

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

3  
4 GUNDERSON, LLC  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF PORTLAND,  
10 *Respondent,*

JAN21 '11 PM12:54 LUBA

11  
12 and

13  
14 FRIENDS OF CATHEDRAL PARK NEIGHBORHOOD  
15 ASSOCIATION, UNIVERSITY OF PORTLAND,  
16 AUDUBON SOCIETY OF PORTLAND,  
17 and WILLAMETTE RIVERKEEPER,  
18 *Intervenors-Respondents.*

19  
20 LUBA No. 2010-039

21  
22 WORKING WATERFRONT COALITION,  
23 *Petitioner,*

24  
25 vs.

26  
27 CITY OF PORTLAND,  
28 *Respondent,*

29  
30 and

31  
32 FRIENDS OF CATHEDRAL PARK NEIGHBORHOOD  
33 ASSOCIATION, UNIVERSITY OF PORTLAND,  
34 AUDUBON SOCIETY OF PORTLAND,  
35 and WILLAMETTE RIVERKEEPER,  
36 *Intervenors-Respondents.*

37  
38 LUBA No. 2010-040

39  
40 SCHNITZER STEEL INDUSTRIES, INC.,  
41 *Petitioner,*

42  
43 vs.

44  
45 CITY OF PORTLAND,

1 *Respondent,*

2  
3 and

4  
5 FRIENDS OF CATHEDRAL PARK NEIGHBORHOOD  
6 ASSOCIATION, UNIVERSITY OF PORTLAND,  
7 AUDUBON SOCIETY OF PORTLAND,  
8 and WILLAMETTE RIVERKEEPER,  
9 *Intervenors-Respondents.*

10  
11 LUBA No. 2010-041

12  
13 FINAL OPINION  
14 AND ORDER

15  
16 Appeal from City of Portland.

17  
18 Robyn Ridler Aoyagi, Portland, filed a petition for review and argued on behalf of  
19 petitioner Gunderson LLC. With her on the brief were Joseph S. Voboril, Steven D. Olson  
20 and Tonkon Torp LLP.

21  
22 Phillip E. Grillo, Portland, filed a petition for review and argued on behalf of  
23 petitioner Working Waterfront Coalition. With him on the brief was Miller Nash LLP.

24  
25 Steven L. Pfeiffer, Portland, filed a petition for review and argued on behalf of  
26 petitioner Schnitzer Steel Industries Inc. With him on the brief were Roger A. Alfred,  
27 Corinne S. Celko and Perkins Coie LLP.

28  
29 Kathryn S. Beaumont, Chief Deputy City Attorney, Portland, filed a response brief  
30 and argued on behalf of the respondent. With her on the brief was Linly F. Rees, Deputy  
31 City Attorney.

32  
33 Daniel J. Rohlf, Portland, filed a response brief and Jessica Johnson argued on behalf  
34 of intervenors-respondents Audubon Society of Portland and Willamette Riverkeeper. With  
35 him on the brief were Tom Buchele and the Pacific Environmental Advocacy Center.

36  
37 Kathryn E. Holland, Vancouver, Washington, represented intervenor-respondent  
38 Friends of Cathedral Park Neighborhood Association.

39  
40 Christe C. White, Portland, represented intervenor-respondent University of Portland.

41  
42 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
43 participated in the decision.

44  
45 REMANDED

01/21/2011

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

**NATURE OF THE DECISION**

Petitioners appeal a decision by the city adopting amendments to the city's comprehensive plan text and maps and the city's zoning code text and maps.

**INTRODUCTION**

The challenged decision adopts the North Reach River Plan (NRRP), which amends portions of the Portland Comprehensive Plan (PCP) text and maps and the Portland City Code (PCC) text and maps. The NRRP replaces a portion of the city's existing Willamette Greenway Plan that was previously adopted by the city in 1987 and acknowledged by the Land Conservation and Development Commission (LCDC) to be in compliance with Statewide Planning Goal 15 (Willamette River Greenway).<sup>1</sup>

The area affected by the decision, known as the North Reach of the Willamette (North Reach), is a 12-mile stretch of the Willamette River from the Broadway Bridge to the

---

<sup>1</sup> This opinion uses a number of acronyms and abbreviations, as follows:

