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

SHAMROCK HOMES, LLC Petitioner, vs. CITY OF SPRINGFIELD, Respondent.	)	LUBA No. 2012-___

NOTICE OF INTENT TO APPEAL

I.

Notice is hereby given that Petitioner intends to appeal that land use decision made by the Springfield City Council entitled Ordinance 6279: AN ORDINANCE AMENDING THE EUGENE-SPRINGFIELD METROPOLITAN AREA PLAN DIAGRAM, THE GLENWOOD REFINEMENT PLAN DIAGRAM AND TEXT, THE SPRINGFIELD DEVELOPMENT CODE, AND THE SPRINGFIELD ZONING MAP, AND ADOPTING A SEVERABLILITY [*sic*] CLAUSE. The city adopted the ordinance on June 18, 2012, and the decision became ripe for appeal when notice of the decision was mailed on September 7, 2012.

The challenged decision involved the City of Springfield's adoption of Phase I of the new Glenwood Refinement Plan and implementing zoning regulations. The decision changed both the plan designation and zoning regulations for all affected properties.

II.

Petitioner is represented by the LAW OFFICE OF BILL KLOOS PC, 375 W. 4th Ave., Suite 204, Eugene, OR 97401; Phone: 541-954-1260

III.

Respondent, City of Springfield, has as its mailing address and telephone number: City of Springfield, 225 Fifth Street, Springfield, OR 97477. Respondent has as its legal counsel: Joseph

Date Received: 9/28/12
Planner: MEM

J. Leahy, Leahy, Van Vactor, Cox & Melendy, LLP, 188 W B St., Bldg N., Springfield OR, 97477; Phone: (541) 746-9621.

IV.

Petitioner appeared below and was represented by the undersigned. Other persons mailed written notice of the land use decision by City of Springfield, as indicated by its records in this matter, include those persons listed on Exhibit A, attached hereto.

NOTICE:

Anyone designated in paragraph IV of this Notice who desires to participate as a party in this case before the Land Use Board of Appeals must file with the Board a Motion to Intervene in this proceeding as required by OAR 661-10-050.

Dated: September 28, 2012.

LAW OFFICE OF BILL KLOOS PC

Bill Kloos, OSB 81140
Nick Klingensmith 076713
Of attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, I served a true and correct copy of this Notice of Intent to Appeal on all persons listed in paragraphs III and IV of this Notice pursuant to OAR 661-010-0015(2) by certified mail, return receipt requested.

Dated: September 28, 2012.

Nick Klingensmith 076713

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

SHAMROCK HOMES, LLC Petitioner, vs. CITY OF SPRINGFIELD and LANE COUNTY, Respondents.	)	LUBA Nos. 2012-077, 078, 079

PETITION OF SHAMROCK HOMES, LLC

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January, 2013

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APPENDIX: LOCAL DECISION UNDER APPEAL

Appendix Vol. 1 (color graphics appended to Petition)

App-1 Current Metro Plan & Refinement Plan Designations map (black and white version at Rec 186.)

App-2 Current Zoning map (black and white version at Rec 501)

App-3 Phase 1: Proposed Zoning and Refinement Plan Designations map (black and white version at Rec 195.)

Appendix Vol. 2

Note: The local decisions (two county ordinances and one city ordinance) appear in the Record at pages 34-509. All these pages are reproduced here. The Record pages will be used as the App pages for simplicity and clarity. Thus, pages are numbered at the lower right corner. Pages 1-33 are omitted from the appendix, as they are substance free.

I. PETITIONER'S STANDING

Petitioner Shamrock Homes, LLC has standing under ORS 197.830(2) to appeal these decisions because it appeared and took a position in the proceedings below. It filed a participation letter dated May 26, 2012, before the city and county (Rec 2156), stating its opposition to the proposal and requesting individual written notice of the final decision. Petitioner filed a June 4, 2012 letter with the city and the county outlining its position on half a dozen issues. Rec 2144. Petitioner also filed a timely NITA of each discrete local decision.

II. STATEMENT OF THE CASE

A. Nature of the Decision and Relief Sought

The decisions on appeal are a package of legislation adopted for a portion of the Glenwood area, which is inside the Springfield UGB and partially in the city. The changes applied only to the "Phase I" area of Glenwood, which is the area along the Willamette River. The centerpiece of the legislation is a completely new refinement plan for the Phase I area, including text and diagram – the Glenwood Refinement Plan ("GRP"). Looking higher up the planning pyramid, the package also includes changes to the Metro Plan Diagram, to reflect the GRP changes. Looking lower in the planning pyramid, the package made changes to the text of the zoning code and to the zoning maps.

Because the Phase I area is partially outside the city, the County co-adopted the amendments, as required by Section IV of the Metro Plan for situations involving amendments to the MetroPlan.[1] The County acted in two ordinances; the city acted in one.

The city took the planning initiative and acted first in Ordinance No. 6279 (June 18, 2012). App-38. In Ordinance No. PA1288 (Sept. 5, 2012) the County amended the Metro Plan

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[1] Policy 5 at page IV-3 of the Metro Plan says, in part:

> "A site specific Type I *Metro Plan* amendment that involves a UGB expansion or Plan Boundary change and a Type II *Metro Plan* amendment between the city limits and Plan Boundary, must be approved by the home city and Lane County (Springfield is the home city for amendments east of I-5 and Eugene is the home city for amendments west of I-5)."

Diagram, amended the Glenwood Refinement Plan diagram and text, and amended the Springfield zoning map. App-34. In Ordinance No. 3-12 (Sept. 5, 2012) the County amended chapter 10 of its code to adopt code text amendments for the UGB area outside the city limits. App-36.

Springfield adopted 141 pages of findings. These appear at App-44 to 185. The County ordinances simply joined in these findings. App-35, 37.

This Petition alternately refers to "the City" or "Respondents" as having committed errors. In all cases we are referring to the City errors, which the County joined in by co-adopting the same regulations, based on substantially the same record, supported by the same findings.

Organization of Appendix and Graphics: As the product of a multi-year local planning effort, the record is over 10,000 pages; the decision documents are 476 pages, including the GRP itself. Early on we advised all counsel we would organize this Petition as follows:

The decision documents are in a separately bound "Petition Volume II; Appendix: Local Decisions Under Appeal." This Volume II is the three decision documents – two county ordinances, one city ordinance, and Exhibits A through E supporting the city ordinance. These are pages 34 to 509 of the Record. We added a one-page Table of Contents for Volume II.

For clarity, we are using the Record page numbers as the Appendix page numbers, and not adding a new set of numbers.

The original decision documents have very competent color graphics of new and old plan and zone maps for the GRP area. However, the record filed with LUBA and the decision documents in Volume II have typically pedestrian black and white graphics. We advised responding counsel that we would include in our Petition color copies of the originals that we wish to use, which we have snagged from the city's published online ordinances.

Relief requested: Petitioner seeks remand of the ordinances for further proceedings consistent with state and local law, as further discussed in the assignments.

B. Summary of Arguments

The Assignments of Error are generally arranged by Statewide Planning Goal. Some of the assignments raise issues under state statutes and local plan policies that apply.

The new GRP and its implementing regulations only apply to the Phase I portion of Glenwood, the area closest to the river; the upland portion of Glenwood still operates under the old GRP plan and zoning regulations. The challenged decisions were an extreme makeover for the Phase I area; all of the old designations and districts were swept into the river; four new and unique plan designations and matching zones were applied to the area, along with some unique land use regulations.

Goal 2 requires an adequate factual basis, adequate findings, evaluation of alternative courses of action, and a statement of ultimate policy choices in complying with the substantive requirements of the other goals. Goal 2 is implicated in shortcomings identified under the other substantive goals.

Goal 5 is triggered by the new GRP legislation because the city is changing the regulations that apply in an acknowledged Goal 5 resource area, which includes the 75 feet adjacent to Willamette River. When this happens Goal 5 and the Goal 5 Rule require the City to update its Goal 5 program following the Goal 5 ESEE process. The City missed this step. It concluded that none of the GRP changes will conflict with a Goal 5 resource, and substituted that conclusion for the analysis needed to reach the conclusion.

Goal 8, the recreation goal, is implicated by the obligations that were carried over from the 2030 Refinement Plan, which instructed the city to provide adequate open space to meet the needs of the high density residential land the GRP would also be supplying. Specifically, the 2030 Plan said the open space should have the same high density residential designation as the housing uses it would be serving. The GRP contravenes the 2030 Plan by locating the required open space all over the map, across all of the four new designations.

Goal 9 requires the city to include in its planning efforts enough land to meet the anticipated need for commercial and industrial employment lands. However, the City erroneously relied on an unacknowledged EOA. In addition, even if the city had used an acknowledged EOA, it needs to determine whether the inventory will remain adequate in light of new discretionary regulations that render some of the inventoried land uncountable for Goal 9 purposes. The amendments are replete with *Opus* errors.

Goal 10 is relevant because the City needs High Density Residential land in the GRP to meet its 20-year inventory requirement.

The most grevious substantive error is the city's decision to wipe out several hundred units of affordable housing in Subarea D of the GRP, including 11 acres of the Shamrock property. Metro Plan Housing Policy A.25 says to conserve this kind of housing; instead the city will replace it with offices. The Metro Plan recognizes this as irreplaceable affordable housing that must be conserved, stabilized and strengthened. In addition, all of the new Goal 10 inventory acreage proposed in Subarea A is subject to discretionary standards, rather than clear and objective standards. It is not planned to have supporting public facilities within the 20-year planning period. And the acreage comes with land assembly standards (Minimum Development Areas of five acres) that discourage "needed housing through unreasonable cost or delay."

Goal 11 also gets short-sheeted in the revisioning, which hinges on extending the sanitary trunk line through the south half of the neighborhood, building a public stormwater system that is currently missing, and redeveloping the arterial through the neighborhood as a "hybrid multi-way boulevard." These facilities are not in place, and the acknowledged plan and public facilities plan do not call for them during the planning period.

Goal 12 requires the transportation planning to support the plan, but the city has taken a short-cut, concluding that it need not perform the more detailed TPR traffic analysis because traffic under the new zoning is predicted to be less than traffic generated by the old zoning.

However, the city's math on this point is flawed, and it applies assumptions about nodal designations unevenly, giving itself trip deductions for the new nodal designations but failing to recognize the same deductions that would apply to the areas previously given nodal designations.

Goal 15 planning for the Willamette River Greenway has been sidestepped. The Goal requires an inventory of Greenway resources, but no Greenway Inventory has been done. The city has adopted a one-size-fits-all 75-foot Greenway setback. The GRP allows uses in the setback area that are not allowed by the Goal, either because they are not water-dependent or water–related or because they are explicitly prohibited by the Goal. The GRP reflects the assumption that public asphalt is ok in the Greenway setback, but private asphalt would be bad.

The challenged decisions also include provisions that violate the statutory mandate requiring city fees for processing permit applications to be the actual or average cost, and they incorporate and rely on approval standards found in an Engineering and Design Standards and Procedures Manual (EDSPM), which is an unacknowledged land use regulation.

C. Summary of Material Facts

The Glenwood neighborhood is located between Eugene and downtown Springfield. Generally, it is in the shape of a leg of prosciutto, bordered on the north and east by the Willamette River, and on the west and south by I-5, with McVay Highway extending southward to form the shank and hock portion of the ham.

The previous Glenwood Refinement Plan covered the entire neighborhood, an area of about 620 acres. The Glenwood area includes a site of about 52 acres designated on the Metro Plan as appropriate for "nodal development."[2] See TransPlan (July 2002), Map at Appendix A;

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[2] The Nodal Development strategy is explained by the Metro Plan (2004) at II-G-8:

> "Nodal development is a mixed-use pedestrian-friendly land use pattern that seeks to increase concentrations of population and employment in well-defined areas with good transit service, a mix of diverse and compatible land uses, and public and private improvements designed to be pedestrian and transit oriented."

App-66. See also App-126-127. In 2005 the city amended the GRP to apply plan designations implementing the Nodal Development policy in the 52-acre area. Figure 1, App-232.

The 2012 amendments at issue here expanded the Nodal Development area to encompass about 123 acres. The 2012 amendments were limited to a "Phase I" area, with planning for the GRP "Phase II" area being deferred a bit in time. The Phase I area includes all the land between the river and the arterial that runs through the area, plus a bit of acreage on the landward side of the road.

1. Procedural Summary:

In 2005 the refinement plan designations were amended for the 52-acre portion of the Glenwood area that was designated in the Metro Plan for Nodal Development in 2002. App-44. The city created a new plan designation for this area – the Glenwood Riverfront Plan District, codified at SDC 3.4-100. App-44.

In 2008 the city initiated the present new planning effort for all of the Glenwood Phase I area, totaling 267 acres. The matter was heard jointly before the Springfield and Lane County Planning Commissions on December 20, 2011. App-39.

The city's DLCD "Form 1 Notice" was mailed on September 1, 2011. App-39. The "Form 2 Notice" was sent on September 7, 2012. Rec 32.

The final joint public hearing of the Springfield City Council and the County Board was held on April 2, 2012. App-41, third last Whereas para. The City Council conducted its final public hearing on June 4, 2012. App-42, third Whereas para. The County conducted its final hearing public hearing on June 20, 2012, and reopened the record for the limited inclusion of specified materials on July 11, 2012, as summarized on Rec. 1090.

The City took final action by Ordinance No. 6279 (June 18, 2012). App-38. The County took final action in two ordinances. App-34. 36.

The City and County sent a single, consolidated notice for the three ordinances on September 7, 2012. Rec 689. Petitioner filed a NITA for each of the three ordinances, and the appeals were consolidated.

2. Factual Summary:

The Phase I area that is the subject of this planning area is described in the findings thusly: (App-45)

> "Glenwood Phase 1, as the term is used in this staff report, includes all land fronting the Willamette River from the I-5 Bridges to the southern boundary of Glenwood on both sides of Franklin Boulevard and McVay Highway, described as the Glenwood Riverfront. The proposed Glenwood Riverfront is further divided into the Franklin Riverfront and the McVay Riverfront. The Glenwood Riverfront is also divided into the following Subareas: A Residential Mixed-Use; B Commercial Mixed-Use; C Office Mixed-Use; and D Employment Mixed-Use."

The Phase I planning effort was a complete makeover of the planning and zoning designations for the 267 acres in the Phase 1 area. The first page of the Exhibit A findings summarize the changes made: (App-44; footnote omitted)

> **"Proposed Phased 1 Plan and Zoning Amendments**
>
> **"Nature of Request:** Springfield staff is requesting that the Springfield and Lane County Planning Commissions forward a recommendation of approval to the Springfield City Council and the Lane County Board of Commissioners regarding a package of amendments to the Metro Plan Diagram and Glenwood Refinement Plan diagram and text, the Springfield Zoning Map and the Springfield Development Code collectively, "Glenwood Phase 1":
>
> 1. Amend the Eugene-Springfield Metropolitan Area General Plan Diagram to designate 122.99 acres of land to Mixed Use/Nodal Development and 144.28 acres of land to Mixed Use*;
>
> 2. Amend the Glenwood Refinement Plan Diagram to designate 33.26 acres of land to Residential Mixed Use, 14.58 acres of land to Commercial Mixed Use, 46.33 acres of land to Office Mixed Use and 173.11 acres of land to Employment Mixed Use and amend plan text*;
>
> 3. Amend the Springfield Zoning Map to zone 33.26 acres of land to Residential Mixed Use, 14.58 acres of land to Commercial Mixed Use, 46.33 acres of land to Office Mixed Use and 173.11 acres of land to Employment Mixed Use*;

4. Amend the Springfield Development Code Section 3.4-200."

With respect to the changes in the Metro Plan Diagram summarized in item 1 above, there is a Table at App-47 showing acreages in the existing Metro Plan designations and what they are being changed to. The Mixed-Use Nodal plan designations are being expanded from 52 acres to 123 acres. All other Metro Plan designations are being cleaned out and replaced with 144 acres of "Mixed-Use" plan designation.

With respect to the changes in the refinement plan designations summarized in item 2 above, there is a Table at App-48 showing that all of the existing refinement plan designations are being swept out and replaced with four new Mixed-Use designations: Residential Mixed-Use, Commercial Mixed-Use, Office Mixed-Use, and Employment Mixed-Use.

With respect to the changes in the zoning summarized in item 3 above, there is a Table at App-49 showing that all of the existing zoning districts are being replaced with four new Mixed-Use zones: Residential Mixed-Use, Commercial Mixed-Use, Office Mixed-Use, and Employment Mixed-Use. The acreages match the new refinement plan designations.

The entire Glenwood Refinement Plan Phase I, as amended, appears at App-203 to 375.

The City intends the redesignation of 28 acres of land for High Density Residential use in the GRP Phase I to be the second and final step in the city's completion of its obligations under HB 3337 (2007), codified at ORS 197.304. The city's obligation was to provide enough land inside the city's own UGB to supply 20 years of needed housing. The first step was accomplished by the Springfield 2030 Refinement Plan, Residential Land Use and Housing Element, via Ordinance No. 6268 (June 20, 2011) ("2030 Plan"). The 2030 Plan noted there was still a deficiency in HDR land and mandated that the GRP would provide the needed 28 acres. App-40, first three Whereas paras.

In January of 2011 the City had adopted, by resolution, the draft Springfield Commercial and Industrial Buildable Lands Inventory and Economic Opportunities Analysis ("CIBL/EOA").

App-40, last four Whereas paras. The CIBL/EOA has not yet been incorporated into the acknowledged comprehensive plan, as it has not been acknowledged. App-73 to 74.

The City intends the GRP to expand "nodal development" acreage. Nodal development was approved by the LCDC in 2001 as an "Alternative TPR Performance Measure." The strategy is intended to increase residential density and reduce the need for individual trips. The GRP increases the nodal development area from 52 acres, reflected in the 2005 GRP and code amendments, to 123 acres. App-41, first five Whereas paras.

3. Petitioner's Property:

Petitioner described its property holdings in the GRP Phase I area in its June 4 letter to the city and the county thusly:

> "Shamrock Village RV Park is at 4531 Franklin Blvd., with about 11 acres of fully developed ground between the highway and the river, just south of the railroad bridge. (There is also about 3.6 acres of light industrial land across the highway to the east, for a total holding of 14.6 acres.)" Rec 2144.

Petitioner also described its proposed redevelopment plans, and why the amended GRP Phase 1 would frustrate those plans:

> "We have reviewed the draft Glenwood Refinement Plan with some care. The proposal is to change the plan for this site from Commercial/Industrial/Multi-Family Residential Mixed Use to Employment Mixed Use. Our client would like to keep the current plan and zone designations. They work for him now, and they allow him to pursue his longstanding redevelopment plans, which include high density residential uses. It should also work for the city, as discussed below, because the current proposal will leave the city short of the high density residential land that it needs." Rec 2144.

