable standards of review as ORS 197.835(8) and
11 197.835(9)(a)(C) and (D). Petition for Review 13, 18. Petitioner argues that the
12 decision is not in compliance with applicable law, that the city council improperly
13 construed Metro’s condition of approval, and that the city council’s decision is
14 not supported by substantial evidence.

15 **C. First Subassignment of Error**

16 Petitioner argues that the selected road alignment is in violation of the
17 Metro condition of approval because it does not protect the conservation
18 easement area to the maximum extent possible. The text of the conservation
19 easement describes the property’s conservation values as:

- 20 “• Forest and forested wetland provides wildlife habitat for birds
- 21 and animals.
- 22 “• Several creeks cross the property that provide clean cool
- 23 water to the Tualatin River and habitat for small fish and
- 24 amphibians.

- 1 “• Riparian forest and floodplain is planted with alder, maple
 2 and other trees and shrubs that shade the river and hold the
 3 soil from eroding into the river. In addition the floodplain
 4 holds water during high water periods, allowing it to slowly
 5 filter back into the river system.
- 6 “• Property provides views of undeveloped natural area from the
 7 Tualatin River for river users[.]” Record 2549.

Figure 7. Bankston Family Trust Conservation Easement



8 Source: DOWL

9 Record 2514.

10 The easement describes its purpose as:

11 “[T]o preserve and protect in perpetuity the Conservation Values of
 12 the Protected Property by confining the development, management
 13 and use of the Protected Property to activities that are consistent with
 14 the preservation of the Conservation Values, by prohibiting
 15 activities that significantly impair or interfere with these
 16 Conservation Values, and by providing for remedies in the event of
 17 any violation of this Easement. Furthermore, the conservation
 18 purposes of this easement are for:

1 “• The protection of a relatively natural habitat of fish,
2 wildlife, or plants, or similar ecosystem’, and as
3 defined in IRC § 170(h)(4)(A)(ii).

4 “• The preservation of certain open space ... where such
5 preservation is (1) for the scenic enjoyment of the
6 general public’, and as defined in IRC §
7 170(h)(A)(iii).” Record 2550.

8 The easement does not allow new roads. Record 2552. The easement includes
9 provisions related to the distribution of compensation if the easement, or portion
10 of the easement, is condemned. Record 2560-61.

11 Petitioner maintains, “[b]ecause there were other viable options for the
12 east-west connection that did not encroach into the easement, the City’s chosen
13 alternative will not protect the resource to the maximum extent possible in
14 violation of the Metro ordinance.” Petition for Review 5. Petitioner argues that
15 the dictionary definition of “protect” is “to cover or shield from exposure, injury,
16 damage or destruction,” and that in the context of the statewide planning goals,
17 the court has interpreted “protect” to require shielding from more than *de minimis*
18 impacts. Petition for Review 16.

19 Petitioner’s first subassignment of error largely restates its arguments from
20 *Meyer Master Plan Appeal* concerning its preferred interpretation of the
21 condition of approval. We addressed the correct construction of the easement
22 condition in *Meyer Master Plan Appeal*, explaining:

23 “We review the city’s interpretation to determine whether the city
24 improperly construed the applicable law. ORS 197.835(9)(a)(D);
25 [M & T Partners v. City of Salem, 80 Or LUBA 221, 170 (2019),
26 aff’d sub nom, M & T Partners, Inc. v. Miller, 302 Or App 159, 460

1 P3d 117 (2020)]. In interpreting the condition, we will consider the
2 text and context. *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042
3 (2009).

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

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

20 “Third, the condition requires that the city ‘work with’ the easement
21 holder, Columbia Land Trust, to protect, ‘to the maximum extent
22 possible, the portion of the Bankston property covered by the
23 conservation easement.’ The text of the condition requires the city
24 to ‘work with’ the easement holder and there is no assertion that the
25 city did not work with the easement holder.

26 “Lastly, we consider the context. The condition is imposed in a
27 Metro decision approving a concept plan that anticipated placement
28 of a roadway on property that included an area subject to a
29 conservation easement. *We conclude that the city did not*
30 *misconstrue the condition by concluding that some measurable*
31 *impact on the easement area is permissible, subject to working with*

1 *the easement holder to minimize impacts.*”⁶ ____ Or LUBA at ____
2 (slip op at 14-15) (emphasis added; citation omitted).