NRRP	North Reach River Plan
PCP	Portland Comprehensive Plan
PCC	Portland City Code
RE Overlay	River Environmental Overlay Zone
RI Overlay	River Industrial Overlay Zone
RG Overlay	River General Overlay Zone
RR Overlay	River Recreational Overlay Zone
VE	Vegetation Enhancement requirements
NRI	Willamette River Natural Resources Inventory
WWC	Working Waterfront Coalition, one of the petitioners in these consolidated appeals

1 Willamette River’s confluence with the Columbia River, and includes an approximately  
2 5,500-acre industrial area within the city known as the Portland Harbor. The Portland Harbor  
3 contains most of the city’s Heavy Industrial (HI)-zoned land and approximately one-third of  
4 the city’s industrial land base. A portion of the North Reach is designated in the PCP as an  
5 “industrial sanctuary.” The Willamette River within the Portland Harbor area contains the  
6 primary shipping channel for the city and provides access to other modes of transportation  
7 including rail, roads, and pipelines. The North Reach also contains remnant bottomland  
8 hardwood forests, upland forests, wetlands, streams, riparian corridors, beaches, and islands.  
9 The National Marine Fisheries Service has listed several species of salmon that spawn in the  
10 Willamette River as threatened or endangered under the Endangered Species Act, and the  
11 North Reach portion of the river has been designated as special habitat for endangered  
12 salmon by the city.

13 As relevant to these appeals, the decision: (1) amends the PCC zoning map to apply a  
14 new River Environmental (RE) overlay to approximately 423 acres of riverfront properties  
15 within the North Reach that are within the River Industrial (RI), River General (RG), or River  
16 Recreational (RR) overlay zones; (2) amends the PCC zoning map to apply the River  
17 Environmental Conservation (RC) overlay zone to approximately 104 acres and to apply the  
18 River Environmental Protection (RP) overlay zone to approximately 79 acres; (3) amends the  
19 text of the PCC to require River Review for certain non-exempt and discretionary  
20 development of properties within the RE overlay zone; (4) amends the text of the PCC to  
21 adopt Vegetation Enhancement (VE) requirements for new development within the RI, RG,  
22 and RR zones; (5) amends the PCP to adopt the Willamette River Natural Resources  
23 Inventory (NRI); (6) amends the PCP map to change the PCP map designation of a 42-acre  
24 property from industrial to mixed employment; and (7) amends the PCC zoning map to  
25 modify the Willamette River Greenway Boundary as required by Statewide Planning Goal 15

1 (Willamette River Greenway). We summarize briefly below the changes to the PCC enacted  
2 by the adoption of the NRRP that are central to the issues presented in the present appeal:

3 **A. River Review**

4 As provided in newly enacted PCC 33.860.300, some proposed development of  
5 properties with the new RE overlay will require discretionary review by the city to confirm  
6 that (1) the proposed development will minimize the loss of natural resources; and (2) the  
7 proposed location, design, and construction methods will have the least significant  
8 detrimental impact on natural resources of all practicable and significantly different  
9 alternatives. If the proposed development cannot avoid impacts on natural resources, then  
10 mitigating the impacts is required. The preference is to mitigate on-site, but if the city  
11 determines that on-site mitigation is not “practicable or ecologically beneficial,” then the city  
12 can allow off-site mitigation either (1) by planting vegetation at one of the city’s River  
13 Restoration sites to be acquired and designated as such at some point in the future; (2) by  
14 purchasing mitigation credits from a city-certified mitigation bank to be created or certified at  
15 a later time; or (3) by paying a mitigation fee in lieu of on-site mitigation. Record 408. The  
16 third option expires two years after the effective date of the ordinance.

17 **B. Vegetation Enhancement**

18 For properties within the RI, RG, and RR overlay zones, certain development  
19 proposals will require the development site to be planted with vegetation until 15 percent of  
20 the site’s total acreage is planted with vegetation. The value of the new vegetation must be in  
21 an amount equal to the lesser of 1 percent of the project’s value and \$200,000, and the  
22 vegetation can be planted on-site or on an eco-roof. In the alternative, the applicant may  
23 choose to pay the city the lesser of 1 percent of the project value and \$200,000.