Shamrock's petition to the City for relief went without avail. All of the Shamrock property in the Phase I area was redesignated and rezoned to Mixed-Use Employment. See graphics at App-48 and -49, and attached in color at the end of this volume.

Prior to the decisions under review here, the Shamrock property had a mix of designations. The Metro Plan diagram showed the Shamrock property split, with the half close to the river designated as medium-density residential, and the half close to the road designated as

Community Commercial. The Glenwood Refinement Plan designated the whole parcel as Commercial/Industrial/Multi-Family Residential Mixed Use.

Zoning of the entire Shamrock property prior to this decision was Low Density Residential. Under the GRP prior to these amendments, the LDR zone implemented the GRP designations for existing mobile home parks, such as Shamrock. The old GRP said, for this part of the neighborhood:

> "2. The City shall allow for appropriate zoning reflecting the land use designations within this subarea.
>
> 2.1 Allow for a mixture of zoning districts that would allow parks, office and industrial parks, and medium-density residential use.
> 2.2 Allow manufactured dwelling parks to have Low Density Residential zoning.
> 2.3 Allow Neighborhood Commercial or Community Commercial zoning within the commercially designated area." (Emphasis added)

In other words, the old zoning was in conformance with this previous refinement plan policy.

Graphics from Record Included Here:

The following color graphics, taken from the city website, appear at the end of this volume. Each of these also appears in the Record of this decision in black and white. The first shows the previous GRP plan designations. App-186. The second shows the previous GRP zoning districts. App-501. The third shows the new plan and zone designations. App-195.

D. Jurisdiction

The decision is a "land use decision" subject to LUBA's jurisdiction because it involves an amendment to acknowledged comprehensive plan provisions and land use regulations. ORS 197.015(10)(a)(A)(ii) and (iii).

E. Standard of review

In this appeal of a post-acknowledgement plan amendment ("PAPA"), all of the following assignments of error are reviewed according to the same standard of review. ORS 197.835(6) provides "The board shall reverse or remand an amendment to a comprehensive plan

if the amendment is not in compliance with the goals." ORS 197.835(7) provides a similar standard for review of amendments to land use regulations.

FIRST ASSIGNMENT OF ERROR (Goal 5, Natural Resources, et al.)

Respondents violated Goals 2 and 5, and the Goal 5 Rule in numerous respects. They violated Goal 5 standards by failing to apply Goal 5 in connection with this post acknowledgment plan amendment that affects a Goal 5 resource in the meaning of the Goal and OAR 660-0023-0250(3).

We incorporate here the discussion of Goal 2 requirements in the Goal 9 assignment of error. Goal 2 imposes the same findings, evidence and policy choice requirements with respect to the substantive standards of Goal 11.

The GRP amendments change the uses allowed and regulations that apply on lands in the acknowledged Goal 5 inventory. This triggers the obligation to apply the Goal 5 Rule. See generally, *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282, 299, *aff'd* 175 Or App 419, 28 P3d 1229 (2001).

The city's findings address Goal 5 at App-59 to 65. They address the trigger provision of the Goal 5 Rule, OAR 660-0023-0250(3), at App-64, but erroneously find it is not pulled. The operative finding is:

> **"660-023-0250 Applicability**
>
> ***"(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:***
> ***(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;***
> ***(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or***
> ***(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area."***
>
> "Springfield's riparian and wetland inventories, as discussed above, were amended under a separate PAPA, LRP2010-00002.
>
> "While the proposed Glenwood Refinement Plan and the proposed Glenwood Riverfront Mixed-Use Plan District do discuss new uses along the Glenwood

> Riverfront they will not conflict with significant Goal 5 resources because these uses will be less intense than the existing industrial and commercial uses and the proposed Glenwood Refinement Plan Open Space Chapter, Natural Resource Section states: *"Provide ample opportunities for people to access and enjoy the Willamette River and the natural environment while complying with State and Federal regulation and providing stable riverbanks and conserving, protecting, restoring, and establishing a diversity of riparian habitats and wetlands in order to retain their properly functioning condition related to fish and wildlife habitat, riverine flood control, sediment and erosion control, water quality, and groundwater pollution,"* [*emphasis original*].

The finding concedes that the new regulations will do things that trigger the rule. Goal 5 is triggered by any change in regulations "that affects a Goal 5 resource," as quoted in the city finding above. Goal 5 regulations are being changed here. The finding admits that changes are being made to uses allowed in a Goal 5 resource area, but asserts that there will be no conflicts with Goal 5 resources. That conclusion misses the point of the rule; it jumps to a conclusion about impacts in order to ignore the analysis required to evaluate impacts.

The city's findings begin with a chronological summary of the city's Goal 5 and related natural resource protection measures. App-59 to 60. They note that in 2002 the city adopted regulations under its Stormwater Management Program to meet various federal water quality and drinking water requirements, consistent with Goal 6. These amendments

> "established 50 and 75 foot protection setbacks along Water Quality Limited Watercourses. No changes are proposed to riparian corridor standards contained in the SDC as part of the Glenwood Refinement Plan Update Project." App-59 last para.

In 2004 the City adopted its Natural Resources Study (NRS), which became its Goal 5 program for wetlands, riparian corridors, and upland wildlife habitats. As Eugene's partner in the Metro Plan, this was Springfield's contribution to completing Tasks 4 and 7 of the Metro Area Work Program for periodic review. The package was adopted by Springfield Ordinance No. 6150 (Nov. 28, 2005) and submitted for acknowledgment on December 2, 2005. Exhibit A to the ordinance was the NRS, which included the full Goal 5 analysis; Exhibit B was summary

supporting findings. Following review of objections, the program was acknowledged by the LCDC by Approval Order 06-WKTASK-001711 (Oct. 30, 2006).

Ordinance No. 6150 adopted code language that identified "locally significant protected riparian areas." The new code language applied Site Plan Review standards to

> "Locally significant protected areas, listed in the Springfield Inventory of Natural Resource Sites and shown on the Natural Resources Inventory Map. The City has determined which riparian areas are significant in accordance with rules adopted by the Oregon Department of Land Conservation and Development (DLCD)." Ord. No. 6150 pages 4-5 (Nov. 28, 2005)

The Natural Resources Inventory Map shows the Willamette River as a locally significant protected area. See 11x17 map in NRS following page 22. As a "Water Quality Limited Watercourse" on the DEQ 303(d) list, the NRS relied on existing setbacks for the Willamette River rather than adopting new setback provisions. Ord. No. 6150 pages 5-6 (Nov. 28, 2005). As the findings in Exhibit B to the ordinance explained: "Sites protected by the Stormwater Management Program are not recommended for additional protection." Ord. No. 6150, Exhibit B Findings at page 3 (Nov. 28, 2005). In other words, the regulations adopted for the purpose of protecting Goal 5 resources involved the carrying-forward of existing setback provisions. Thus, any changes to those regulations would constitute an amendment to "land use regulation adopted in order to protect a significant Goal 5 resource," within the meaning of 660-023-0250(3)(b).

Under the code amendments adopted with the GRP, the Willamette River, as a Goal 5 resource, and identified as a Water Quality Limited Watercourse, continues to be subject to the stormwater regulations. "Public Stormwater Facilities. Public stormwater facilities shall comply with Section 4.3-115." SDC 3.4-270.I., App-395, 422. The reference to SDC 4.3-115 is to "Water Quality Protection." App-457.

Thus, both before and after the GRP amendments, the water quality standards in SDC 4.3-115 apply to development adjacent to, and are protective of Goal 5 riparian resources. But the standards were changed by the GRP. This can be seen by comparing SDC 4.3-115 before

and after the GRP amendments. The new provisions are at App-457 to 461. Here is a list of the most significant changes in the new provisions, as compared with the old:

For the Willamette River, as a WQLW with more than 1,000 cfs flow, the "riparian area boundary" remains "75 feet landward from the top of the bank." SDC 4.3-115.A.1., App- 457. However, there is a new protection not contained in the old:

> "Existing native vegetative ground cover and trees shall be preserved, conserved, and maintained between the ordinary low water line and the top of bank and 75 feet landward from the top of bank." App-457.

The rules stated in SDC 4.3-115.B.1. allowing the "planting of trees and native vegetation" in the riparian area also have changed. Under the new regulations trees may be planted for a longer list of purposes. App-459.

"Stormwater management systems and outfalls" are now allowed if provided for in the Springfield Engineering Design Standards and Procedures Manual (EDSP), rather than merely at the discretion of the Public Works Director. SDC 4.3-115.B.5., App-459. The EDSP is not an acknowledged land use regulation, as discussed elsewhere.

The new regulations allow "multi-use paths for pedestrians and/or bicycle use," whereas the old regulations allowed "pedestrian trails." SDC 5.3-115.B.6., App-459. A multi-use path is much more robust than a pedestrian trial, which by definition is limited to pedestrians. See definitions in SDC 6.1-110: "**Pedestrian Trail.** A surfaced path that is designed and reserved for the exclusive use of pedestrian travel." See also the definition of "Shared Use Path" in SDC 6.1-110.

"Bikeways shown on the TransPlan Priority bikeway System Projects Map or the Future Bikeway Projects Map as specified in Section 4.2-150" are a newly permitted use, not listed as allowed in the old regulations. SDC 5.3-115.B.7., App-459.

The changes in regulations and allowed uses above are sufficient to trigger the application of Goal 5, as explained in *Rest-Haven*. Under OAR 660-0023-0250(3), a plan

amendment "affects" a Goal 5 resource (thereby requiring Goal 5 analysis) if the amendment changes the uses allowed or the regulations that were adopted to protect the resource. The list above shows both – changed regulations and changed uses. The conclusion that the changes are OK needs to be made after the Goal 5 analysis, not as a substitute for it.

SECOND ASSIGNMENT OF ERROR (Goal 8, Recreation)

Respondents violated Goal 8 by failing to designate seven acres of high density residential land to provide for public open space, and violated Goal 2 by failing to implement a policy that the Springfield 2030 Plan requires to be accomplished by the GRP.

The 2030 Plan includes policies directing the city to designate 21 acres of land designated for high density residential uses ("HDR-designated land") and to include 7 acres of HDR-designated land to be used for public open space, intended to serve the needs of the 21 acres of residential uses. The GRP satisfies the initial requirement of providing the 21 acres of HDR-designated land, but it does not provide the seven acres of HDR-designated land to be used for public open space. Contrary to the mandate imposed by the 2030 Plan, the GRP calls for siting some of the open space along the river, in areas that are designated for Commercial, Office and Employment mixed uses. Placing the public open space in commercially-designated areas, as opposed to the residentially-designated area, as called for by the 2030 Plan, makes it less accessible to the residential areas it is intended to serve. More simply, it is contrary to the 2030 Plan.

As background, HB 3337 (2007), codified at ORS 197.304, directed the City to adopt its own UGB with a 20-year residential land supply. To meet that mandate, the city adopted the Springfield 2030 Refinement Plan, Residential Land Use and Housing Element, via Ordinance No. 6268 (June 20, 2011).[3] That plan found the city to be 28 acres short on high density residential land ("HDR-designated land"). Hence, it included in the 2030 Plan a policy

[3] Lane County adopted the package by Ordinance No. PA1274 on June 6, 2011.

obligating the City to make up deficit when it finished the GRP, which was on the city's "coming soon" planning docket at the time. The findings in the Residential Land and Housing Element of the Springfield 2030 Plan describe exactly what was needed:

> "There is not enough buildable land in Springfield's UGB designated for high density Residential uses within the existing Springfield UGB to meet the future housing needs of the projected population. The High Density Residential designation has a deficit of approximately 28 gross acres. At a minimum, the City will meet the high density residential land deficit of 28 acres (including 7 acres of HDR designated land to provide public open space for the higher density development, as well as any needed public facilities) through its redevelopment strategies in Glenwood." App-71, (emphasis added.)

The need for splitting the 28 acres of HDR into 21 acres for housing and seven acres for public open space to support the housing derives from the Residential Land and Housing Needs Analysis (RLHNA), the city's refinement plan for housing that informed the 2030 Plan. That requirement was carried over into the new GRP amendments. The introduction to the Housing and Economic Development chapter of the GRP amendments characterizes this obligation as:

> "[T]he adopted Springfield RLHNA identified a deficit of 28 gross acres for high-density residential uses and associated public/semi-public land intended to provide public open space for the higher density development, as well as any needed supporting public facilities. To address this deficit, Implementation Action 2.1 in the Springfield 2030 Residential Land Use and Housing Element directs the City Council to re-designate at least 28 additional gross buildable acres as part of Glenwood Phase I (seven acres of which are intended to provide public open space for the higher density development, as well as any needed supporting public facilities)." App-313, (emphasis added).

The Neighborhood Urban Park Section of the Open Space Chapter in the GRP also states:

> "In addition, Springfield's [RLHNA] directs the designation of at least seven gross acres of high-density residential land for public/semi-public uses to support a minimum need of 21 gross acres of land designated for high-density residential uses in the Glenwood Riverfront." App-300, (emphasis added).

The GRP accomplishes its task of providing the 21 acres of HDR-designated land intended for development (see App-77), but it does not provide the seven acres of HDR-designated land to be used for public/semi-public facilities. The public open space in the GRP is largely planned for lands that are not HDR-designated. As shown in Figure 10 at App-301, the

linear park will be developed along the riverfront, with only a portion planned for the HRD-designated land in Subarea A. As stated in the findings for Goal 8, Recreational Needs:

> "Glenwood Phase 1 proposes to provide for the recreational needs of the proposed high density residential neighborhood in the Franklin Riverfront, Subarea A by requiring two park blocks and a linear park and multi-use path along the Willamette River." App-70.

The staff report for April 2, 2012 City Council meeting makes this point directly:

> "The park blocks portion of the open space need is 3.5 acres. The proposed 75 foot-wide riparian/Greenway Setback Line and the proposed multi-use path area comprise the remaining 3.5 acre need for open space." Rec 2323.

That paragraph of the staff report also quoted the requirement from the 2030 Plan to provide seven acres of HDR-designated land for the public space. But then it concludes the needed open space will be provided elsewhere.

Accordingly, the city's most recent GRP amendments are inconsistent with the commitments it made in its 2030 Plan. One plan says provide seven acres of HDR-designated open space in order to serve the 21 acres of HDR uses; the other plan says it will put seven acres of public open space all over the map. These refinement plans need to be mutually consistent. *South of Sunnyside Neighborhood League v. Bd. of Comr's of Clackamas County*, 280 Or 3, 13 (1977); ORS 197.015(5). When the comprehensive plan is amended, it must remain internally consistent after the amendment. *NWDA v. City of Portland*, 47 Or LUBA 533, 550 (2004).

THIRD ASSIGNMENT OF ERROR (Goals 2 and 9)

Respondents violated Goals 2 and 9, and the Goal 9 Rule in numerous respects. They violated Goal 2 by failing to make a decision based on ultimate policy choices, an adequate factual basis, or adequate findings related to Goal 9 standards. They violated Goal 9 standards by failing to demonstrate compliance with Goal 9 and the Goal 9 Rule requirements for contents of comprehensive plans.

Goal 2 sets requirements for an adequate factual basis, adequate findings, evaluation of alternative courses of action, and a statement of ultimate policy choices in complying with the substantive requirements of the other goals.

Goal 2 imposes "on local governments a duty to provide somewhere in the record an explanation of why the governing body believed the particular ordinance under consideration complied with the applicable statewide planning goals." *Oregon Electric Sign Assn. v City of Beaverton,* 7 Or LUBA 68, 74 (1982), cited with approval in *Davenport v. City of Tigard*, 22 Or LUBA 577, 582 (1992). This requirement applies to legislative as well as quasi-judicial amendments, especially where required by an applicable statute, goal, rule, plan or ordinance. *Opus Development v. City of Eugene (Opus I)*, 28 Or LUBA 670, 680 (1995).

Goal 2 requires that decisions have an "adequate basis in fact." OAR 660-015-000(2). The "adequate basis" standard requires local governments to demonstrate that substantial evidence in the record or in adopted studies or plans supports any factual findings necessary to demonstrate compliance with an applicable statewide land use goal, statute or rule. This requirement applies to legislative and quasi-judicial amendments. *Opus I*, 28 Or LUBA at 680 (1995); *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998). Here, ORS 197.175, Goal 9, the Goal 9 Rule, and the Metro Plan all require respondents to demonstrate that the amendments in question are consistent with those requirements and do not put other elements of the acknowledged plan and implementing regulations out of compliance.

Goal 2 requires "[a]ll land use plans shall include * * * evaluation of alternative courses of action and ultimate policy choices." While this does not mean that local governments must eliminate all ambiguity from local standards and procedures in the absence of some more specific requirements, it does mean they can't create internal conflicts in local plans and implementing regulations.

A. Respondents violated Goal 2, Goal 9 and the Goal 9 Rule, and related Metro Plan policies, by basing their conclusion of compliance with the Goal 9 land inventory requirements by reliance on an unacknowledged economic opportunities analysis (the 2010 CIBL) that is not yet a part of the comprehensive plan.

LUBA recently summarized the range of potential standards that apply in considering Goal 9 compliance. See *Gunderson, LLC v. City of Portland,* 65 Or LUBA __ (LUBA No.

2010-039/040/041, Jan. 21, 2011), *rev'd in part and remanded*, 243 Or App 612, 259 P3d 1007 (2011), *affirmed* __ Or __ (June 12, 2012):

> "Goal 9, paragraph 3 provides in relevant part that comprehensive plans must "[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies." There is also a statutory obligation for local governments to plan for commercial and industrial development. ORS 197.707 through 197.719. Administrative rules at OAR chapter 660, division 9 implement Goal 9, but those rules apply only in certain specified circumstances. However, where a city enacts zoning amendments that are likely to reduce the supply of buildable industrial and commercial lands, even if the Goal 9 rule does not apply to the decision, the city has an obligation to demonstrate that despite any such reductions in development potential for industrial and commercial lands, the city's land supply inventories continue to comply with Goal 9. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 691 (1995); *Volny v. City of Bend*, 37 Or LUBA 493, 510-11 (2000)."

This decision is a post-acknowledgment plan amendment made by local governments that are part of a Metropolitan Planning Organization (MPO), as defined by OAR 660-009-0005. Goal 9 applies directly. As a post-acknowledgment amendment that changes more than two acres from an industrial to nonindustrial designation, respondents must demonstrate consistency with the most recent acknowledged economic opportunities analysis (EOA) and comprehensive plan provisions, or amend the plan to reflect the changes, or a combination of both. OAR 660-009-0010(4).

The requirements for an EOA are stated at OAR 660-009-0015. Because Springfield is in an MPO, the EOA must include documentation of a "short-term supply of land." OAR 660-009-0015(3)(a)(C). The comprehensive plan must state policies for economic development that cover certain bases. These policies must be supported by the acknowledged EOA. OAR 660-009-0020.