3 Petitioner expands from their argument in *Meyer Master Plan Appeal* and
4 argues that the alternatives analysis upon which the city council relied supports
5 its interpretation of the condition as allowing only a *de minimis* impact on the
6 easement. The alternatives analysis discussion of natural resources begins:

7 “The study evaluated potential impacts of the circulation system

⁶ Metro staff submitted a letter to the city explaining:

“The process and outcome of the City’s transportation alternatives analysis is described in detail in the City staff report dated April 19, 2023. The analysis studied four alternatives, including Alternative 2, which is an extension of SW Fischer Road that would cross the northern portion of the conservation easement. The analysis concludes that Alternative 2 is the preferred option considering all relevant factors, including transportation planning, cost, safety, environmental impacts, equity, protection of existing housing, and provision of public services. The alternatives analysis amounts to substantial evidence in support of the City’s conclusion that future road alignment options that do not cross some part of the conservation easement are not viable for meeting the City’s needs.

“Condition E.8 requires that potential impacts to the conservation easement from the new road must be mitigated as much as possible. The condition does not require the City to spend any amount of public money, to lengthen vehicle trips and emergency vehicle response times, to install sewage lift stations, or to demolish existing homes in order to completely avoid the easement area. Rather, the condition compels the City to work with the Trust and to take steps that will protect the subject area as much as possible from potential impacts, while still achieving the stated purpose of Ordinance 18-1427, which is to provide additional land for development of needed housing.” Record 233.

1 alternatives on natural resources, including the following:

2 “• Wetlands

3 “• Streams

4 “• Riparian areas

5 “• Upland habitats, and

6 “• *The Bankston Easement*.

7 “Evaluation is based on typical regulatory and conservation
8 principles of ‘*first avoid impacts and then minimize impacts (if*
9 *avoidance is not possible)*.’ As noted by Clean Water Services when
10 the project enters final design, permitting and construction, it will
11 be important to keep in mind CWS requirements for buffers,
12 vegetated corridors, etc. as these could add additional cost and
13 regulatory complexity to a project.” Record 3652 (emphases added).

14 We do not find anything in this discussion that requires interpreting protecting to
15 the maximum extent possible to mean that the easement must be avoided at all
16 costs, or that any impacts be *de minimis*.

17 We observed in *Meyer Master Plan Appeal* that the condition required
18 that the city work with the Trust and there was no evidence that the city had not
19 done so. Petitioner argues that the city “paid lip service to the Trust’s concerns
20 and refused to go with alternatives that would avoid the Conservation Easement
21 entirely over its objections.”⁷ Petition for Review 17. Petitioner argues that the

⁷ Petitioner argues within this assignment of error that there is evidence that the city did not work with Columbia Land Trust because locating the road within the easement will require condemnation of the easement. Petition for Review 17. A road impacting 0.5 acres of a 12-acre easement, whose terms address the

1 easement cannot have been avoided to the maximum extent possible where there
2 were alignments studied that avoided the easement in its entirety and that the
3 Trust preferred. We do not find in the text of the condition a requirement that the
4 city agree with the Trust over the location of the road. The concept plan identified
5 the conservation easement area as the future location of the collector road. Metro
6 did not impose a condition overruling that location. Instead, Metro approved a
7 concept plan, subject to nine conditions of approval, including a condition
8 requiring that the city work with the Trust to protect the easement to the
9 maximum extent possible. For the reasons set out above, we conclude that the
10 city council did not misconstrue the condition of approval.

11 The first subassignment of error is denied.

12 **D. Second Subassignment of Error**

13 Petitioner's second subassignment of error is that the city council's
14 findings are inadequate to support the conclusion that the easement is protected
15 to the maximum extent possible.⁸ Petition for Review 18. Petitioner points to a

distribution of proceeds in the event of condemnation, does not necessarily reflect failure to work with the Trust to protect the easement to the maximum extent possible.

⁸ Petitioner argues, "even if Metro Ordinance 18-1427 did not prohibit outright the construction of a road and bridge in the Conservation Easement when other alternatives are possible, the City's findings regarding compliance with the Metro Ordinance are so weak, skimpy, and illogical, that no reasonable person would rely on them in finding that the Conservation Easement was protected 'to the maximum extent possible.'" Petition for Review 18.