24 **REPLY BRIEF**

25 Petitioners Gunderson, LLC (Gunderson), Working Waterfront Coalition (WWC) and  
26 Schnitzer Steel Industries, Inc. (Schnitzer) (together petitioners) each move to file a separate

1 reply brief to respond to new matters they allege were included in the response brief. The  
2 city objects to the reply briefs and argues that the new matters that are identified by  
3 petitioners are not new matters. We agree with petitioners that the reply briefs respond to  
4 new matters. The reply briefs are allowed.

5 **MOTION TO TAKE OFFICIAL NOTICE**

6 At oral argument, the city moved to take official notice of Ordinance 184276, an  
7 ordinance that was adopted by the city on December 1, 2010 that amended the effective date  
8 of the NRRP from January 1, 2011 to July 1, 2011. Under ORS 40.090(7), LUBA may take  
9 official notice of “[a]n ordinance, comprehensive plan or enactment of any county or  
10 incorporated city in this state, or a right derived therefrom \* \* \*.” The city’s motion is  
11 allowed.

12 **STATEWIDE PLANNING GOAL 9**

13 Petitioners allege overlapping and related assignments of error that generally assert  
14 that parts of the NRRP violate Statewide Planning Goal 9 (Economic Development) and the  
15 Goal 9 administrative rules at OAR 660, Division 9.<sup>2</sup>

16 **A. Goal 9, Paragraph 3**

17 Goal 9, paragraph 3 provides in relevant part that comprehensive plans must  
18 “[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and  
19 service levels for a variety of industrial and commercial uses consistent with plan policies.”  
20 There is also a statutory obligation for local governments to plan for commercial and  
21 industrial development. ORS 197.707 through 197.719. Administrative rules at OAR chapter  
22 660, division 9 implement Goal 9, but those rules apply only in certain specified  
23 circumstances. However, where a city enacts zoning amendments that are likely to reduce  
24 the supply of buildable industrial and commercial lands, even if the Goal 9 rule does not

---

<sup>2</sup> This section addresses Gunderson’s First Assignment of Error, Schnitzer’s First Assignment of Error, and the portions of WWC’s First through Fourth Assignments of Error that address Goal 9.

1 apply to the decision, the city has an obligation to demonstrate that despite any such  
2 reductions in development potential for industrial and commercial lands, the city's land  
3 supply inventories continue to comply with Goal 9. *Opus Development Corp. v. City of*  
4 *Eugene*, 28 Or LUBA 670, 691 (1995); *Volny v. City of Bend*, 37 Or LUBA 493, 510-11  
5 (2000).

6 **1. Effect of RE Overlay and the VE Standards on Industrial Land**  
7 **Supply**

8 According to petitioners, the on-site mitigation requirements for proposed  
9 development within the RE overlay zone and the new VE requirements will have the effect of  
10 diverting a significant amount of industrial land from potential industrial use and will  
11 effectively decrease the supply of industrial land available for industrial development. Given  
12 that decreased supply, petitioners contend that the record does not support the city's  
13 determination that after adoption of the NRRP the city will remain in compliance with Goal  
14 9, paragraph 3's requirement that the city maintain an adequate supply of sites for a variety of  
15 industrial and commercial uses.<sup>3</sup>

16 The city's Goal 9, paragraph 3 determination was based in part on the fact that off-site  
17 mitigation and fee-in-lieu options are possible in particular cases, in which case no industrial  
18 land would be lost to non-industrial uses. Petitioners argue that even if the city determines in  
19 every case that on-site mitigation is not "practicable or ecologically beneficial" and allows  
20 off-site mitigation, any allowed off-site mitigation will occur on one of 18 potential  
21 restoration sites in the North Reach area, at least some of which are zoned industrial. With  
22 respect to the new VE standards, petitioners maintain that the new requirement that  
23 development of all properties within the RI, RG and RR overlay zones requires planting on-  
24 site vegetation until 15 percent of the site is vegetated will similarly remove land from the

---

<sup>3</sup> Petitioners calculate that approximately 692 acres will become unavailable for industrial development as a result of the mitigation required under River Review, the VE standards, and the RC and RP overlay zones.