In turn, the city must have implementing measures in its plans for the plan policies required above. Needed sites must be identified; serviceable land to meet the need must be identified; a short-term supply of land must be identified; uses that are incompatible with

industrial and employment uses are to be managed to limit negative impacts. OAR 660-009-0025(1), (2), (3), (6).

As explained in the Summary of Facts, this decision adopts and applies wholesale new commercial and industrial plan designations and zoning districts. In their finding under Goal 9 and the Goal 9 Rule, the respondents candidly admit that the touchstone for compliance is a 2010 Draft Commercial Industrial Buildable Lands Inventory, Economic Opportunities Analysis and Economic Development Objectives and Strategies, adopted by Resolution 10-03 (January 19. 2010) ("2010 CIBL/EOA"). The draft 2010 CIBL/EOA is a draft, not incorporated into the acknowledged plan. A copy is not included in the Record. The findings on the Goal 9 issues are at App-72 to 83.

The city's findings describe the 30 year history of planning for Goal 9 uses under the Metro Plan it shares with Eugene, including the most recent statutory mandate that it adopt its own UGB. App-72 to 74. Following that review, the city explains that the 2010 CIBL/EOA has yet to be incorporated into the plan, but that it contains the most current and best Goal 9 data.

> "Springfield locally adopted the Springfield Commercial and Industrial Buildable Lands Inventory, Economic Opportunities Analysis and Economic Development Objectives and Implementation Strategies in January 2010. The final decision on adoption of the Springfield Commercial and Industrial Buildable Lands Inventory and Economic Opportunities Analysis shall be made by the Springfield City Council and the Lane County Board of Commissioners as this document is incorporated into the Springfield 2030 Refinement Plan, a refinement plan of the Eugene-Springfield Metro Plan.
>
> "The Springfield Commercial and Industrial Buildable Lands Inventory and Economic Opportunities Analysis contains the most current and best data available to inform the update of the Glenwood Refinement Plan as it addresses land needed for employment for the planning period 2010-2030." [App-73 to 74]

With that admission on the table, respondents then evaluate the land use decision for compliance with the unacknowledged 2010 CIBL. The Goal 9 Rule is examined section by section. App-75 to 83. Respondents conclude the changes comply with Goal 9 based on the findings in the 2010 CIBL. App-83.

As Petitioner advised respondents in letters of advice (Rec 2144, 1124) that they may not demonstrate compliance with Goal 9 inventory standards or related plan policies based on draft plan documents. That caselaw is now quite clear. See, e.g., *Gunderson, LLC v. City of Portland*, __ Or LUBA __ (LUBA No. 2010-039/040/041, Jan. 21, 2011), *rev'd in part and remanded*, 243 Or App 612, 259 P3d 1007 (2011), *affirmed* __ Or __ (June 12, 2012); *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 124 P3d 1249 (2005); *DS Parklane, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000).

The situation here is very similar to *Gunderson*, where the City of Portland relied on a 2009 draft Goal 9 inventory document and the earlier, 1989 acknowledged inventory document did not have an express projection of needs. LUBA said:

> "The 2009 EOA is, as far as we can tell, the city's first attempt to quantify its supply of industrial land in 2009 and project industrial land needs through 2035. However, even with those differences in circumstances, we conclude that the city erred in relying on the 2009 EOA to conclude that adopting the additional restrictions on industrial lands that are included in the NRRP will not result in the city failing to comply with Goal 9. While the 2009 EOA is included in the evidentiary record, as we have already noted, it has not been adopted as part of the PCP. As the Court of Appeals held in *Dundee*, the "comprehensive plan and information integrated in that plan [must] serve as the basis for land use decisions." As we explain below, the 1989 EOA that is part of the PCP does not provide an adequate factual basis for finding that after adopting the NRRP the city comprehensive plan will remain consistent with Goal 9's requirement that the city "[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies." If the city relies on the 2009 EOA as the primary basis for its determination that the challenged amendments are consistent with the city's Goal 9 obligations, under *Dundee* it has little choice but to amend its comprehensive plan to adopt the 2009 EOA or take other appropriate action to amend the plan so that it will provide an adequate basis for the required Goal 9 determination." *Gunderson*, LUBA No. 2010-039/040/041, Slip Op at 15.

Respondents' reliance on the draft 2010 CIBL/EOA for Goal 9 compliance is fatal to its findings of compliance with Goal 9 and the relevant subsections of the Goal 9 Rule.

B. There are other shortcomings in the Glenwood ordinance in terms of what land can be counted toward the Goal 9 inventory, when the city ultimately has an acknowledged CIBL/EOA to actually apply.

An acknowledged EOA is the *sine qua non* for a Goal 9 analysis. However, as it did in *Gunderson,* LUBA should address the following issues that will come to bear when respondents have an acknowledged EOA. There are aspects of GRP package that would apply in the GRP area that likely disqualify acreage from being counted toward the Goal 9 inventories, when the city ultimately adopts an inventory into its comprehensive plan. These shortcomings are apparent on the face of the existing regulations. Therefore, they are discussed here, so that the errors can be avoided in the city's repair operations on remand.

1. All of the Goal 9 lands in the GRP area are subject to highly discretionary reviews, such as requiring conflicts with adjacent uses to be resolved; these discretionary standards likely disqualify those lands from being counted toward the need established in the inventory.

As an introduction to the list of issues here, it is important to grasp the Springfield process for development applications. Site Plan Review is required for any multifamily, commercial or industrial development prior to issuance of any development permit. SDC 5.17-105. Thus, "[A]ll development in the Glenwood Riverfront will require Site Plan Review." App-100 para 3; see also App-112 para 3. Site Plan Review is a Type II process. SDC 5.17-110.B. There are five approval criteria listed in the code, each of which incorporates multiple other standards by reference. SDC 5.17-125. Site Plan Review can be denied. "If conditions cannot be attached to satisfy the approval criteria, the Director shall deny the application." SDC 5.17-125. Reduced to its essentials, Springfield has made every Goal 9 and multi-family use a highly discretionary use. Uses listed as permitted outright in the Goal 9 zones (and multi-family zones) are permitted outright in name only.

Many of the Site Plan Review standards call for discretionary decisions, decisions that can severely limit or snuff out a use listed as permitted in the zone. When the code imbues each individual development application with discretionary standards, it becomes a surrogate for

doing the comprehensive planning at the front end, and it deprives landowners the benefit of knowing with any certainly what uses they can actually develop.

Instead of including limitations in the code to ensure that adjacent uses will be appropriate neighbors, the City makes this determination at time of a development proposal. Site Plan Review gives the Director broad conditioning authority, including to "mitigate identified negative impacts to surrounding properties." SDC 5.17-130. The Site Plan Review hoop in the development process means that owners of Goal 9 land can't be certain how or even whether they can develop their land until they have exited the Site Plan Review gauntlet.

In addition, the GRP ordinance has grafted into the Site Plan Review process a new, more robust set of standards for the GRP area. The actual language of the GRP ordinance says that it is substituting "development and design standards" in the new SDC 3.4-215.B.1 for the information requirements in the standard Site Plan Review Process stated in SDC 3.4-270. See SDC 3.4-215.B.1 at App-378. The list of GRP "development and design standards" covers topics A through N, as listed at App-395; these cover soup to nuts. The details of the development standards run from App-395 to App-427.

Whether the Site Plan Review process is a "limited land use decision," as defined in ORS 197.015(12), or a statutory "permit" as defined in ORS 227.160(2), the review involves a lot of discretion. As noted above, the code is explicit that Site Plan Review may be denied.[4] If that is the case, the process is most likely a "permit" process.

In *Opus I,* LUBA held that when a local government encumbers Goal 9 lands with the kinds of limitations and discretionary standards that come with Site Plan Review, it must

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[4] As for the soft continuum from uses permitted outright, through limited land use decisions, to statutory permits, see *Fechtig v. City of Albany,* LUBA Nos. 94-019, 94-020, 27 Or LUBA 480, 484, *aff'd,* 130 Or App 433 (1994):

> "Limited land use decisions under ORS 197.015(12)(a)(B) fall somewhere between (1) outright permitted uses for which approval involves no discretionary review and (2) uses allowed subject to application of discretionary approval standards that may result in denial of the use altogether."

demonstrate that it still has an adequate inventory of Goal 9 land. That is, lands so encumbered may not be counted as being "available" as required by Goal 9; they just "might" be available, depending on how the city feels in the Site Plan Review process. *Opus I* dealt with Site Review in Eugene, which is the fungible equivalent of Site Plan Review in Springfield.

The allegation in *Opus I* was that the area of the amended refinement plan has "important, central-city commercial and industrial uses." The new Site Review requirement "add[ed] a new layer of burdensome, subjective and indeterminate regulation to property on the city's Goal 9 inventory of commercial and industrial sites." Also, by requiring with Site Review that the "future land uses on such properties be 'compatible' with nearby residential uses," the plan and zone change orders "effectively removed those lands from the city's inventory of land available for expansion, replacement, and redevelopment of new commercial and industrial uses." Petitioners also alleged in *Opus I* that rezoning 105 formerly I-2 properties to Mixed Use invites residential uses into the area without establishing there wouldn't be an impact to Goal 9 inventory lands.

LUBA remanded in *Opus I,* saying:

> "Petitioners have demonstrated the challenged decisions include zone changes from an industrial zone to a mixed use zone allowing a variety of residential uses. Petitioners have also demonstrated the site review requirements imposed by the challenged decisions on numerous industrial, commercial and mixed use zoned properties may impose limitations on future industrial and commercial use of those properties. This is sufficient to require the city to demonstrate that it remains in compliance with the Goal 9 requirement for an adequate inventory of commercial and industrial sites.
>
> "* * * *
>
> "Goal 9, paragraph 3 requires that the city's inventory of suitable commercial and industrial sites be adequate not just with regard to total acreage, but also with regard to size, type, location and service levels, to provide for a "variety of industrial and commercial uses consistent with plan policies." The city must demonstrate that in view of the limitations and changes imposed by the challenged decisions, it still has an inventory of commercial and industrial sites that is adequate with regard to size, type, location and service levels, considering its plan policies for use of the Whiteaker neighborhood." 28 Or LUBA at 691.

As compared to the Eugene Site Review standards at issue in *Opus I*, the Site Plan Review process in Springfield allows every bit as much discretion in the review of uses proposed on Goal 9 land, and perhaps much more. The key provisions that make Site Plan Review at least as objectionable as Eugene's Site Review standards include:

- Conditions may be imposed "to mitigate identified negative impacts to surrounding properties." SDC 5.17-130. This is a blanket invitation to shrink, setback, and otherwise limit permitted uses.

- Parking and access is evaluated under the following discretionary standards: "facilitate vehicular traffic, bicycle and pedestrian safety to avoid congestion; provide connectivity within the development area and to adjacent residential areas, transit stops, neighborhood activity centers, and commercial, industrial and public areas; minimize driveways on arterial and collector streets as specified in this Code or other applicable regulations and comply with the ODOT access management standards for State highways." SDC 5.17-125.D.

- Conditions may be imposed "[l]imiting the hours of operation whenever a land use conflict is identified by the Director or a party of record, including, but not limited to: noise and traffic generation." SDC 5.17-130.F.

- Conditions may be imposed regarding "[p]hasing of development to match the availability of public facilities and services * * * as determined by the Public Works Director or the utility provider." This appears to make the facilities issue a case-by-case determination in the discretion of city staff, and it frustrates the requirement of having a "short-term supply" of "at least 25 percent of the total land supply within the urban growth boundary designated for industrial and other employment uses," as specified by OAR 660-009-0025(3)(a).

- Conditioning to require "[r]etention and protection of existing natural features and their functions, including but not limited to: significant clusters of trees and shrubs, watercourses shown on the WQLW Map and their riparian area * * * *" SDC 5.17-130.I.

- "If conditions cannot be attached to satisfy the approval criteria, the Director shall deny the application." SDC 5.17-125.

- "Existing Mature Vegetation and Healthy Trees * * * shall be retained to the maximum extent practicable." SDC 3.4-270.F.5.; App-407. None of these terms is defined in the code. In connection with a proposal to develop a vacant lot containing a lawn and trees, the Director could take the position that all of the lawn and trees must be preserved from development, or use this standard as a basis to limit a development proposal.

- In the 75-foot area between the Greenway Setback Line and the Willamette Greenway outer boundary, special standards apply, as required by 3.4-270.J.4.a. (App-423), to be applied through a Type III process. The special standards are the Willamette Greenway Development Standards, stated at SDC 3.4-280; App-446 to 456. Criteria for approval of

the Type III application appear at SDC 3.4-280.L.; App-454 to 456. There are 12 discretionary review standards that limit development potential to the point of extinction. A sampling incudes:

> "[P]rovide the maximum possible landscaped area/open space between the activity and the river." SDC 3.4-280.L.2.; App-455.
>
> "Significant air, water and land resources * * * shall be protected, preserved, restored, or enhanced to the maximum extent practicable." SDC 3.4-280.L.3.; App-455.

In summary, under the rule in *Opus I*, it is likely that the Site Plan Review process that applies to all Goal 9 uses imposes so much discretion that these lands may not be counted toward the Goal 9 inventory, when the City has a Goal 9 inventory. On remand, the City should have to demonstrate that the lands it wants to count toward its Goal 9 inventory are indeed "available" for Goal 9 uses. This likely will require doing upfront planning work that will enable the city to list permitted uses that are indeed permitted, not just allowed to run the Site Plan Review gauntlet with a chance of emerging with a discretionary development approval.

2. The "Minimum Development Area" violates Goal 9 and the Goal 9 Rule, for failure to base the size limitation on an acknowledged Economic Opportunities Analysis.

SDC 3.4-265 sets "Base Zone Development Standards." App-394. For each Mixed-Use zone there is a five-acre Minimum Development Area. This means that, in order to develop property, an applicant must get the cooperation of neighbors to assemble at least five acres. Small owners may not be able to develop because they can't assemble. Or they may be "held up" financially by their neighbors. Footnote 1 to the Development Standards Table at App-394 attempts to explain the standard, but the logic is hard to follow, perhaps due to typos. Suffice it to say, the city wants fewer, larger development sites, whereas the planning area now has a large number of small development sites. This standard is a planner's dream but the market's land bank.

As a twist on this requirement, for the Mixed-Use Employment Subarea D, where Petitioner's land is located, Footnote 1 to the Development Standards Table prohibits land

divisions of parcels over five acres in size absent an approved Final Site Plan or Final Master Plan. App-394. Thus, you need to get Master Plan approval for a specific parcel in order to divide it to sell part to someone who might want it for purposes of assembling a five acre parcel for their own development ambitions, but only after they undo the Master Plan for the portion they buy.

Ownerships under five acres are "too small" to develop alone; acreages over five acres in Area D are "too big" to divide and sell for development without first being master-planned. Five-acre development sites are "just right," as in the story about the three bears. *Cf* "Goldilocks and the Three Bears," R. Southey (1837).

The five-acre minimum mandates a massive makeover of property control, whether through ownership changes or development agreements. There are 267acres in the GRP Phase I area. App-47. There are 189 Tax Lots in the Phase I area, as listed in the Table of Tax Lots being rezoned in Exhibit E to the decision. App-504 to 509. That is 189 current potential development sites with an average size of 1.4 acres. The vast majority of Tax Lots are under 3 acres in size. Four Tax Lots are between 3 and 4 acres; three are between 4 and 5 acres; six are between 5 and 10 acres; four are between 10 and 20 acres; one is larger than 20 acres. *Id.*

The 11 Tax Lots over five acres total 112 acres. Thus, there are 178 Tax Lots under five acres totaling 155 acres; the average Tax Lot size of all lots under five acres in size is 0.87 acres. Imposing the five-acre Minimum Development Area would result in a maximum total of 42 development sites in the entire Phase 1 area (that is, 31 development sites of five acres each, totaling 155 acres, plus the 11 Tax Lots that are already over five acres in size). The mandated makeover would be from 189 potential development sites down to 42.

Another way to think of the wisdom of this policy is to realize that, starting with the Tax Lots under five acres, a would-be developer owning an average size Tax Lot (0.87 acres) would have to assemble five more average size tax lots in order to get to the 5-acre Minimum

Development Area. Or, to acquire a portion of a parcel that is larger than 5 acres, the parcel would first require Master Plan approval. That is a lot of assembly that has to be done under city rules that distort the property market to the benefit of would-be sellers.

The explanatory Footnote 1 to Development Standards Table at App-394 references the CIBL as partial justification for the five-acre one minimum size fits all standard. However, the CIBL is not acknowledged, as discussed above. The required justification is missing. If the City continues to believe that the Minimum Development Area standards are good policy, that policy needs to be explained in relation to an acknowledged EOA "inventory of commercial and industrial sites that is adequate with regard to size, type, location and service levels." *Opus I*, 28 Or LUBA at 691.

3. Respondents have failed to demonstrate that 25% of the Goal 9 land supply in the UGB qualifies as "short-term supply," as required by the Goal 9 Rule, OAR 660-009-0025(3).

The finding of compliance with this standard appears at App-80 to 81. The city relies on the unacknowledged CIBL/EOA to demonstrate compliance, which, as explained above, cannot be a basis for compliance. The findings recite that the CIBL found that the land supply in the UGB as a whole meets the 25% requirement, and it simply extrapolates that the land in the GRP area meets this standard, too. Even after the city has an acknowledged CIBL/EOA, it still must base its decision on evidence. That means looking at the available short term supply of Goal 9 in the relevant GRP area. In view of the admitted shortage of public facilities, it is going to be hard to show that any of the GRP land has earned a seat in the short-term supply.

FOURTH ASSIGNMENT OF ERROR (Goal 10, Housing)

Respondents violated Goal 10, the Goal 10 Rule, and comprehensive plan policies related to housing in numerous respects, most notably by violating a Metro Plan policy mandate to "conserve" affordable housing, and by failing to demonstrate the city has meet its need for a 20-year supply of buildable land that is developable under clear and objective standards and without unreasonable cost and delay in the development process.

We incorporate here the discussion of Goal 2 requirements in the Goal 9 assignment of error. Goal 2 imposes the same findings, evidence and policy choice requirements with respect to the substantive standards of Goal 10.

The Metro Plan directs the city to conserve the six mobile home parks in Subarea D as affordable housing and to increase their stability. The GRP does just the opposite, making the ultimate policy choice to recycle this affordable housing into offices. The City also needs to clean up the regulations that apply to development of all of its inventory of needed housing.

A. The GRP is inconsistent with Metro Plan Housing Policy A.25, which requires conserving and strengthening existing affordable housing.

1. By redesignating the developed mobile home park acreage, in particular the development in Subarea D, including Petitioner's fully developed mobile home park, for Mixed-Use Employment, the city is acting inconsistently with Metro Plan Housing Policy A.25, which requires the city to "conserve" the supply and "increase the stability and quality" of this "existing affordable housing."