1 statement in the city’s alternative analysis stating: ““A balance among the factors
2 was sought so that no single category would outweigh another ...”⁹ Petition for
3 Review 20. The second subassignment of error is premised on petitioner’s
4 assertion that “the City had to determine which alternative would protect the
5 Conservation Easement to the maximum extent possible and *protection of the*
6 *Conservation Easement should have been the primary factor.*” Petition for
7 Review 19 (emphasis added). Petitioner restates their argument that the easement
8 has necessarily not been avoided to the maximum extent possible if there is any
9 alignment possible that avoids the easement.

⁹ The cited sentence is taken from the following paragraph:

“It is important to note in identifying a preferred alternative to recognize that there is no perfect solution – all alternatives will have positive benefits and negative impacts. Existing plans, policies and the regulatory context were considered in evaluating trade-offs among alternatives, as was the magnitude of identified adverse impacts and positive benefits. *A balance among the factors was sought so that no single category would outweigh another but that they are considered on the basis of their merits.* For example, if too much importance is placed on not crossing riparian corridors, the master plan could end up with a series of long cul-de-sac neighborhoods where car use becomes almost a necessity and both transit and emergency vehicle access might be compromised. Utility services, especially sanitary sewer and potable water could become inefficient as well. It will also be important to remember that the selected east/west circulation alternative will need to accommodate all travel modes and must support and integrate with the broader transportation network that will ultimately serve Kingston Terrace. Emphasis will be on accommodating local circulation needs rather than regional through traffic.” Record 3668 (emphasis added).

1 The city addressed compliance with the condition of approval in its
2 approval of the KTMP. We explained in *Meyer Master Plan Appeal* that “the city
3 did not misconstrue the condition by concluding that some measurable impact on
4 the easement area is permissible, subject to working with the easement holder to
5 minimize impacts.” ___ Or LUBA at ___ (slip op at 15). Accordingly, we
6 concluded that the easement does not require avoidance of the easement.
7 Petitioner now sets out a new interpretation, that the condition of approval
8 requires prioritization of the conservation easement when the city council is
9 considering various factors influencing the ultimate site selection. Petitioner does
10 not develop an argument that the text or context supports the conclusion that one
11 of nine Metro conditions controls the city council road location decision.

12 For the reasons described in our resolution of the first subassignment of
13 error, we conclude that the easement condition does not include a requirement
14 that avoidance of the easement area occur if physically possible. We also
15 conclude that the easement does not require that avoidance of the easement be
16 given primacy over all other considerations by the city council when it determines
17 what is possible. As we discussed in *Meyer Master Plan Appeal*, and as Metro
18 staff confirmed in their written comments on the TSP, the context of the
19 conservation condition of approval is a decision authorizing urbanization of the
20 area through development of housing. As Metro staff opined, “the condition
21 compels the City to work with the Trust and to take steps that will protect the
22 subject area as much as possible from potential impacts, while still achieving the

1 stated purpose of Ordinance 18-1427, which is to provide additional land for
2 development of needed housing.” Record 233.

3 Substantial evidence exists to support a finding of fact when the record,
4 viewed as a whole, would permit a reasonable person to make that finding. *Dodd*
5 *v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). The city council’s
6 decision is legislative.¹⁰ Statewide Planning Goal 2 (Land Use Planning) requires
7 that land use decisions be supported by an adequate factual base. “An ‘adequate
8 factual base’ for a legislative land use decision ‘is synonymous with the
9 requirement that a decision be supported by substantial evidence.’” *Restore*
10 *Oregon v. City of Portland*, 301 Or App 769, 778, 458 P3d 703 (2020) (citing
11 *1000 Friends of Oregon v. LCDC*, 244 Or App 239, 268 n 11, 259 P3d 1021
12 (2011)). Because petitioner’s substantial evidence/adequate factual base
13 argument is based on an interpretation of the condition of approval which we
14 reject, the subassignment of error is denied.

15 The second subassignment of error is denied.

16 The first assignment of error is denied.

17 The decision is affirmed.
18

¹⁰ Amendments to the text of the comprehensive plan are legislative actions by the city council. King City Code 16.40.040 (2023).