1 city's industrial land supply. Petitioners also argue that even if all property owners opted to  
2 pay the fee-in-lieu of planting vegetation, the vegetation that will be purchased and planted  
3 with those fees will be planted at restoration sites within the North Reach that are presumed  
4 to be zoned industrial.

5 Petitioners also argue that the RC and RP overlay zones restrict development to such  
6 a degree that properties with these overlays should be considered unavailable for future  
7 development, and their removal from use as industrial land should have been taken into  
8 account by the city in determining whether the city's industrial land supply is adequate.  
9 WWC additionally argues that the NRRP's requirement that the city acquire and build a  
10 continuous greenway trail along the River violates Goal 9, paragraph 3 because it removes  
11 land that will be used for the greenway trail from the city's industrial land base.

12 The city responds that the NRRP's requirement for mitigation of impacts to natural  
13 resources for RE overlay property development, the VE standards, the RC and RP overlay  
14 zones, and the greenway trail section of the NRRP will not affect the city's industrial land  
15 supply. First, the city argues, not every development on property within the RE overlay zone  
16 will be subject to River Review because the NRRP contains a number of exceptions for  
17 nondiscretionary and exempt development activities. In addition, according to the city, the  
18 requirement for on-site mitigation of impacts from development of RE overlay properties and  
19 the VE standards are not much different from the landscaping requirements that previously  
20 arose out of discretionary review of development within the area and other regulations that  
21 previously applied under regulations that were superceded by the amendments adopted by the  
22 decision on appeal. With respect to the 18 sites identified as potential restoration sites within  
23 the North Reach, the city argues that the sites are merely in the identification process and as  
24 of the date the NRRP was adopted, maintain their current industrial zoning and are available  
25 for development with industrial uses. With respect to the RC and RP overlay zones, the city  
26 responds that the city council concluded that even if the 104 acres subject to the RC and RP

1 overlay zones are considered to be unavailable for industrial development, enough buildable  
2 industrial land remains. Finally, with respect to the requirement that the city acquire and  
3 build a greenway trail along the entire length of the river, we understand the city to respond  
4 that the NRRP's statements concerning a greenway trail are aspirational and recognize the  
5 challenges of siting a trail within an industrial area.

6 We agree with petitioners that the record does not support a determination that the RE  
7 overlay and the mitigation requirements of River Review will not have an effect on the city's  
8 supply of industrial land. The mitigation requirements include a presumption that mitigation  
9 will occur on-site. On-site mitigation will be in the form of planting replacement or other  
10 vegetation to offset the impacts to the site's natural resources from the proposed  
11 development, and once that replacement vegetation is planted, the planted area will be  
12 unavailable for development unless the property owner again undergoes River Review.  
13 Although it is possible that, as the city posits, in every case the city could determine that on-  
14 site mitigation is not "practicable or ecologically beneficial" and allow off-site mitigation, the  
15 city does not dispute that off-site mitigation will occur at one of the 18 identified potential  
16 restoration sites within the North Reach, which are currently zoned for industrial use. If off-  
17 site mitigation occurs at those sites, then presumably those sites will not be available for  
18 industrial development. Further, even if in every case the city allowed an applicant to  
19 purchase mitigation credits or pay a mitigation "fee-in-lieu" of planting, the end result of the  
20 payment of those funds under the NRRP is that mitigation for the loss of identified resources  
21 will occur somewhere within the North Reach area, and could reduce the amount of industrial  
22 land available for development.

23 With respect to the VE standards, although the VE standards are structured somewhat  
24 differently from the mitigation requirements in that it is entirely the applicant's choice  
25 whether to plant vegetation or pay a fee in lieu, the fact remains that even if every applicant  
26 chose the payment option, the paid funds are dedicated under the NRRP to planting

1 vegetation on one of the city's restoration sites within the North Reach. We understand  
2 petitioners to argue, and the city does not dispute, that those sites are currently planned and  
3 zoned for industrial use. For the reasons explained above, planting those sites as vegetated  
4 natural areas would reduce the amount of industrial land available for development.  
5 Similarly, with respect to the RP and RC overlay zones, it appears that land within those  
6 zones will be subject to strict development constraints that will likely make all or part of  
7 those lands unavailable for development. We agree with petitioners that the VE standards  
8 could have the effect of decreasing the amount of land that was available for industrial  
9 development prior to adoption of the disputed amendments. In addition, with respect to the  
10 NRRP's call for a greenway trail, we agree with petitioners that the city has an obligation to  
11 determine whether eventual designation and construction of the trail will cause the city to  
12 have an inadequate supply of industrial land.