The City addresses Metro Plan Housing Policy A.25 at page A-102 of the findings; App-144. The policy says:

> "A.25 Conserve the metropolitan area's supply of existing affordable housing and increase the stability and quality of older residential neighborhoods, through measures such as revitalization; code enforcement; appropriate zoning; rehabilitation programs; relocation of existing structures; traffic calming; parking requirements; or public safety considerations. These actions should support planned densities in these areas." (Ref. P. III-A-9)"

This wicket is too sticky for the city to simply sweep the existing affordable housing out of the Phase I GRP. Two pages of findings attempt to explain that redesignating all the mobile home parks in Subarea D to Mixed-Use Employment, making them nonconforming uses, and

facilitating their replacement with apartment units in Subarea A, will be consistent with this policy.

Initially, Policy A.25 is directly applicable based on its plain language, which invites application during policy making. For a recent LUBA decision finding that another Metro Plan policy of similar flavor and particularity is directly applicable in decision making, see *Northgreen Property LLC v. City of Eugene*, __ Or LUBA __ (LUBA No. 2011-099, March 5, 2012)(finding Metro Plan Policy E.4 directly applicable). The policy is also mandatory. "Conserve" means conserve, not "consider conserving" or "encourage conserving" or "say you are conserving but really don't."

Subarea D as a pool of existing affordable housing, including Shamrock Homes: As explained in the Summary of Facts, Shamrock Homes LLC is an existing, fully developed mobile home park in Subarea D. It had a GRP refinement plan designation of Commercial/Industrial/Multi-Family Residential Mixed Use. It was zoned Low Density Residential, which the old GRP said was a conforming zone for manufactured dwelling parks. See Summary of Facts. The City summarizes the magnitude of the larger, affordable housing pool in Subarea D at page A-102 of the findings; App-144:

> "Subarea D, which is planned for employment mixed-use, currently contains 6 mobile home parks with 375 units on approximately 34 acres of land, which equates to a density of just over 11 dwelling units per net acre. The parks are currently designated Mixed Use/Nodal Development Area, Commercial/Industrial/Multi-Family Mixed Use or Low Density Residential and zoned Low Density Residential. Only the parks and park land on the west side of McVay Highway that are designated and zoned Low Density Residential are currently conforming. The parks on the east side of McVay Highway are currently pre-existing non-conforming uses."

Note that there may be a typo in this finding. Shamrock is on the east side of McVay, not the west, is zoned LDR, and is in a zone for which the use is conforming, according to the GRP policy quoted in the Summary of Facts and below.

Additionally, Springfield's Refinement Plan for Housing, the RLHNA (2011),[5] confirms the importance of preserving the affordable housing in Glenwood's mobile home parks. It has the highest degree of owner occupancy.[6] It can't be replaced by building new units, due the prohibitive building costs.[7] And encouraging redevelopment of this kind of housing will result in the overall loss of affordable housing in Springfield.[8]

The GRP recipe for existing affordable housing in Subarea D: The two pages of city findings about what is in store for the existing, affordable, mobile home park uses boils down to this: Redesignate and resdictrict for employment; create or aggravate nonconforming use status; transition the nonconforming uses into employment uses; build fancy high density housing in a different part of the GRP neighborhood. This is the traditional housecleaning model for dealing with mobile home parks.

Inconsistency with Policy A.25: The Metro Plan policy says to "conserve" this housing and "increase the stability and quality" of this "older residential neighborhood." The GRP calls for sweeping the neighborhood clean of the residential uses. In many paragraphs of findings the city never even states a hollow conclusion that the GRP is consistent with the policy, which is what is needed. *South of Sunnyside*, 280 Or 3, 13 (1977); ORS 197.015(5); ORS 197(2)(b); ORS 197.835(7)(a); OAR 660-015-0000(2). We critique the city's findings one paragraph at a time.

Para 1; App-144: This paragraph confirms that most of the neighborhood's affordable housing is in projects just like Shamrock, and that landowners will feel pressure to redevelop

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[5] Springfield Residential Land and Housing Needs Analysis, ECONorthwest (April 2011), adopted as Exhibit B to Ord. No. 6268 (June 20, 2011) as a refinement of the Metro Plan to comply with ORS 197.304 (RLHNA).

[6] 93% of mobile and manufactures homes in Springfield are owner occupied. RLHNA at 26

[7] "The cost of building new housing is largely prohibitive for building dwelling units affordable to low-income households." RLHNA at 77.

[8] "The City of Springfield understands that low value housing is an integral part of the City's affordable housing stock and that encouraging redevelopment of such housing will likely result in an overall loss of affordable housing in Springfield." RLHNA at 19

more valuable mixed uses, induced in part from the expense of annexing and hooking up to the public wastewater system when it is available. This finding confirms the need for Policy A.25.

Para 2; App-144: This finding posits a "conundrum," a conflict between "conserving the existing affordable housing" and "providing sites for new centrally-located multi-family housing and employment opportunities." The conflict is not explained or otherwise evident. There is no conflict between building new high density fancy housing in Subarea A and also meeting Policy A.25 by conserving and supporting the hundreds of affordable housing in Subarea D. The City can do both; at least it has not explained why it can't do both.

Para 3; App-144: This finding elaborates on the 1100 units of housing intended to be developed in Subarea A, with the impact of replacing 49 units in the 7-acre Ponderosa Mobile Home Park at that location. This finding describes city action inconsistent with the Metro Plan policy; the existing affordable housing will not be conserved, supported, or made more stable.

Para 4; App144: This finding is quoted above and documents the 375 units of existing affordable housing now located in Subarea D, including the Shamrock site, all of which the city plans to make nonconforming uses, to be eventually replaced with employment uses.

Para 5; App-145: This finding simply notes that the new multi-family housing planned in Subarea A will be much more dense than the existing affordable housing in the mobile home parks. This finding is not relevant to the policy.

Para 6; App-145: This finding explains that the redesignations will eliminate plan/zone conflicts and make all the mobile home parks nonconforming uses, until redevelopment happens. Documenting how the demise of mobile home inventory will be expedited via the plan zone changes further demonstrates inconsistency with the policy.

Para 7; App-145: This finding explains what help the city can provide to residents when the mobile home parks close; it documents the demise of existing housing the city is expediting.

Para 8; App-145: This finding explains that Subarea D has large parcels and the Goal 9 CIBL says there is a need for larger parcels. This is guesswork, as the CIBL is not acknowledged. Also, the desire for large parcels for employment use is not a basis for violating the Metro Plan policy. The City has not explained why it can't find its needed Goal 9 parcels elsewhere and comply the policy in Subarea D here.

Para 9; App-145-46: This finding explains the city's commitment to helping mobile home park occupants weather the relocation process when their housing is converted to another use. The policy tells the city to keep the use alive, not help with burial arrangements.

Para 10; App-146: This last finding says the city has programs to conserve existing affordable housing as long as possible. However, the GRP is not one of those programs, as it calls for replacing the housing with other uses, contrary to the Metro Plan policy.

Summary: Read as a whole, the findings do not demonstrate the policy is complied with. Read individually, many of the findings demonstrate inconsistency with the Metro Plan policy.

2. The GRP Phase I text amendments eliminate a plan policy from the old GRP that implemented Metro Plan Policy A.25 by clarifying that mobile home parks are an allowed use in the LDR use. This policy protected the mobile home parks from falling into nonconforming use status, which is a big step on the road to extinction. Removing the GRP policy is inconsistent with the Metro Plan policy.

The Subarea 9, McVay Mixed-Use Area section of the GRP, which includes Petitioner's area, contained the following policies prior to the adoption of the new Phase I GRP amendments:

> **"2. The City shall allow for appropriate zoning reflecting the land use designations within this subarea.**
>
> 2.1 Allow for a mixture of zoning districts that would allow parks, office and industrial parks, and medium-density residential use.
>
> 2.2 Allow manufactured dwelling parks to have Low Density Residential zoning.
>
> 2.3 Allow Neighborhood Commercial or Community Commercial zoning within the commercially designated area.
>
> **"3. The City shall consider this area as appropriate for RV use.**
>
> 3.1 Continue to allow RVs to replace RVs and manufactured dwellings in existing manufactured dwelling parks that contain RVs." (Emphasis added).

These policies got disappeared in the new plan for the Phase I area; they remain in effect for the Phase II area. Each of these policies reflects one way to implement, in a practical way, Metro Plan Policy A.25. Each policy facilitates conserving affordable housing and making those neighborhoods more stable. Being a permitted use is always better than being a nonconforming use. See *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424, 432 (1991)("Nonconforming uses are not favored in Oregon law. *Michael v. Clackamas County*, 9 Or LUBA 70, 75 (1983).").

As with most nonconforming use provisions, those in Springfield are typically stingy, allowing bare continuance, repair and replacement in kind. See SDC 8.8-120. Expansion or modification is discretionary. SDC 5.8-125.

The City should be obligated to demonstrate, based on the record, that cutting these policies from the GRP Phase 1 area is consistent with the Metro Plan Policy A.25. That should be a tough sell.

B. In addition to the shortage in high density residential acreage, the acreage redesignated to high density residential fails to meet statutory, goal and rule requirements for residential land that is developable under clear and objective standards. ORS 197.307(4); OAR 660-008-015(1).

Both the Needed Housing Statute and the Goal 10 Rule require that land in the residential buildable lands inventory be developable under clear and objective standards. The Needed Housing Statute has stated this requirement since its initial enactment in 1981.[9] The current version of the requirement appears at ORS 197.307(4):

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

[9] In 2011 the legislature enacted a major reorganization of the Needed Housing Statute, which took effect on January 1, 2012. Those revisions essentially renumbered ORS 197.307(6) (2009) as ORS 197.307(4) (2011).

This touchstone requirement also appears in the Goal 10 Rule, where it has rested comfortably, in a hint of a benign neglect aura, since the initial adoption of the rule in 1982. OAR 660-008-0015(1) says:

> "Except as provided in section (2) of this rule, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Since enactment of the statute in 1981 and the rule in 1982, both codifications were later amended to allow local governments to apply standards that are not clear and objective to regulate "appearance and aesthetics," but only provided the owner has the right to proceed under clear and objective standards. See OAR 660-008-0015(2); ORS 197.307(6).

Thus, under the state scheme, a city can have a single track for approval of needed housing, which must have only clear and objective standards, or it can have two tracks – one that is clear and objective, and another that includes discretionary standards for regulating "appearance and aesthetics.[10]" Eugene, for example, has the two-track approach. See generally *Home Builders Assn. of Lane County v. City of Eugene*, 41 Or LUBA 370 (2002) (reviewing compliance of the clear and objective track with state law). Springfield has only one track. Applicants are not offered the optional, discretionary track, under the Springfield code. Therefore, all of the city's standards for review of residential development on land that is in the 20-year buildable land inventory must be clear and objective.

In addition, the legislature bolstered the statutory requirement for clear and objective standards in 1999 in two ways, responding to LUBA and Court of Appeals decisions in *Rogue Valley Association of Realtors v. City of Ashland,* LUBA No. 97-260, 35 Or LUBA 139, 155

[10] What is critical to note about the alternative, nondiscretionary track, is that it only applies to regulation of "appearance and aesthetics." All other issues aspects of development of land that meets the definition of "Needed Housing" can be reviewed only under standards that are clear and objective. Standards that are not clear and objective simply may not be applied to deny an application. See *Rudell v. City of Bandon,* 62 LUBA 279, __ (2010). Presumably, standards that are not clear and objective also may not be used to condition an application.

(1998), *aff'd* 158 Or App 1 (1999). First, it required that standards required to be clear and objective "must be clear and objective on the face of the ordinance." ORS 227.173(2). Furthermore, in any appeal at LUBA, "the local government imposing the provisions of the ordinance shall demonstrate that the approval standards are capable of being imposed only in a clear and objective manner." ORS 197.831. These amendments were via 1999 Or Laws ch 357.

The 2030 Plan explicitly recognizes the state mandate for clear and objective standards in the last finding following the listing of housing policies.[11] The City added the finding recognizing the statutory right because it did not have time for the significant revision to bring the code into compliance.[12] The City has had plenty of time to get it right in the GRP.

Determining whether a standard is clear and objective is itself not a clear and objective task. As LUBA has noted: "[F]ew tasks are *less* clear or *more* subjective than attempting to determine whether a particular land use approval criterion is clear and objective." *Rogue Valley,* 35 Or LUBA at 155 (1998), *aff'd,* 158 Or App 1 (1999). However, the general rule of thumb is that standards for approval of needed housing are clear and objective within the meaning of the statute and the rule if the local government demonstrates that they do not impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development." *Rogue Valley*, 35 Or LUBA at 158.

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[11] 2030 Plan, Residential Land Use and Housing Element, Approval Standards for Residential Development, Finding 1:

> "Consistent with the Needed Housing Statute Goal 10 and the Goal 10 rule any approval standards special conditions and the procedure for approval adopted by the City shall be clear and objective and may not have the effect either in themselves or cumulatively of discouraging needed housing through unreasonable cost or delay."

[12] Springfield 2030 Refinement Plan, Residential Land Use and Housing Element, adopted by Ord. No. 6268 (June 20, 2011), Exhibit F Findings at page 63:

> **"Request that owners of land in the residential inventory have the right to develop under clear and objective standards.** While the city believes this request is an appropriate objective for the LCHBA, to fully implement this request would require a significant revision to the City's acknowledged development code that is beyond the scope of HB 3337. However the city is also aware that there is a statutory requirement to approve residential development under clear and objective criteria. The city therefore added a finding in the housing element recognizing this statutory right."

Turning to the standards for the high density housing designations in the GRP, we note for starter, that all multi-family housing development proposals must run the Site Plan Review gauntlet. "[A]ll development in the Glenwood Riverfront will require Site Plan Review." App-100 para 3; See also App-112 para 3. Site Plan Review is a Type II process. SDC 5.17-110.B.

Site Plan Review is an inherently discretionary process. We described the standards imposed in some detail in Part B.1 of the Goal 9 Assignment; we incorporate that here. The Site Plan Review process in Springfield is more discretionary than the Site Review process that LUBA found in the *Opus* litigation too discretionary to allow counting the land as being truly "available" for development and countable in a required land inventory. *Id.*

In summary, LUBA should find that the high density residential acreage in the GRP may not be counted toward the Goal 10 inventory (to meet the 20-year supply as anticipated by the 2030 Plan and ORS 197.296) because that acreage is burdened by development standards that are not clear and objective on their face. If the city wants to count this acreage toward its inventory obligation, it will need to strip out the discretionary standards, which are replete in the Site Plan Review process.

C. The City may not count all of its high density residential acreage toward the need established in its BLI because it has not planned for the public facilities to support development of the acreage during the 20-year planning period.

The City has not included in its comprehensive plan or its public facilities plan the basic facilities that are needed for the high density residential land to build out in the 20-year planning period, as imposed by ORS 197.296(2). We have demonstrated this shortcoming, with respect to storm and sanitary and transportation, in connection with the Goal 11 Assignment of Error. We incorporate that argument here.

It is inherent in the notion of having a supply of land that "provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years" that the plan include facilities to allow

development of the land. ORS 197.296(2). "'Buildable lands' means lands in urban and urbanizable areas that are suitable, available and necessary for residential uses." ORS 197.295(1). Inventory lands are not "suitable" or "available" if they are not planned to be serviced in a way that would allow development.

The Goal 10 Rule restates the "suitable" and "available" point. OAR 660-012-005(2) (definition of "buildable land"). It also anticipates that public facilities must be available for lands designated for residential use, as it explains when a residential plan designation may be withheld, due to identified constraints in needed public facilities. OAR 660-008-0020(2).

Goal 11 and the Goal 11 Rule require the plan to include public facilities needed to support the buildable lands identified in the plan. See discussion in connection with the Goal 11 assignment of error.

Finally, when the City set its UGB for residential land in 2011, it did so consistent with Goal 14 and the Goal 14 Rule. Setting the UGB to accommodate enough land for 20 years of needed housing brings with it the obligation to plan for needed public facilities, too. OAR 660-024-0040(1) says:

> "The UGB must be based on the adopted 20-year population forecast for the urban area described in OAR 660-024-0030, and must provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period consistent with the land need requirements of Goal 14 and this rule. The 20-year need determinations are estimates which, although based on the best available information and methodologies, should not be held to an unreasonably high level of precision."

The City is now placing the last piece of its residential UGB puzzle, as promised in and required by the 2030 Plan – designating 28 acres of HDR in Glenwood. That comes with an obligation to plan for the needed public facilities during the planning period. The city may not count toward its needed housing inventory any residential acreage that is not supported by public facilities in its plans. As explained more fully in the Goal 11 assignment, the city has not yet planned to support its proposed Glenwood HDR acreage.

D. The city's code standard requiring a five-acre Minimum Development Area in the GRP violates the prohibition against standards and processes "discouraging needed housing through unreasonable cost or delay." ORS 197.307(4); OAR 660-008-0015(2).

Owners of High Density Residential land in the GRP area must assemble five acres of land in order to see development or redevelopment approval. This is the effect of SDC 3.4-265, which sets "Base Zone Development Standards." App-394. For each Mixed-Use zone there is a five-acre Minimum Development Area ("MDA").

We described the mechanics of how the MDA standard functions in Part B.2 of our Goal 9 assignment, which is incorporated here. In connection with Goal 9 standards, we explained that the MDA standard is not supported by an acknowledged EOA, because there is none. The MDA standard is objectionable under Goal 10 standards, too, but for different reasons.

The MDA will delay needed housing: Simple logic suggests that the MDA standard will delay the development of land inventoried for Needed Housing. Owners of small parcels will need time to assemble other small parcels to get to the five acres needed to get in the door at the Planning Department to submit their Site Plan Review application for discretionary review by the Director. With the average size of all Tax Lots under five acres in the GRP at 0.87 acres, an owner of one average size lot must assemble five more average size parcels before starting her site planning. That is a lot of assembly time, which means delay in delivery of housing.[13]

The MDA will also increase the cost of needed housing: Simple logic also suggests that the MDA will increase the cost of land assembly, which will increase the cost of the housing ultimately delivered to the market. The MDA will increase the value of land adjacent to undersized parcels. If owner "A" has an undersized lot wants to develop, the owners of adjacent lots "B" through "D" can be expected to demand higher prices for sale or control of their dirt.

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[13] A lot of opportunities can be missed while small parcels are assembled to meet the MDA. The liquid metal T-1000 in Terminator 2: Judgment Day (1991) comes to mind. When the T-1000 model Terminator is incapacitated after being hit hard, it takes time for liquid metal parts to flow together to make a whole Terminator that can function again. A lot happens during the delay waiting for assembly.

They own the key that A needs to get in the door to the Planning Department. That is how the land market works. Logically, if "A" has to pay a premium to get more land to develop her own, then that will higher cost will be passed along.

The city has not established a reasonable basis for the higher costs and delay in delivering needed housing. As noted in the Goal 9 assignment, the 5-acre MDA reduces the number of potential development sites in the GRP neighborhood from 189 to 42. The city's findings do not justify the 5-acre MDA in the context of housing development. The utility of the delay and the higher costs are not apparent on the face of the ordinance.

LUBA has opined that the unreasonable cost and delay standard in Needed Housing Statute and the Goal 10 Rule is best addressed in an "as applied" context. *Home Builders Assn. of Lane County v. City of Eugene*, 41 Or LUBA 370, 422 (2002)("In our view, the question of whether approval standards or procedures discourage needed housing through *unreasonable* cost or delay cannot, in most cases, be resolved in the abstract, in a challenge to a legislative decision that adopts such standards or procedures."). However, no applicant will be able to challenge the MDA in an as applied context, because no applicant will be able to get into an as applied situation without meeting the MDA.

Petitioner should be able to challenge the MDA here, based on the lack of any approval standard that supports imposing the MDA. This is analogous to the situation in *Home Builders*, 41 Or LUBA at 424, where LUBA struck down a geotechnical information requirement that was unrelated to any approval standard.

FIFTH ASSIGNMENT OF ERROR
(Goal 11 (Public Facilities and Services); and Goal 2(internal plan consistency)

Respondents violated Goal 11and the Goal 11 Rule in numerous respects, most notably by failing to do the basic planning required in connection with stormwater, sanitary and transportation facilities and services; it violated Goal 2 by failing to adopt a refinement plan that is coordinated and integrated with the comprehensive plan.

We incorporate here the discussion of Goal 2 requirements in the Goal 9 assignment of error. Goal 2 imposes the same requirements for findings, evidence and policy choice with respect to the substantive standards of Goal 11.

The question here is whether the GRP amendments are adequate to comply with Goal 11 and the LCDC's Goal 11 administrative rule, OAR chapter 660, division 11. Petitioner believes they fall short. In summary, the GRP Phase I amendment prescribes a grand makeover of the entire riverfront area in Glenwood, envisioning much higher density residential and commercial development, to be served by redevelopment of Franklin Blvd., the arterial through the neighborhood, into a much more robust "multimodal transportation facility." App-92, last para. The same will be done for McVay Highway. App-93, para 2. Redevelopment of Glenwood will be made possible by extending the sanitary sewer trunk line through the entire neighborhood in the redeveloped arterial (App-93, para 5), and by developing, for the first time, a public stormwater collection system. App-93, para 6. However, to the extent Goal 11 requires public facility planning needed to support the land use planning, the GRP falls short. The GRP is a Potemkin plan; a plan that can't be implemented, for lack of infrastructure. The City has failed to include in its plans the sufficient information about these facilities to comply with the goal.

A. What Goal 11 requires.

The basic mandate of Goal 11 is:

> "To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.
>
> "Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served. A

provision for key facilities shall be included in each plan. Cities or counties shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons."

"* * * *

"Timely, Orderly and Efficient Arrangement – refers to a system or plan that coordinates the type, locations and delivery of public facilities and services in a manner that best supports the existing and proposed land uses."

This basic planning mandate is fleshed out in the Goal 11 rule.

B. What the Goal 11 Rule Requires.

"Public facility" planning, in the meaning of the goal, includes "water, sewer and transportation facilities." OAR 660-011-0005(5). Here we address sanitary sewers, storm sewers, and transportation.

"A public facility plan is a support document or documents to a comprehensive plan." OAR 660-011-0005(1). It is required to contain seven items of information, as listed in OAR 660-011-0010(1).

"The Public Facility Plan

"(1) The public facility plan shall contain the following items:

(a) An inventory and general assessment of the condition of all the significant public facility systems which support the land uses designated in the acknowledged comprehensive plan;

(b) A list of the significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan. Public facility project descriptions or specifications of these projects as necessary;

(c) Rough cost estimates of each public facility project;

(d) A map or written description of each public facility project's general location or service area;

(e) Policy statement(s) or urban growth management agreement identifying the provider of each public facility system. If there is more than one provider with the authority to provide the system within the area covered by the public facility plan, then the provider of each project shall be designated;

(f) An estimate of when each facility project will be needed; and

(g) A discussion of the provider's existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each public facility project or system.

"(2) Those public facilities to be addressed in the plan shall include, but need not be limited to those specified in OAR 660-011-0005(5). Facilities included in the public facility plan other than those included in OAR 660-011-0005(5) will not be reviewed for compliance with this rule.

"(3) It is not the purpose of this division to cause duplication of or to supplant existing applicable facility plans and programs. Where all or part of an acknowledged comprehensive plan, facility master plan either of the local jurisdiction or appropriate special district, capital improvement program, regional functional plan, similar plan or any combination of such plans meets all or some of the requirements of this division, those plans, or programs may be incorporated by reference into the public facility plan required by this division. Only those referenced portions of such documents shall be considered to be a part of the public facility plan and shall be subject to the administrative procedures of this division and ORS Chapter 197."

A few essentials from the adopted public facilities plan must be carried forward into the comprehensive plan, as stated in OAR 660-011-0045(1):

"(1) The governing body of the city or county responsible for development of the public facility plan shall adopt the plan as a supporting document to the jurisdiction's comprehensive plan and shall also adopt as part of the comprehensive plan:

"(a) The list of public facility project titles, excluding (if the jurisdiction so chooses) the descriptions or specifications of those projects;

"(b) A map or written description of the public facility projects' locations or service areas as specified in sections (2) and (3) of this rule; and

"(c) The policy(ies) or urban growth management agreement designating the provider of each public facility system. If there is more than one provider with the authority to provide the system within the area covered by the public facility plan, then the provider of each project shall be designated."

C. The organization of public facilities planning for the Springfield/Eugene Metro Area:

Springfield has a public facilities plan that is jointly adopted with Eugene and Lane County to cover the Metro area. That is the Eugene-Springfield Metropolitan Area Public Facilities and Services Plan (2001), as amended ("PFSP"). This is an acknowledged refinement

plan of the Metro Plan. GRP Findings, App-92; see also PFSP at 1. The Metro Plan is the shared comprehensive plan, more formally known as the Eugene-Springfield Metropolitan Area General Plan (2004), as amended.[14] See generally, *Home Builders Assoc. v. City of Springfield,* 50 Or LUBA 134 (2005) (discussing the level of detail that must be in a public facility plan and carried forward into the comprehensive plan). TransPlan: Eugene/Springfield Transportation System Plan, is also a refinement plan of the Metro Plan, and is incorporated into the PFSP.[15]

In the next section we challenge compliance with the Goal 11 Rule. In the section that follows we challenge compliance with the language of the Goal itself.

D. GRP findings regarding public facilities planning.

Respondents' findings regarding Goal 11 appear at App-91 to 93. The findings list 11 documents, some of which are acknowledged, related to public facilities planning. App-91. The findings then discuss compliance with the Goal 11 Rule, with reference to the GRP and the other facilities documents. App-92. The findings conclude, with respect to Goal 11:

> "Glenwood Phase 1 complies with Goal 11 because existing public facilities and services either have the capacity to serve future development in Glenwood Phase 1 or future public facilities can be provided in a timely, orderly, and efficient manner."

This conclusion and the related findings do not support compliance with the Goal 11 planning requirements.

E. The GRP does not comply with the Goal 11 Rule (OAR 660-011), for failure to provide the information required by the rule in the public facilities plan and the comprehensive plan.

1. Shortcomings in the city's Transportation planning under the Goal 11 Rule.

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[14] Codified copies of both plans, as well as TransPlan, are maintained by the Lane Council of Governments (LCOG) and posted on its website with links at this page: http://www.lcog.org/metroplandocs.cfm.

[15] The PFSP says, at 2: "Transportation system requirements are met through *TransPlan*, incorporated into this refinement plan by reference."

Franklin Blvd. and McVay Highway are the arterials running through the GRP area. The GRP Goal 11 findings are at (App-92 to 93). They conclude that both Franklin Blvd. and McVay Highway are to be redesigned and reconstructed as multimodal transportation facilities to support the redevelopment of Glenwood and to improve arterial connections between Eugene, Springfield and I-5. They also call for developing a multi-use path along the whole Glenwood portion of the Willamette River that "strengthens physical and visual connections to the river and supports recreational uses and bicycle/pedestrian commuters along the riverfront."

More details about the redevelopment plan for the Franklin and McVay arterials appear in the Transportation chapter of the GRP. App-254 to 284. Franklin Blvd. is planned to have a 197-foot corridor envelope, containing a "hybrid multi-way boulevard" of about 172 feet, including: four auto travel lanes; dedicated bus rapid transit facilities; left turn lanes; continuous bicycle facility along each side; access lanes in certain areas separated from through lanes by a landscape median; continuous, wide, setback sidewalks buffered from traffic flow; on-street parking in north and south access lanes; and related bicycle/pedestrian amenities. GRP at 61; App-263. A schematic map appears at App-267.

The redevelopment plan for McVay Highway is: four travel lanes for autos; dedicated bus rapid transit facilities; a landscaped median; a bicycle facility on each side of the street; and continuous setback sidewalks buffered from traffic flow. GRP at 73; App-275. A conceptual plan appears at GRP at 72; App-274.

The Riverfront Multi-Use Path is described in the GRP at 78-80; App-280 to 282. It is planned to extend from I-5 to the southern tip of the UGB. GRP at 79; App-281.

These are grand plans. Transportation is the crankshaft of implementing the GRP. As the GRP notes:

> "Changing the nature of the transportation network in the Glenwood Riverfront to improve access, mobility, safety, and comfort for motorists, transit users, pedestrians, and bicyclists is essential to attaining and sustaining the mix, intensity, and types of uses desired." GRP at 53; App-255.

However, the grand plan for transportation is not adequately reflected in the public facilities planning. Three plans are relevant here – the close-coupled trinary star system of the MetroPlan, TransPlan and the PFSP. The Metro Plan's goals, policies and project lists for transportation are incorporated from TransPlan.[16] As noted above, the PFSP also incorporates TransPlan for those facilities. Thus, the touchstone for Goal 11 compliance for transportation is TransPlan. That is, in TransPlan we need to find all the essential elements required by the Goal 11 Rule to be in both the public facilities plan (OAR 660-011-0010(1)) and the comprehensive plan (OAR 660-011-0045).

Improving Franklin and McVay to "urban standards" appears on a map in TransPlan as "Future Roadway Projects." See TransPlan, Appendix A – "TransPlan Maps; Future Roadway Porjects." However, "Future Roadway Projects" are beyond the planning period. The map legend says: "This map illustrates the roadway projects not planned for construction during the 20-year planning period."

The same is true for the Riverfront Multi-Use Path. It appears on a map in TransPlan as "Future Bikeway Projects." See TransPlan, Appendix A – "TransPlan Maps; Future Bikeway Projects."

Reference to required elements of a public facilities plan, per OAR 660-011-0010(1), makes the following shortcomings apparent:

- **10(1)(b):** The plan does not contain "public facility project descriptions or specifications" of these transportation, as required by the rule. There is simply a vaguely defined upgrade to "urban standards" shown on the future projects map.

- **10(1)(c):** The plan does not contain "rough cost estimates" of these transportation projects.

[16] The Metro Plan says, at III-F-1: "Goals and policies in *TransPlan* are contained in this Transportation Element and are part of the adopted *Metro Plan*. *TransPlan* project lists and project maps are also adopted as part of the *Metro Plan*."

- **10(1)(f):** The plan does not contain an estimate of when these transportation projects will be "needed." The plan says that they are planned for beyond the 20-year planning period. However, when it is planned is not same as when it is needed. As quoted above, the GRP says at page 53 that the transportation improvements are essential; there's just nothing to provide the needed facilities in time. App-255.

- **10(1)(g):** The plan does not provide sufficient information about the funding mechanisms for these transportation projects.

Hence, the most essential project that would pave the way for the GRP's ultimate policy choices is not within the 20-year planning horizon. Put differently, the city's public facilities planning has not kept pace with its land use planning for Glenwood.

2. Shortcomings in the city's planning for Sanitary Sewers under the Goal 11 Rule.

The GRP findings had this to say about sanitary sewers: (App-93)

> **Public Wastewater System**
> *"The Springfield Wastewater Master Plan states that adequate wastewater capacity will be available in Glenwood with the completion of the backbone system, including: upgrades to the Glenwood Pump Station; upgrades to, or decommissioning of, the Nugget Way Pump Station; and the extension of the Glenwood Trunk Sewer...."*

The text of the GRP elaborates on the issue: (App-333 to 334)

> "Development in Glenwood over the last 20 years has been limited, in part, by a lack of existing public wastewater (sanitary sewer) infrastructure. The City has partially removed this limitation by constructing some of the key components of the public wastewater system, including two pump stations and Glenwood Trunk Sewer in Franklin Boulevard. Challenges remain for providing public wastewater service to all areas in the Glenwood Riverfront, and there are several properties annexed to Springfield since 2000 that continue to be served by on-site sewage disposal systems (septic tanks). Significant investments in public and private wastewater infrastructure are needed in order of the Glenwood Refinement Plan to be fully implemented."

The proposed Glenwood Trunk Sewer, extending the length of the McVay Highway part of the neighborhood, is shown on Figure 2 at GRP page 132. App-334.

This project does not appear in the PFSP. Consistent with section subsection 10(1) of the Goal 11 Rule, it should appear in Table 4, City of Springfield Wastewater System Improvement Projects, at page 29 of the PFSP. Because the PFSP serves both at the "public facilities plan"

and comprehensive plan, the failure to list the project in the PFSP also demonstrates noncompliance with the comprehensive plan requirement in subsection 45 of the Goal 11 Rule.

The reference in the GRP finding, quoted above, to the *Springfield Wastewater Master Plan* saying that that service will be available with extension of the Glenwood Trunk sewer line does not help the city with Goal 11 compliance. The Springfield Wastewater Master Plan (June 2008) is a report produced by CH2M Hill, an engineering firm contracted by the City, and is not an element of the acknowledged plan. Furthermore, it begs the question of whether the needed trunk sewer line is identified in any acknowledged plan. Finally, Petitioner does not see the extension of the Glenwood Trunk Line on any list in the CH2M Hill plan.

In summary, the Glenwood "Planned Trunk Extension" that is shown on Figure 2 of the GRP (App-334), as providing service necessary to implement the GRP in the south half of the refinement plan area, is not included in any element of the comprehensive plan or the public facilities plan.

3. Shortcomings in the city's planning for Stormwater under the Goal 11 Rule.

The GRP findings had this to say about the public stormwater facilities: (App-93)

> **"Public Stormwater System**
> *"The Springfield Stormwater Facility Master Plan adopted in 2008, identifies Glenwood as the highest priority area for stormwater infrastructure improvements.... The existing public stormwater facility serving Franklin Boulevard is an undersized system. Current plans call for replacement by a minimally sized system for the future Multi-Way Boulevard that utilizes LIDA to minimize and infiltrate most runoff. Where capacity is available, Springfield will utilize this system to accept treated stormwater overflows from adjacent development for large rainfall events, but not runoff from regularly occurring rainfall events which should be addressed on each development site."*

The text of the GRP elaborates on the issue. App-339 to 343. "Glenwood has never had a public stormwater collection system or comprehensive plan guiding how stormwater runoff should be managed." GRP at 137; App-339.

> "The existing public stormwater facility serving Franklin Boulevard is an undersized system. Current plans call for replacement with a minimally-sized system for the future Multi-Way Boulevard that utilizes LID [Low Impact

> Development] to minimize and infiltrate most runoff. Where capacity is available, Springfield will utilize this system to accept treated stormwater overflows from adjacent development for large rainfall events, but not runoff from regularly occurring rainfall events that should be addressed on each development site." [GRP at 139; App-341]

The GRP policies for the public facilities for stormwater are stated quite generally at GRP page 141. App-343. They commit to: "provide treatment and conveyance of stormwater runoff for new public buildings;" "provide conveyance of treated stormwater from private development to receiving areas;" and "provide treated emergency overflow conveyance to receiving waters."

Based on the above, the baseline is that there is no public stormwater collection system for Glenwood. Public stormwater collection infrastructure is needed. But the PFSP lists only one Glenwood stormwater project. That is Project No. 112, Glenwood Channel and Pipe Improvements, listed in the PFSP, Table 6, at page 33. It is shown on Map 3, PFSP page 43. Table 18 in the PFSP, at page 114, estimates the cost at $4.6 million, and shows the completion date as 2008-2013.

The City has not shown, in a way that complies with the Goal 11 Rule, that it has planned for the stormwater infrastructure that the GRP neighborhood needs. Most glaring is the omission of any description (as required by OAR 660-011-0010(1)(b)) of the scope of the single public stormwater project that is planned for the GRP area – the Glenwood Channel and Pipe Improvements, Project No. 112. It is impossible to tell how much of the need for stormwater facilities this project will fill, although it is not likely much (maybe just a drop in the stormwater bucket) given the modest $4.6 million price tag.

F. The GRP does not comply with the language of Goal 11 itself, for failure to provide the information required by the rule in the public facilities plan and the comprehensive plan.

To comply with the language of Goal 11 itself, the city must plan for and develop a "timely, orderly and efficient arrangement of public facilities and services," as a framework for

its planned urban development. That means describing the type, location and delivery of facilities and services that best supports the proposed land uses.

The GRP contains conclusory recitals saying that transportation, stormwater and sanitary facilities can be provided to support the makeover of Glenwood. However, as shown in some detail above, in the discussion of the Goal 11 Rule requirements, the essential elements of facility planning are not yet in place. This reduces the GRP to a plan that looks good on paper but has no prospect of being implemented during the planning period; the hardware needed for implementation is not in place and is not on the foreseeable horizon.

Conclusory statements in the GRP saying that facilities can be provided is not enough to satisfy Goal 11. The city's enactment must be based on an adequate factual basis and adequate findings demonstrating compliance. See discussion of Goal 2 requirements at the start the Goal 9 Assignment of Error.

The GRP is premised upon the makeover of Franklin Boulevard and McVay Highway into a completely different kind of transportation facility, but the city's plans lack supporting information explaining how and when that can happen. The entire south end of the neighborhood along McVay Highway, which contains all of the "Mixed-Use Employment" land, requires a trunk sewer line, which is essential for development, and the city's plans do not describe how and when that will be put in place. The situation is similar for the public stormwater infrastructure. None is in place now. With the exception of a single project, the location and scope of which is not explained in the city plans, it is not apparent how or when the public stormwater infrastructure will be in place to support development.