13         Because the likely result of applying the new regulations is that the city's supply of  
14 land potentially available for new or expanded industrial development would be effectively  
15 reduced, perhaps significantly so, it is incumbent on the city to consider the impact of such  
16 potential reductions on the city's industrial land supply and determine, based on an adequate  
17 factual base, whether any such impacts on the inventory are consistent with the city's Goal 9  
18 obligation to maintain an adequate supply of industrial land. To do so, the city must  
19 necessarily (1) undertake to quantify to the extent necessary the number of acres the new  
20 regulations will likely remove from potential industrial development, compared to the  
21 existing acknowledged regulations, and (2) evaluate the impact of any net reduction in land  
22 supply on the city's Goal 9 inventory of industrial lands. The second step will entail making  
23 at least some determinations regarding the adequacy of the city's industrial land supply,  
24 before and after application of the new regulations.

25         As noted, the city's initial position that the NRRP will have zero impact on the  
26 industrial land supply is not supported by the record. Petitioners argued below that,

1 conservatively estimated, the NRRP will result in the loss of approximately 692 acres of  
2 industrial land in the North Reach to industrial uses. That estimate may be inflated, as the  
3 city argues, but the city cites to no other evidence supporting a different estimate. The city  
4 apparently made no attempt to quantify the impacts of the NRRP on the industrial land  
5 supply in the North Reach. Unless there is some other adequate factual or legal basis to  
6 conclude that the city’s industrial land supply remains adequate after the NRRP is applied,  
7 remand is necessary for the city to consider and make some attempt to estimate how many net  
8 industrial acres, if any, would likely be lost to potential industrial development under the  
9 NRRP.

10 As discussed below, we understand the city to take the position that, regardless of  
11 how many acres might be lost to potential industrial use under the NRRP, the city’s current  
12 supply of industrial land remains adequate for purposes of Goal 9, paragraph 3, based on a  
13 2009 economic opportunities analysis the city has drafted for purposes of periodic review.  
14 Petitioners challenge the city’s reliance on that 2009 analysis and other documents, and we  
15 turn to that dispute.

16 **2. Adequacy of Industrial Land Supply**

17 **a. 2009 Economic Opportunities Analysis (2009 EOA)**

18 The city concluded that the NRRP would not reduce the city’s five year supply of  
19 industrial sites in the North Reach.<sup>4</sup> The city based its determination on a draft economic

---

<sup>4</sup> The city adopted findings that concluded that the new standards would not decrease the city’s “short term” supply of industrial and commercial sites in the North Reach:

“Goal 9 requires the City to provide an adequate supply of sites for industrial and commercial uses, but does not require adequacy over a specific planning period as does the Goal 9 rule. Application of the proposed environmental overlay zones will not decrease the City’s currently adequate short-term supply of industrial and commercial sites in the North Reach consistent with Goal 9. While industrial and employment uses will continue to be allowed within the environmental overlay zones in the North Reach, meeting the regulations associated with the zoning will in some instances increase the cost of development. According to a draft Economic Opportunities Analysis (draft EOA) recently prepared for use in City’s periodic review and comprehensive plan update process, the potential increased cost and increased

1 opportunities analysis prepared in 2009 (2009 EOA) that is part of the record. Citing *DS*  
2 *Parklane, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000) (*Parklane*) and *1000*  
3 *Friends of Oregon v. City of Dundee*, 203 Or App 207, 124 P3d 1249 (2005) (*Dundee*),  
4 petitioners argue that the city’s reliance on the 2009 EOA to support its conclusion is  
5 prohibited by Statewide Planning Goal 2 (Land Use Planning) because the 2009 EOA has not  
6 been adopted as part of the PCP.<sup>5</sup>