G. Summary of Goal 11 arguments.

The Board should remand the GRP for the city's failure to demonstrate compliance with Goal 11. The city has not provided a factual basis or adequate findings demonstrating that it can provide a timely, orderly and efficient arrangement of transportation, stormwater, and sanitary

facilities and services to support the types and levels of urban development it prescribes in the amended GRP. The Board should also find that the city has failed to meet the requirement of the Goal 11 Rule. The Goal 11 Rule provides a kind of roadmap for local governments to follow to ensure compliance with the goal. It specifies the kinds of facility plans that must be in hand and what those plans must contain. Here we have shown that the city has not adequately conducted the required analysis for these three kinds of facilities.

H. The GRP violates Goal 2 because it is not internally consistent, in that it prescribes land uses for the GRP neighborhood that are not adequately supported by the functional systems (including sanitary and storm and transportation facilities) that are prescribed in the comprehensive plan.

The argument above looks at the shortage of public facilities from the perspective of Goal 11. Here we look at it from the perspective of the substantive elements of Goal 2. Goals 2 and 11 are different ways of characterizing errors that stem from the same shortcoming – adopting a land use plan without planning for the facilities needed to implement it.

Acknowledged, unamended elements of a comprehensive plan apply as a standard for plan and code amendments. That is because, based on the definition of a "comprehensive plan" in ORS 197.015(5) comprehensive plans have to be coordinated and interrelated, including with respect to functional systems. See *South of Sunnyside*, 280 Or 3, 13 (1977).

LUBA summarized this standard most recently in *Central Oregon Landwatch v. City of Bend*, __ Or LUBA __ (No.2012-043, Nov. 29, 2012), Slip op 6:

> "Goal 2 provides in relevant part that "[c]ity, county, state and federal agency and special district plans and actions related to land use shall be consistent with the comprehensive plans of cities and counties and regional plans adopted under ORS Chapter 268." *See* OAR 660-015-0000(2). Goal 2 requires that when the comprehensive plan is amended, it must remain internally consistent after the amendment. *NWDA v. City of Portland*, 47 Or LUBA 533, 550 (2004)."

In *Central Oregon Landwatch* LUBA found an internal inconsistency between the comprehensive plan and the public facilities plan because the former identified a project as being

in the 20-year planning period, whereas the latter plan did not show it as either a short term or long term project.

Here we have an inconsistency of much greater magnitude, as summarized in connection with the Goal 11 discussion above. The GRP needs substantial sanitary, storm and transportation facility improvements to support it. The GRP makes generalized conclusions that these facilities can be provided. However, neither the comprehensive plan (the Metro Plan) nor the PFSP (which is both a refinement plan of the Metro Plan and the public facilities plan) nor TransPlan (which is a refinement plan and the public facilities plan for transportation) shows these facility projects as being provided in the planning period. This amounts to an inconsistency of the new plan with the acknowledged plans; it reflects elements of the comprehensive plan that are not coordinated or interrelated.

SIXTH ASSIGNMENT OF ERROR (Goal 12 Transportation Issues)

Respondents violated Goals 2 and 12, and the Goal 12 Rule in numerous respects. They violated Goal 2 by failing to make a decision based on ultimate policy choices, an adequate factual basis, or adequate findings related to Goal 12 standards. They violated Goal 12 standards by failing to demonstrate compliance with the Goal 12 and the Goal 12 Transportation Planning Rule (TPR) requirements.

We incorporate here the discussion of Goal 2 requirements in the Goal 9 assignment of error. Goal 2 imposes the same findings, evidence and policy choice requirements with respect to the substantive standards of Goal 12.

The city gave itself a "bye" on Goal 12 issues by finding that none of the plan and zone changes would significantly affect an existing or planned transportation facility. It reached this conclusion through a math exercise, concluding that development of the Phase I GRP area under the new plan designations and implementing regulations would generate less traffic than under the existing regulations. This is the "less traffic" escape hatch discussed in *Mason v. City of Corvallis*, 49 or LUBA 199 (2005) (no significant effect when amended plan and zoning would

generate less traffic from the subject property than the traffic generated by uses allowed under the existing amended plan and zoning).

Here we examine the math. We show that the city's conclusion is not supported by the evidence in the record or in adopted plans, and reflects faulty methodology and other legal errors. The reality is, as reflected in the Goal 11 (Public Facilities discussion), the area does not have and is not planned to have facilities needed to develop under either the old or the new zoning. Inadequate facilities will cause real trouble for Glenwood; this needs to be addressed and dealt with, and should not be ignored by using funny math to squeeze through the "less traffic under the new plan" escape hatch.

We start with an overview of the city's approach to crafting its Goal 12 escape hatch. Then we address specific errors in the subassignments below. (Note, initially, that all of the city's findings with respect to the TPR reference the 2011 version of the rule, prior to the amendments that took effect on January 1, 2012, even though the decision was made in 2012. Thus, the findings are a bit stale with respect to the applicable TPR standards.)

The city's Goal 12 findings appear at App-94 to 116. The city starts with a summary listing of all the 11 transportation regulations that potentially apply. App-94 to 98. The gist of the city's finding at App-113 of no significant affect is in response to the triggers in OAR 660-0012-0060(1)(c)(B) and (C)(2011 version):

> ***"(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or***
>
> ***(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."***
>
> "OAR 660-012-0060(1)(c)(B): Proposed zone changes constitute a lower potential trip generation than existing zoning: 5057 peak hour trips are associated with current zoning (Table 1) and 4,971 peak hour trips associated with proposed zoning (Table 4). The City's adopted and acknowledged TSP (TransPlan) and comprehensive plan (Metro Plan) both anticipate levels of development in the subject area and associated trip generation. Both plans have

> been acknowledged by the state as meeting, among other requirements, those of the TPR. Since the proposed Glenwood Phase 1 amendments do not generate more trips than those already planned, the City finds that the amendments do not reduce performance standards for existing or planned facilities.
>
> "OAR 660-012-0060(1)(c)(C): Proposed zone changes constitute a lower potential trip generation than existing zoning (5057 peak hour trips are associated with current zoning (Table 1) and 4,971 peak hour trips associated with proposed zoning (Table 4)), thus no transportation facilities will be worsened in performance below the minimum acceptable performance standards as a result of the proposed Glenwood Refinement Plan Amendment. Those facilities which may operate below the performance standard in the plan year will do so regardless of the proposal under review. The City therefore finds that no facilities are significantly affected by the proposed amendments."

The comparison of 5047 trips under the old designations with 4971 trips under the new designations was reached as follows: Starting with total acreage, and then removing the "identified non-buildable areas," the trip generation potential during the 20-year planning period was then calculated for the buildable area ("reasonable building coverage footprints") under the old zoning, using ITE trip generation numbers for "reasonable worst case assumptions" about uses. Table 1 at App-105 to 106 shows the 5057 estimated PM peak hour trips.

Next, the calculations are done for the entire 267 acre area under the new zoning intended to "redevelop the Glenwood Riverfront into a vibrant mixed use neighborhood supported by quality pedestrian, bicycle, and transit infrastructure to incent (*sic*) responsible growth." App-106. Table 2 shows, for each of the four mixed use zones (A through D), assumptions about the mix of uses and the building coverage footprints. Assumptions about non-buildable areas in each zone are documented in Table 3 at App-108. Assumptions were made about "build out" in each area during the 20-year planning period. App-106. Assumptions were made about trips associated with existing development that is not expected to redevelop during the planning period. App-108 last para. Table 3 at App-109 then shows all expected trips for each of the four areas under the new zoning. The total is 5760 pm peak trips. Table 3, App-109.

Note that the projected trips under the new designations are greater than under the old designations – 5760 versus 5057. The projected trips under the new designations need to be

smaller than under the old in order to get through the "no significant affect" escape hatch. To shrink the initial figure of 5760 trips, the city gave itself two deductions for the new designation trips. First, for all areas except the Mixed Use Employment zone of Subarea D, the city reduced the trips by 10% by relying on OAR 660-0012-0060(6)(a), which allows the reduction for a "mixed use, pedestrian-friendly center, or neighborhood." After this deduction there were still more trips under the new than under the old.

The city then took an additional reduction in trips based on OAR 660-0012-0060(6)(b), which allows a reduction based on "detailed or local information about the trip reduction benefits of mixed-use, pedestrian-friendly development where such information is available and presented to the local government." App-110 to 111. The city referenced a Portland, Oregon study and, based on the study, took a total 20% reduction under (a) and (b), excluding the Mixed-use Employment Subarea D. The 20% reduction brought the trip number under the new zoning down to 4097 – lower than the trips under the old zoning.

A. The methodology is skewed to reduce the trips under the new zoning by assuming full buildout during the planning period under old zoning, but only partial buildout under the new zoning.

In estimating trips under the old zoning, "it was assumed that current zoning would be fully built out within the planning period." App-105 last para. Under the new zoning, however, a 90% buildout was assumed for the net available land in sub-areas A, B, and C, and a 50% buildout was assumed for the planning period. App-108, para 2, 3. The reason given for assuming less than full build out is the uncertainty about the availability of needed road and sanitary sewer improvements. *Id.* These deductions were partially offset by adding traffic from existing development in Subarea A (10%) and Subarea D (50%) not anticipated to redevelop during the planning period. *Id.* para 4.

The error here is in assuming full build out during the planning period under the new zoning, but less than full build out under the old zoning. Logically, the same factors that would

limit full build out under the new zoning (slow delivery of roads and sewers) would apply equally to development under the old zoning. There is no basis for the city's assumption that the old designations will be fully developed, but the new designations will only partly develop because of inadequate facilities.

B. The proposed new zoning does not qualify for the 10% trip reduction offered in OAR 660-0012-0060(6)(a) because the zones include prohibited uses, which rely "solely on auto uses."

The city took the 10% reduction in trips for the new zoning under subsection 60(6)(a), which says:

> "The 10% reduction allowed for by this section shall be available only if uses which rely solely on auto trips, such as gas stations, car washes, storage facilities, and motels are prohibited;"

The list of prohibited uses is not a closed set. It is a "such as" list. Motels are an example of a prohibited use. However, the new Commercial Mixed-Use and Office Mixed-Use zones allow hotels. SDC 3.4-250, Table; App-391.

For purposes of this TPR provision, a hotel is the fungible equivalent of a motel. Indeed, under the city's code, they are both defined as the same thing. SDC 6.1-110 includes:

> **Hotel/Motel.** Any building or group of buildings used for transient residential purposes containing guest rooms used for sleeping purposes. No more than 50 percent of the rooms may contain kitchen facilities."

In addition, the Commercial Mixed-Use Subarea allows outright "Conference/Visitor Centers," and that use is defined to include "conference hotels." SDC 3.4-250, Table; App-391.

It would seem, therefore, that the city has included in its list of allowed uses, one in particular that disqualifies it from getting the benefit of the 10% deduction.[17] It would seem, too, that if allowing hotels disqualifies the city from the 10% trip reduction in (60)(6)(a), that the city

[17] Petitioner does not oppose hotels or motels in the GRP neighborhood. They are a desired part of redevelopment. The issue is that the city should not be able to escape doing the difficult facilities analysis by saying that it will have not have auto-dependent uses, but then include auto-dependent uses in the zones.

would also not be a candidate for a higher percentage of trip reductions under subsection (60)(6)(b). If one does not qualify for the across the board 10% deduction, then one should not qualify for the additional deduction based on more detailed information.

C. The city has not demonstrated that it qualifies for the higher percentage trip reduction (20%) that is has taken under OAR 660-0012-0060(6)(b).

Initially, as noted above, a city can't get to the second level in the trip discounts game if it can't get to the first level, which it has not, due to its allowing disqualifying uses. Furthermore, the city has not demonstrated that it is entitled to use data from the Portland, Oregon study, to claim an additional 10% trip reduction. Finally, the Portland study relied upon does not appear to be in the record, posing an evidentiary shortcoming for the city's conclusion.

D. The city's analysis under OAR 660-0012-0060(6)(a) and (b) is skewed in favor of "no significant affect" because, via the 2005 amendments to the GRP, more than 50 acres of the Subareas A, B and C have already been planned and zoned for "nodal development." That involved an assumption of reduced trips for part of the old designations. However, that previous assumption of reduced trips is not reflected in the old vs. new comparison at issue here. As a result, the trip count under the old zoning is skewed high.

1. Existing Nodal Development designations: The Metro Plan jurisdictions adopted a "nodal development" strategy in order to get their TransPlan approved by the DLCD in 2001. This meant identifying more than 50 sites on the Metro Plan maps as "Potential Nodal Development Areas." See TransPlan (July 2002), Map at Appendix A.

The Nodal Development concept is discussed in detail in TransPlan's Land Use Policy #1: Nodal Development, beginning at Chapter 2, page 15 of TransPlan. Those details are carried over into the text of the Metro Plan itself. The definition of Nodal Development in the Metro Plan describes exactly what the city says it is doing in this GRP makeover.

> "Nodal development is a mixed-use pedestrian-friendly land use pattern that seeks to increase concentrations of population and employment in well-defined areas with good transit service, a mix of diverse an compatible land uses, and public and private improvements designed to be pedestrian and transit oriented." Metro Plan at II-G-8.

The new GRP text has a pithy summary of the area's history with Nodal Development and how it was implemented in 2005 on more than 50 acres of the GRP Phase I area. See GRP 29-30; App-231 to 233. It explains, at App-232 to 233:

> "The 2002 TransPlan identified more than 50 sites throughout the Eugene-Springfield metropolitan area that were considered to have the potential for this type of land use pattern, including a portion of the Glenwood Riverfront paralleling Franklin Boulevard. Implementation of the 2005 Glenwood Riverfront Specific Area Plan included putting the nodal development strategy into action by applying the Metro Plan's Nodal Designation to the approximately 50-acre Glenwood Riverfront Plan District boundary, ads depicted in Figure 1. Implementation Action 2.4 in the Springfield 2030 Refinement Plan Residential Land Use and Housing Element calls for Springfield to increase opportunities for mixed use nodal development, including considering expansion of the Glenwood node through the Glenwood Refinement Plan Update process."

The Figure 1 mentioned above is found on page 32 of the GRP (App-234). It shows the areas already planned and zoned for nodal development, as of 2005. It can be compared with the map of the four Subareas at page A-64 of the ordinance findings (App-106). The comparison shows that the existing 50-acre Nodal Development area includes all of Subarea A (Residential Mixed-Use), all of Subarea B (Commercial Mixed-use), and the portion of Subarea D (Employment Mixed-Use) that lies between the two bridges across the river – the bridge for traffic on the north and the railroad to the south. The amendments to the Metro Plan Diagram also include a tax-lot specific accounting of the parcels that already had a Nodal designation, beginning at App. 188.

2. Discussion of the Skew: The city must apply a consistent comparison of traffic impacts when comparing existing and proposed plan and code provisions. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 235, 254, *aff'd without opinion* 191 Or App (2003). If it is going to take a 10% trip discount for its new nodal designations, it must assign a 10% discount for its old nodal development designations, too. If it is going to take a total 20% discount under subsection (6)(b), it needs to afford the same to the old nodal development designations, unless

there is some reasoned explanation why the Portland data should apply to the new nodal designations but not the old.[18]

Put differently, when the city compares the traffic generated by the old and new designations, it has not explained why it can take trip discounts for the new zoning in Subareas A and B, but not afford those same discounts to the areas that already have nodal designation under the old zoning in Subareas A and B and the portion of Subarea D between the bridges.[19] Subsection 0060(6)(a) of the TPR says that old zoning would qualify for the10% discount, just like the new zoning.

3. Adjusting the math: The even-handed way to approach this would be to look at the trips projected to be generated under the old zoning for Subareas A and B, reduce those trips by 10% or 20%, and then compare the resulting trips for the new and old zoning. We do not think this can be done simply, because the city has not presented the trip generation data in exactly the same way for the old and new zoning. Table 1 (App-105 to 106) shows trips under the old zoning, totaling 5057, but it does not break the trip generation out by Subareas. Table 3 (App-109) shows trips under the new zoning, by each Subarea, and totaling 5760 before any discounts are taken. The discounts bring the new zoning trips down to 4971.

There is, however, a way to make a comparison with available data that suggests giving the discount to the old zoning for Subareas A and B will be deadly to the city's "fewer trips" escape hatch. That is to put back into the calculation the "discount trips" for the new zoning in

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[18] The 2005 amendments to the GRP adopting nodal designations for 50 acres in the GRP area were adopted by Ordinance No. 6137 (July 18, 2005). The findings supporting the amendments explained that, in comparing the traffic impacts of the old designations with the new 2005 designations, the city was entitled to take the 10% discount of trips under the DLCD Goal 12 Rule. See Ordinance findings at page E-31 fn.

[19] The area between the bridges is a special area for this analysis. It had the nodal designations under the 2005 GRP amendments, so the old zoning qualifies for the 10% trip deduction. It is Mixed-Use Employment under the new zoning; hence the City agrees it does not qualify for the trip discount under the new zoning.

Subareas A and B, effectively giving equal treatment to the areas that were previously given nodal designation and the areas that get them under the GRP.

The projected trips under the new zoning, without discounts, for Subareas A and B respectively, are 1110 and 1223. If just the first 10% discount is withheld for these two areas, that would be 111 and 122 trips, respectively, for the two areas. That would bump the new zoning trip count to 5204, which would lead to the conclusion that the new zoning produces more trips than the old, closing the escape hatch. If the full 20% discount is withheld for these two areas, that would bump the new zoning trip count to 5437.

Conclusion: LUBA should conclude that the city's traffic has not been shown to be even handed and consistent because it appears that the city has taken the trip discounts allowed under subsection (6)(a) and (b), while failing to assign the same discounts to Subareas A and B, which have had nodal development plan and zone designations since 2005, and which appear to qualify for those discounts equally with the new zoning.

E. The city's findings and evidence are inadequate to explain its conclusion that it is entitled to the 10% trip discount in OAR 660-009-0060(6).

The city's escape hatch from the "significant affects" analysis is based solely on the "fewer trips under the new zoning" theory. It is an aggressive analysis that runs from App-62 to 72. The city initially says that the new zoning would generate more trips than the current zoning, but that prescribing the right kind of development allows trip discounts to be taken for the new zoning that ultimately reduces the trips to fewer than those generated by the old zoning. As discussed above, that conclusion is not justified under the law.

That said, the analysis as a whole is not sufficiently supported or explained to allow LUBA or the parties to follow the analysis, see that that is based on evidence in the record, and see that the conclusions are sound. It has a quality of a summary that is based on a more detailed traffic trip analysis located elsewhere in the record, but that more detailed study is not referenced and its location is not apparent to the Petitioner. It could be buried somewhere in the 10,000

page record, or it could have been incorporated into some previously acknowledged decision. If so, it would likely provide the basic evidence needed to support fundamental aspects of the traffic analysis. However, the more detailed study appears to Petitioner to be missing in action. Goal 2 imposes "on local governments a duty to provide somewhere in the record an explanation of why the governing body believed the particular ordinance under consideration complied with the applicable statewide planning goals." *Oregon Electric Sign Assn. v City of Beaverton,* 7 Or LUBA 68, 74 (1982), cited with approval in *Davenport v. City of Tigard*, 22 Or LUBA 577, 582 (1992). This requirement applies to legislative as well as quasi-judicial amendments, especially where required by an applicable statute, goal, rule, plan or ordinance. *Opus Development v. City of Eugene (Opus I)*, 28 Or LUBA 670, 680 (1995). By basing its findings of Goal 12 compliance on this missing study, Respondents omit the basic evidence necessary to determine if the decision complies with the applicable standards.

F. The city's contingent methodology stated in the GRP for demonstrating Goal 12 compliance is not a valid methodology.

At pages 45-46 of the GRP Phase I document, the City does some contingency planning for Goal 12 compliance, which is not consistent with the TPR. This contingency planning can be described as building a safety net, in case the lead theory of fewer trips under the new zoning doesn't work out. The City says that if development in Subareas A, B and C during the planning period is expected to push the total trips above 3394 (the number predicted for those subareas under the current zoning), then the development proposed at that time must demonstrate compliance with the TPR "significantly affect" standard in connection with the proposed development. GRP Phase I at 45; App-247. The key language is:

> "Should development be proposed during the Plan horizon that, when added to trips generated from previous redevelopment and trips proposed to be generated on undeveloped property, may be reasonably expected to generate trips in excess of 3,394 trips, then the proposed development will be responsible to make further determinations of significant effect as required by the TPR in effect at the time of the proposed development and best practices, subject to the sunset provisions described below."

This boils down to: We will be sure the new zoning results in fewer trips than the old zoning because we will limit future development to ensure it does not generate more trips than the current zoning, unless the would-be developer fixes the problem at the time of the proposed development. Several optional mitigating solutions are listed. *Id.*

This safety net is not a lawful way of demonstrating compliance with the TPR. Initially, the city's obligation is to demonstrate compliance with Goal 12 now, at the time of the plan and zone change, not at a later stage of the development. See *Willamette Oaks, LLC v. City of Eugene,* 232 Or App 29, 220 P3d 445 (2009)(OAR 660-012-0060 requires impact evaluation to be done at the time of zone change, not deferred to a later stage). The city's approach here is essentially assuming that under the planned-for level of development new traffic could be generated that would exceed the 3394 trips generated by the current zoning for these areas. If that happens, the developer would have to survive the TPR "significantly effects" test. In other words, it's planning on the assumption that the new uses will generate too many trips, and promising to choke down on subsequent development when that happens.

Applying Goal 12 directly, requiring a developer to run the TPR "significantly affects" gauntlet, and imposing trip caps and other remedial traffic solutions, is what local governments do when their Goal 12 planning has broken down, and when the traffic facilities are no longer functioning at the planned-for levels of service. That is what is supposed to be avoided in this comprehensive planning phase. When it is time to actually develop something in Glenwood, relying on the new plan and zoning, no developer should have to face applying Goal 12 directly, merely because his development is the first to push the trips generated in the redevelopment area over 3394. The city is saying that, if it turns out the traffic facilities can't support the planned-for development, then the unlucky developers can either ask ODOT for a reduced mobility standard, or be subject to the TPR mitigating strategies. This is not the same as saying the traffic facilities will be able to support the planned-for development, which is what Goal 12 requires.

SEVENTH ASSIGNMENT OF ERROR (Goal 15)

The amendments violate the planning and regulatory requirements imposed by Goal 15. The Greenway setback line, and the new zoning regulations that apply within that area, were established without regard to an inventory of Greenway resources. In addition, the list of water-dependent and water-related uses includes uses that, as a matter of law, are neither. Finally, the amendments fail to show the Greenway boundaries on the plan and zoning maps, and fail to identify lands for possible public acquisition.

The new GRP and zoning regulations completely redo the regulatory framework for the Willamette Greenway in Glenwood. They fall short of the substantive planning and regulatory requirements imposed by Goal 15. The Greenway rule requires inventory and analysis of Greenway resources before substantive Greenway regulations can be imposed. Respondents skipped the inventory step, defaulting instead to a one-size-fits-all 75-foot Greenway setback. See SDC 3.4-280(C); App-448. As described below, it appears to have been chosen because it was conveniently coterminous with a setback line imposed by a different, preexisting set of zoning regulations.

In addition, the Greenway regulations allow uses in the setback area that are neither water-dependent nor water-related, in violation of the Goal 15; they fail to designate areas identified for possible public acquisition and the conditions under which such acquisition may occur; and they fail to show the Greenway boundaries on the newly amended MetroPlan diagram, refinement plan map, and zoning maps, as required by the Goal 15 rule.

A. The City has failed to do the required inventory of Greenway resources, which is the *sine qua non* of Greenway regulation. Without a competent inventory there is no way to judge whether the Greenway setbacks (and regulations that apply within those setbacks) comply with the Goal and rule.

Part B of Goal 15 imposes inventory and data collection requirements as a precondition to adopting or amending regulations. It says:

> "Information and data shall be collected to determine the nature and extent of the resources, uses and rights associated directly with the Willamette River Greenway. These inventories are for the purpose of determining which lands are suitable or necessary for inclusion within the Willamette River Greenway Boundaries and to develop the plans and management and acquisition programs."

The inventory of Greenway resources, uses and rights is intended to guide the subsequent formation of the city's Greenway regulations, such as the protection of certain areas, the allowance for continuation of pre-existing urban uses, and the planning for public acquisition of specific properties. A local government can't meet its regulatory obligations if it hasn't inventoried the Greenway resources that are to be protected, allowed to continue, or be acquired. In addition, the Greenway Setback cannot be accurately determined if the city doesn't know what Greenway resources are present to be protected by a setback.

The city's findings regarding Goal 15 appear at App-119 to 125. No Greenway inventory was included or considered in the challenged decision. The city drew the Greenway setback as large as possible on the assumption that everything contained therein is a Greenway resource. The opposite approach is what the law requires – do an inventory first so you know where to draw the line.

The Greenway Setback is one of the Use Management Considerations and Requirements of the Goal. Part C.3.k of Goal 15 says:

> "k. Greenway setback – A setback line will be established to keep structures separated from the river in order to protect, maintain, preserve and enhance the natural, scenic, historic and recreational qualities of the Willamette River Greenway, as identified in the Greenway Inventories. The setback line shall not apply to water-related or water-dependent uses."

Perhaps the city assumes that the biggest possible setback will be the most protective. However, the Goal requires the City to base that decision on an inventory, not just an assumption. Under the previous regulations, for Glenwood at large, as for the rest of the City, there is a default 150-foot Greenway overlay zone. Prior to this decision, the Greenway setback in Glenwood was undetermined. The determination of the Greenway Setback was done site by site basis, either in connection with a development application, or as an *a la carte* application for determination of the setback. See SDC 3.3-310; SDC 3.3-325. The eight planning factors in

SDC 3.2-125 that are considered when setting the Greenway Setback are derived directly from Goal 15, Part C.3.b.[20]

This old approach was also devoid of a comprehensive inventory of Greenway resources, as required by Part B of the Goal, but at least it provided an applicant with a quasi-judicial venue to establish what Greenway resources, preexisting uses and rights existed on a specific parcel located within the 150-foot Greenway, and to have the Greenway setback determined according to the direct application of the Goal factors.

With no inventory to guide it, the 75-foot setback is based on the simple, unsupported assumption that it contains the natural, scenic, historic and recreational qualities that are relevant Greenway resources. The city bases this assumption on the existence of a separate 75-foot setback previously imposed by Riparian Standards (see SDC 4.3-115). The findings provide:

> "Since there is an established 75 foot riparian setback along the Willamette River along the Glenwood Riverfront and since Goal 15 requires the protection of "Significant natural and scenic areas, and vegetative cover" a concurrent 75 foot Greenway Setback Line is proposed both in the Glenwood Refinement Plan Open Space Chapter and in the Glenwood Riverfront Mixed-Use Plan District, Section 3.4-280 so that both setbacks can be established at the same time." App-121.

Using the preexisting Riparian Setback area as the fungible equivalent of the Greenway inventory only works if you assume that the preexisting Riparian Setback applies to the same "significant natural and scenic areas, and vegetative cover," that Goal 15 directs cities to protect. However, it is evident the Riparian Standards are not a competent substitute for the required Greenway inventory. For instance, the record reflects that a site-specific application for a Greenway setback determination (processed in 2005 under the old approach that applied the Goal 15 factors directly) established the Greenway setback line as coinciding with the existing riparian vegetation line. App-120. This example indicates the Greenway resources do not

[20] Springfield's iteration of those factors exclude the farming and timber factors listed in the Goal.

necessarily line up perfectly with the 75-foot wide swath established by the pre-existing Riparian setback.

The Greenway inventory required by Goal 15 Part B and the Use Management Considerations and Requirements in Part C.3 are not simply obscure procedural boxes that have to be checked before a local government can adopt Greenway regulations. Both the Court of Appeals and the Supreme Court have weighed in on this topic within the last three years, in the context of *Gunderson, LLC, v. City of Portland*, 243 Or App 612, *aff'd* 352 Or 648 (2012). In *Gunderson* the petitioners argued to LUBA that the challenged decision was based on an inadequate inventory. LUBA characterized those assignments of error as challenges to Greenway boundaries, which are subject to LCDC jurisdiction, and did not rule on the merits of the issues presented. However, the Court of Appeals concluded that the assignments of error challenging the substantive regulations being applied in the Greenway were not simply challenging the boundaries of the Greenway, and that challenges to those new substantive regulations fell within LUBA's jurisdiction. The court said Paragraph B of Goal 15, the "Inventories and Data" paragraph,

> "[D]escribes the information and data that must be collected for purposes of implementing those three components (boundaries, management, and acquisition) of the Greenway Program." *Gunderson,* 243 Or App at 619.

The court then quoted that paragraph, and continued to explain that:

> "The paragraph then lists items that 'shall be inventoried as it relates to the Greenway objectives,' including '[l]and currently committed to industrial, commercial and residential uses[.]'" *Id.*

The court ultimately remanded to LUBA to consider such questions as whether the city had properly determined the Goal 15 requirements had been met when the city did not have a Goal 15 inventory on which to base its decisions. In the balance of the decision, the court explained that Goal 15 provides a minimum level of protections, and that local governments

could adopt regulations that were more protective of Greenway resources than what the Goal provides. The Supreme Court affirmed.

The same threshold question exists here: How can Respondents establish that the new Greenway regulations meet the requirements of the Goal when the regulations were not based on any inventory of Greenway resources? We assert, as did the petitioners in *Gunderson,* that cannot be done. The text of the Goal is clear; an inventory is required as a starting point. The Court of Appeals appears to have agreed with the petitioners in *Gunderson* when it emphasized one petitioner's statement that: "*Without these required inventories, the city cannot properly determine which lands are suitable for inclusion within the Greenway boundary.*" *Id.* at 623 (*emphasis* in original).

B. The list of water-dependent and water-related uses in the new Greenway zoning regulations include uses that are neither.

Under the proposed zoning code regulations for Glenwood, the city is boosting the Willamette Greenway setback to a uniform 75 feet from the top of bank. In this setback area only "water-dependent" or "water-related" uses are allowed.

However, the city's expansive list of public uses that it allows as "water-dependent" or "water related" goes beyond what is allowed by Goal 15. For example, bike paths and bridges for motor vehicles are allowed in the new regulations.[21]

Part C.3.k. of the Goal (excerpted in full above) allows that only water-dependent and water-related uses in the setback area. The new list of allowed uses is the Greenway Setback area appears at SDC 3.4-280.D; App-446:

i. Public multi-use paths;
ii. Access ways;

[21] The City's decision to extend the Greenway Setback to 75-feet across-the-board snuffs out private development in this area, while allowing public development, such as the bike path and bridges. However, if a bike path or bridge is not allowed in the Greenway Setback by state law, then the city may be shooting itself in the foot by opting for a big setback.

iii. Pedestrian trails and walkways;
iv. Boardwalks;
v. Picnic area
vi. Interpretive and educational displays
vii. Overlooks and viewpoints, including benches and outdoor furniture;
viii. Docks;
ix. Boat shelters;
x. Piers;
xi. Boat ramps;
xii. Bridges and related appurtenances for pedestrians, bicycles and motor vehicles; and
xiii. Stormwater facilities.

"Water-related" and "Water-dependent" are defined in the Statewide Planning Goals:

> "WATER-DEPENDENT. A use or activity which can be carried out only on, in, or adjacent to water areas because the use requires access to the water body for water-borne transportation, recreation, energy production, or source of water.
>
> "WATER-RELATED. Uses which are not directly dependent upon access to a water body, but which provide goods or services that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered. Except as necessary for water-dependent or water-related uses or facilities, residences, parking lots, spoil and dump sites, roads and highways, restaurants, businesses, factories, and trailer parks are not generally considered dependent on or related to water location needs."

Looking at the list of uses that would be allowed in the Greenway Setback, and applying the two definitions above:

Public multi-use paths: The GRP proposes a multi-use path at the landward edge of the new 75-foot Greenway Setback. However, this use meets meet neither definition. They can go anywhere, hence are not water-dependent. Springfield currently has some multi-use paths that follow the river, and some that travel cross-country. These paths do not provide a service that is directly associated with a water-dependent land or waterway use; they are like roads and highways, getting people from one place to another. The City recently took an exception to Goal 15 for a bit of a bike path in the Greenway Setback in Glenwood. This goal exception is documented in the Metro Plan at Policy III-D-11.

Access ways: This use potentially violates Goal 15, as it is not adequately defined. Absent a further definition, it might be interpreted broadly to include roads, bike paths, pedestrian trails, and the like, which are neither water-dependent nor water-related.

Pedestrian trails and walkways; Boardwalks: These meet neither definition, for the same reasons given in response to "Public multi-use paths," above.

Picnic area; Interpretive and educational displays; Overlooks and viewpoints, including benches and outdoor furniture: These meet neither definition. They can go anywhere, hence are not water-dependent. The only basis in the entire record for concluding that these amenities are either water-dependent or water-related is the conclusory statement in the findings that "The Glenwood Riverfront Mixed-Use Plan District, specifically Section 3.4-280, establishes a Greenway Setback Line and water-dependent/water-related permitted uses." In other words, Respondents labeled the uses in this list as water-dependent and –related, so it concluded the uses complied with the definitions in the Goal. Absent some sort of support in the record that the uses actually are water-dependent or –related, it isn't enough to simply include these uses in the list of water-dependent or –related uses.

Docks; Boat shelters; Piers; Boat ramps; All of the above are water-dependent or water-related. They can go nowhere except for adjacent to the water. See *Allen v. City of Portland*, 15 Or LUBA 46, n. 4 (1987).

Bridges and related appurtenances for pedestrians, bicycles and motor vehicles: These meet neither definition. This use allows roads and highways, which are explicitly excluded from the definition of "water-related" in the Statewide Planning Goals definitions. To approve these uses in the Setback area, an exception to the Goal is required. Note that the City recently took an exception to Goal 15 for the new I-5 bridge across the river. This goal exception is documented in the Metro Plan at Policy III-D-11.

In summary, the proposed regulations would allow outright uses in the Greenway Setback that are not allowed by Goal 15. Compliance with Goal 15 requires trimming back the list of allowed uses in the Setback area, or shrinking the footprint of the Setback area. *Allen v. City of Portland*, 15 Or LUBA 464 (1987) provides helpful analysis on how these definitions work. The challenged decision in *Allen* was based on failure to comply with Portland zoning regulations in the context of a quasi-judicial decision permit decision, but the city regulations in that situation were similar to the text and definitions of Goal 15, so it provides an appropriate analogy for exploring what is "water-dependent." In *Allen*, the city proposed building an on-ramp for a road in the Greenway setback area. (In the parlance of Springfield's regulations, this is like the "Bridges and related appurtenances for pedestrians, bicycles and motor vehicles.") LUBA found that roads and on ramps are neither water-dependent nor water-related. Likewise, the Statewide Planning Goals expressly exclude roads and highways from the water-related definition.

C. The refinement plan diagram and proposed zoning maps fail to show the boundary line of the Greenway.

Goal 15, Part E.1. requires that the "Boundaries of the approved Willamette River Greenway shall be shown on every comprehensive plan." Goal 15, Part F.1. requires the same for zoning maps. The boundary is not shown on the Metro Plan Diagram or the current or proposed Glenwood Refinement Plan, or the proposed zoning maps. Petitioner believes the use of the plural in the term "boundaries" means this requirement applies to both the outer boundary of the Greenway and the boundary of the Greenway Setback line.

EIGHTH ASSIGNMENT OF ERROR (Unacknowledged Land Use Regulations)

The amendments to the GRP Phase I and the Springfield Development Code rely upon and incorporate as additional standards "land use regulations" that are not acknowledged, specifically the Springfield Engineering Design Standards and Procedures Manual (EDSPM). The EDSPM includes "land use regulations," as defined by state statutes. Incorporating unacknowledged land use regulations into the plan or code violates Goal 2.

The foundation of the city's land use regulatory scheme is the EDSPM, but it is not acknowledged. The GRP Phase I amendment lean heavily on the EDSPM. It is time to elevate the regulations therein into the aura of acknowledgment.

The EDSPM is defined in the SDC 6.1-110 as:

> **"Engineering Design Standards and Procedures Manual.** A document containing design standards and procedures prepared by the Public Works Department and adopted by resolution of the City Council. These standards and procedures are applicable to public and private improvements and allow City staff to provide certainty to developers and consultants to ensure safe, efficient, and cost effective transportation, sanitary sewer, and stormwater management system projects within the City and its Urban Growth Boundary."

It contains land use regulations. ORS 197.015(11) defines "land use regulation" as "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan." It is immaterial for purposes of the definition above that the EDPM is not adopted by ordinance. What is important is that it implements the comprehensive plan. See *Boom v. Columbia County*, 31 Or LUBA 318 (1996); *Baker v. City of Milwaukie*, 271 Or 500, 511, 533 P2d 772 (1975) (a comprehensive plan adopted by resolution is effective to control zoning, because where a resolution is in substance and effect an ordinance or permanent regulation, the name given to it is immaterial).

The test is "whether there is a clear connection between the ordinance and the statewide planning goal or comprehensive plan provision it allegedly implements." *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453, 457 (2002); see also *Angius v. Clean Water Services District of Washington County*, 50 Or LUBA 154 (2005).

Subject to a narrow exception that does not apply here, the city is obligated to apply only acknowledged land use standards, including plans and regulations. See *Davenport v. City of Tigard*, 121 Or App 135,138-40, 854 P2d 483 (1993), which expanded upon *Von Lubken v. Hood River County*, 118 Or App 246, 846 P2d 1178, *rev den*, 316 Or 529, 854 P2d 940 (1993). The EDSPM is not acknowledged; it is a compilation of standards amended on a continuing basis by resolution. App-61.