---

timeline of development associated with the environmental overlay zone regulations will affect the available land supply over the next 25 years by reducing the amount of environmentally zoned land absorbed into the market over that time period. The River Plan/North Reach environmental overlay zoning amendments were inventoried in the draft EOA analysis. The mid-range demand scenario of the draft EOA estimates that only 40 percent of the environmentally zoned land in the harbor and airport industrial districts on average will be available for development by 2035, while the implications of the overlays will vary widely by site. *However, the draft EOA also concludes the City has an adequate short-term supply of unconstrained vacant land to meet forecast demand for industrial and employment land over the next five years. The draft EOA estimates that by 2035 the expected demand for industrial land in the harbor and airport districts will exceed the available supply by approximately 600 acres.*

“The City will address this predicted shortfall through the periodic review process, which is currently underway, and will identify and adopt citywide policies and programs to respond to the identified need. The periodic review process will undertake the regulatory analysis required by Goal 9 rule on a city-wide basis and is expected to be completed within five years. Options for addressing the industrial and employment land supply shortfall are explored in the draft EOA. Examples include setting specific job growth targets (or a regional capture rate target), refining the industrial retention policies, provision of land for regionally significant freight terminal demand (e.g., annexation of West Hayden Island for marine terminal development), and enhanced Airport City concept, gap funding to resolve brownfield issues, encouraging full site utilization, further investigation of market opportunities (e.g., manufacturing recovery, sustainable design, increased FAR), setting use priorities through incentives (e.g., high wages, traded sectors, sustainability edge), and transportation and utility improvements for site development. The draft EOA will be adopted as part of the periodic review process.

“The River Plan / North Reach environmental overlay zone amendments are consistent with Goal 9 because, as the findings demonstrate, the amendments will not impact the short-term supply of available industrial and employment land, and the long-term identified in the City’s draft EOA will be addressed before any shortfall is realized.” Record 1436-37 (emphasis added).

<sup>5</sup> Goal 2’s purpose is “[t]o establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.” That goal further provides 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).

1           In *Parklane* and again in *Dundee*, the Court of Appeals concluded that the regional  
2 and local governments in those appeals violated Goal 2 in making decisions that relied  
3 primarily or conclusively on studies and information that had not been adopted as a part of  
4 their acknowledged comprehensive plans, rather than relying on studies and projections that  
5 had been incorporated into their comprehensive plans. *Parklane*, 165 Or App at 22-23;  
6 *Dundee*, 203 Or App at 216. In *Parklane*, the Court concluded that Metro erred in relying on  
7 a draft report that was included in the record, that was an update of data used to develop  
8 Metro's adopted 2040 projection of its 20-year supply of land in 2017 and that projected a  
9 greater deficit of housing in 2040 than the adopted Metro 2040 projection projected for 2017.

10           In *Dundee*, the city adopted an update to its buildable lands inventory (BLI) in 1988  
11 that projected a surplus of approximately 30 acres of buildable residential land within the  
12 city's urban growth boundary in 2005. That 1988 BLI was adopted as part of the city's  
13 comprehensive plan. In 2003, the city prepared a new buildable lands inventory (the 2003  
14 BLI) that indicated that the city would have a surplus of between 97 and 155 acres of  
15 buildable residential land in 2020, even if the proposed Newberg-Dundee bypass that was the  
16 subject of the challenged comprehensive plan amendment was built across some of the city's  
17 inventory of buildable residential land. The Court reviewed the city's findings in support of  
18 the comprehensive plan amendment and concluded that the city erred in those findings in  
19 relying on the 2003 BLI that was not a part of the city's comprehensive plan to conclude that  
20 even with the bypass built, the city retained an adequate supply of buildable residential land.  
21 The Court rejected LUBA's conclusion that the city did not err in relying on the 2003 BLI.