Implementation of the GRP Phase I and the code amendments accompanying it rely heavily on the EDSPM. The EDSPM establishes standards for implementing both the plan and the code. Looking just at the numbers, the Exhibit A findings supporting the decision reference the EDSPM 19 times. The text of the new GRP Phase I, which appears as Exhibit C to the decision document, references the EDSPM at 14 different locations. Exhibit D in the decision document, which is the amended sections of text from the development code, references the EDSPM in 42 different places. That is 75 discrete references. In Springfield, if you want to design and build something, the EDSPM is your ultimate touchstone.

The GRP Phase I is explicit in saying that the EDSPM will be used to implement the plan. The plan explains that both the zoning code and the EDSPM are relied upon to implement the plan:

> "Implementation of GRP policies is enabled through Springfield Development Code ordinances and other municipal rules and regulations, such as those detailed in Springfield's *Engineering Design Standards and Procedures Manual*, * * * *" GRP at 7; App-209.
>
> "The last year of the Phase I process was spent preparing the policy and regulatory documents for the Phase I GRP update, including drafting the chapters of the GRP and the Springfield Development Code and Springfield *Engineering Design Standard and Procedures Manual* amendments necessary to enable implementation of the plan." GRP at 13; App-215.
>
> "At the time of development, street designs must comply with Springfield's EDSPM. The Introduction to the EDSPM states that Springfield "reserves the right to impose more restrictive or different design standards than those contained in this manual, on a case-by-case basis, to any public works design..." GRP at 63; App-265.

> "Update the Conceptual Local Street Map, the Springfield Engineering Design Standards and Procedures Manual, and the Springfield Standard Construction Specifications regarding the Franklin Riverfront Local Street Network improvements to enable implementation of the Plan transportation policies and implementation strategies." GRP at 66; App-268.
>
> "Incorporate into the Glenwood Mixed-Use Riverfront Plan District and the Springfield EDSPM, as appropriate, riverfront/river bank design concepts for developing an urban river's edge * * * *" GRP at 92; App-294.
>
> "Hillside protection as a natural resource is regulated by the Springfield Development Code and in the Springfield EDSPM." GRP at 94; App-296.
>
> "To the extent practicable, amend the Springfield Development Code and the Springfield Engineering Design Standards and Procedures Manual to facilitate the use of LID [Low Impact Development] techniques to achieve stormwater quality and optimal capacity management." GRP at 139; App-341.

The Exhibit D Findings are also explicit about the EDSPM implementing the plan. A few examples:

> "In order to comply with Goal 11, Springfield has adopted the following documents: * * * The Springfield Engineering Design and Procedures Manual, 2002, as amended." App-91.
>
> "Public Works staff is currently amending the Springfield Engineering Design Standards and Procedures Manual which will include standards for the local street grid proposed in the Franklin Riverfront. The intent of these standards is to comply with the rationale in Subsection (7). The Springfield Engineering Design Standards and Procedures Manual will be adopted either concurrently or within a month of adoption of Glenwood Phase 1." App-100.
>
> "The existing Springfield Development Code and the Springfield Engineering Design Standards and Procedures Manual that is proposed to be updated under a separate review process address stormwater systems including water quality and quantity." App-176.

In summary, a Goal 2 obligation to make land use decisions under acknowledged plans and implementing regulations means that the city may not adopt plans and regulations that rely on unacknowledged land use regulations. The EDSPM is just that, a compilation of unacknowledged land use regulations that the city uses to implement the GRP and its implementing code. The city's choice is to remove the linkages to the EDSPM in its GRP and implementing code or to run the EDSPM through the acknowledgment process.

NINTH ASSIGNMENT OF ERROR (Peer Review)

The city's authority to require "peer review" by the city's chosen consultants at the applicant's expense is contrary to state statute, state goals, and implementing rules.

There are four kinds of changes in the Mixed-Use Plan District that are "Major Modifications" requiring a Type III process. SDC 3.4-230.B; App-379 to 380. Any of these changes constitutes a statutory "permit" in the meaning of ORS 227.160(2). For any Major Modification the Director may require "peer review." SDC 3.4-230.C; App-381. Peer review is a technical review of the proposal by outside consultants picked by the city that is done before the application is filed; it is paid for by the applicant. SDC 3.4-230.C; App-381. It is intended to provide technical review that city staff are not competent to do. It must be submitted at the time of the required Pre-Submittal Meeting. SDC 3.4-230.D; App-381.

A. For land in the residential BLI, the peer review process unreasonably delays the provision of needed housing, contrary to ORS 197.307(4) and OAR 660-008-015.

For development of needed housing the statute requires: "The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." The rule requires the same.

The peer review is a second staff review, done by a private consultant, prior to the filing of the application. The steps would be: (1) applicant prepares the application and supporting information; (2) the Director decides which private consultants will do the peer review; (3) at the required Pre-Submittal Meeting the application and the peer review results are given to the city; (4) the application is formally filed; and (5) the city staff review starts there on the 120-day clock.

Requiring the peer review prior to the application being filed, rather than at the same time as the city staff review after the application is filed, delays the provision of needed housing. It adds an extra step to the process – a step over which the applicant has no control in terms of time. It is delay with no purpose. The delay is contrary to the statue and the rule.

B. The code's requirement that the applicant pay for the peer review conducted by the technical consultants selected by the city violates ORS 227.175(1).

The statutory standard for charging fees is stated in ORS 227.175(1) is: "The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service." The Peer Review provisions allow the city to impose the cost of hiring a private consultant for review that is not part of "processing the permit." The costs are a hurdle an applicant must overcome before the city will even process the application.

If the city conducted the review of the application in-house, it could charge the actual or average cost of providing that service. That would also require the city to process the permit within the 120-day period, as required by ORS 227.178, instead of farming parts of the permit review out to consultants as a prerequisite before even accepting the permit across the planning department counter for further processing.

However, under the Peer Review paradigm, the city is imposing that cost on the applicant, in a manner that separates it from the formal city processing of the permit. The "cost" in the statute means the cost to the local government for its processing. That is a statutory limit on what the local government can charge. If the local government does not provide the service *during* its processing then there can be no charge.

IV. CONCLUSION

For the reasons explained above, the decision should be remanded, with instructions to comply with the Statewide Planning Goals, applicable statutes and regulations, and the acknowledged comprehensive plan.

Dated this 30th day of January, 2013.

Respectfully submitted,

LAW OFFICE OF BILL KLOOS, PC

By: _____

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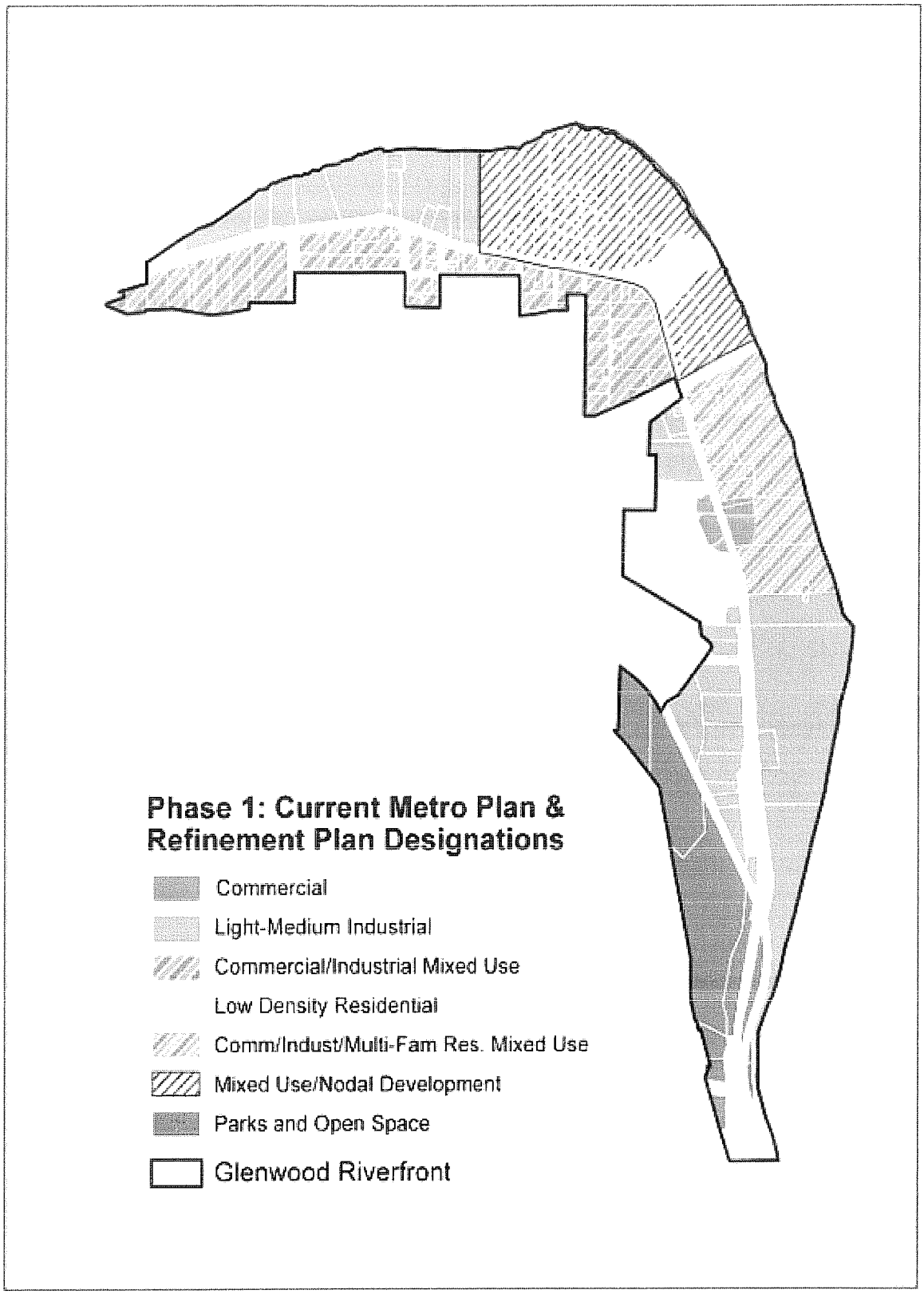
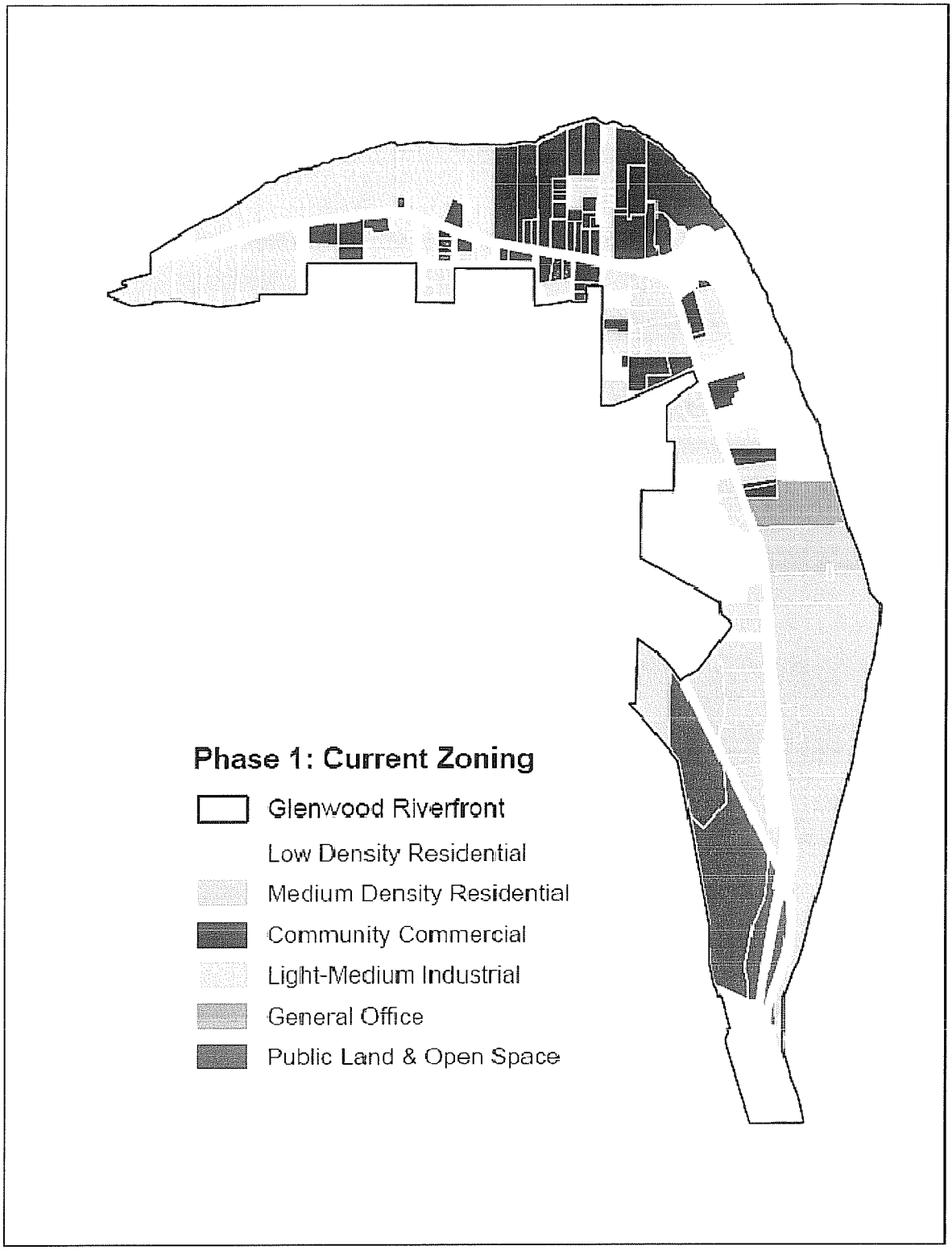


App-1 (black and white copy from record at App-186).



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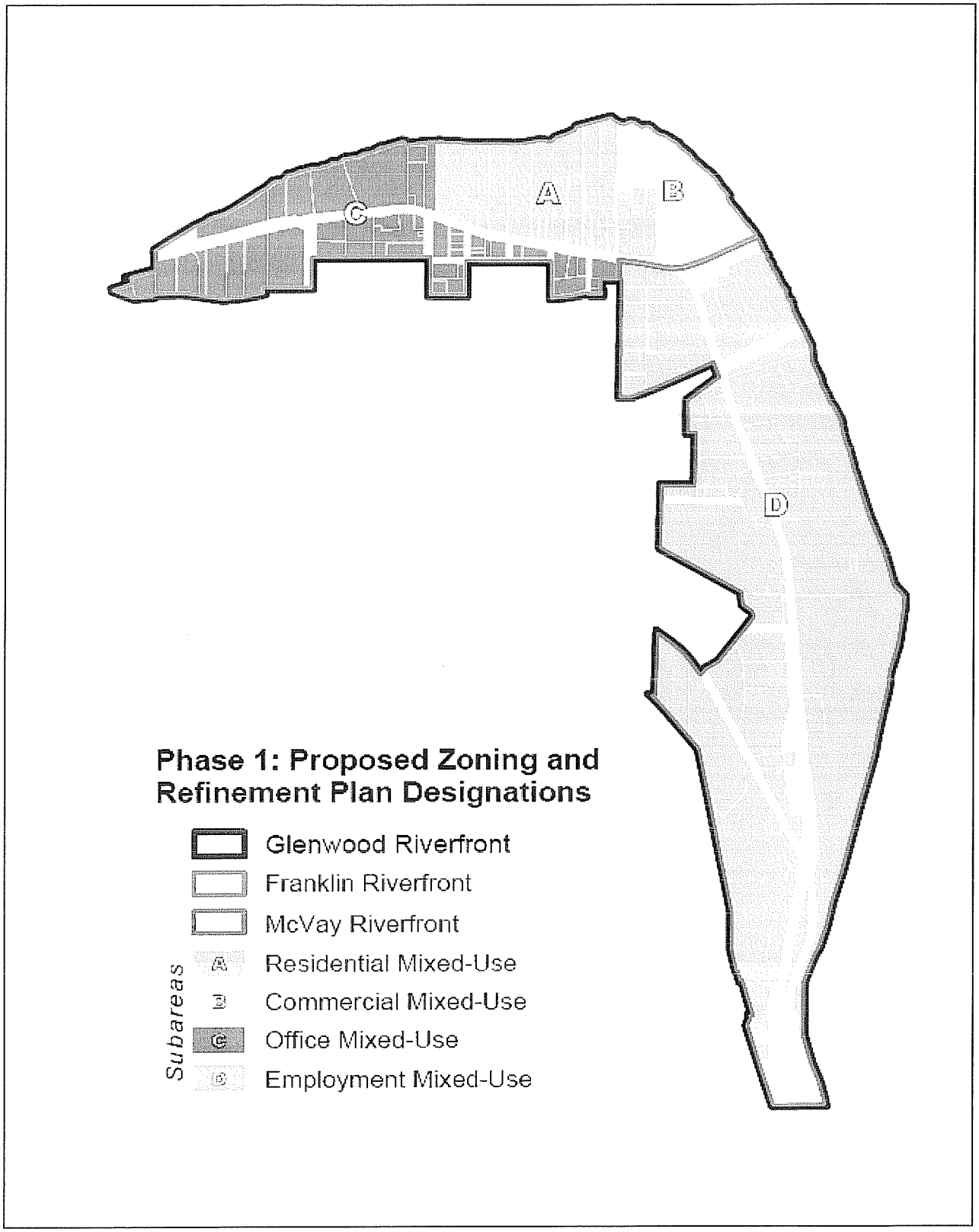

App-3 (black and white copy from record at App-195.)

CERTIFICATE OF SERVICE AND FILING

I certify that on January 30, 2013, I filed the original and four copies of this document with the Land Use Board of Appeals, 550 Capitol Street NE, Suite 235, Salem, OR 97301-2552, by causing same to be deposited in the United States Mail at Eugene, Oregon, enclosed in a sealed envelope with postage prepaid.

I further certify that on said date I served a true and correct copy of said document on the party or parties listed below, by personal delivery at the addresses:

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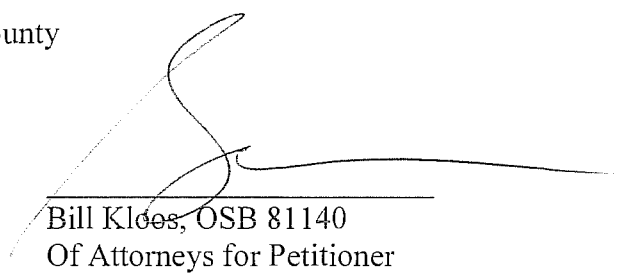

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