22           The Court held that Goal 2 requires local governments to make planning decisions on  
23 the basis of acknowledged comprehensive plans and acknowledged planning documents:

24           “In sum, a planning decision based on a study contemplated by a  
25 comprehensive plan but not incorporated into the comprehensive plan after the  
26 study is carried out is not a planning decision that is made on the basis of the  
27 comprehensive plan and acknowledged planning documents, as is required by  
28 Goal 2. \* \* \* That is not a matter of mere abstract concern. Rather, it goes to

1 the heart of the practical application of the land use laws: The comprehensive  
2 plan is the fundamental document that governs land use planning. Citizens  
3 must be able to rely on the fact that the acknowledged comprehensive plan and  
4 information integrated in that plan will serve as the basis for land use  
5 decisions, rather than running the risk of being ‘sandbagged’ by government’s  
6 reliance on new data that is inconsistent with the information on which the  
7 comprehensive plan was based.” *Dundee*, 203 Or App at 216 (citations  
8 omitted).

9 There was no dispute that the city’s decision in *Dundee* would result in some of its  
10 inventoried buildable residential land being diverted to use for the proposed bypass. The  
11 city’s error in *Dundee* was its reliance on 2020 projections of an expected large surplus of  
12 buildable residential lands—projections that had not been adopted as part of the city  
13 comprehensive plan—in place of projections of a smaller expected surplus of buildable  
14 residential lands in the city’s comprehensive plan.

15 The factual circumstances differ here in some respects from the factual circumstances  
16 presented in *Parklane* and in *Dundee* because, as we determine below, the 1989 EOA that is  
17 part of the PCP does not include any express projection of the city’s industrial land needs in  
18 2010, the year the NRRP was adopted. Therefore, unlike in *Parklane* and *Dundee*, the 2009  
19 EOA is not inconsistent with the PCP. The 2009 EOA is, as far as we can tell, the city’s first  
20 attempt to quantify its supply of industrial land in 2009 and project industrial land needs  
21 through 2035. However, even with those differences in circumstances, we conclude that the  
22 city erred in relying on the 2009 EOA to conclude that adopting the additional restrictions on  
23 industrial lands that are included in the NRRP will not result in the city failing to comply  
24 with Goal 9. While the 2009 EOA is included in the evidentiary record, as we have already  
25 noted, it has not been adopted as part of the PCP. As the Court of Appeals held in *Dundee*,  
26 the “comprehensive plan and information integrated in that plan [must] serve as the basis for  
27 land use decisions.” As we explain below, the 1989 EOA that is part of the PCP does not  
28 provide an adequate factual basis for finding that after adopting the NRRP the city  
29 comprehensive plan will remain consistent with Goal 9’s requirement that the city “[p]rovide

1 for at least an adequate supply of sites of suitable sizes, types, locations, and service levels  
2 for a variety of industrial and commercial uses consistent with plan policies.” If the city  
3 relies on the 2009 EOA as the primary basis for its determination that the challenged  
4 amendments are consistent with the city’s Goal 9 obligations, under *Dundee* it has little  
5 choice but to amend its comprehensive plan to adopt the 2009 EOA or take other appropriate  
6 action to amend the plan so that it will provide an adequate basis for the required Goal 9  
7 determination.

8 The findings quoted above at n 4 make clear that the city relied on the 2009 EOA’s  
9 projections that the city’s industrial land supply would be sufficient for the next five years to  
10 conclude that the city’s industrial land supply is adequate. That reliance runs afoul of Goal 2,  
11 as explained in *Parklane* and *Dundee*, even if the 2009 EOA is part of the record and would  
12 otherwise provide an adequate factual base to support the decision, because it has not been  
13 adopted as part of the city’s acknowledged comprehensive plan

14 Although we conclude above that the city may not base its decision regarding  
15 compliance with Goal 9 on the 2009 EOA because that document is not a part of the PCP, we  
16 nevertheless address petitioners’ challenges to the substance of the 2009 EOA. That EOA  
17 has problems of its own that lead us to conclude that even if the city could properly rely on  
18 the 2009 EOA, it does not provide an adequate factual base on which the city could base its  
19 decision that the NRRP will not have an impact on the city’s industrial land base that violates  
20 Goal 9.

21 The 2009 EOA analyzed vacant and partially vacant industrial land in five geographic  
22 areas: Central City Commercial, Central City Industrial, Columbia Harbor, Columbia East,  
23 and Dispersed Industrial. Record 3261-3318. The geographic area identified in the 2009  
24 EOA as the “Columbia Harbor” appears to include the North Reach as well as industrial  
25 lands near and including the airport and other lands east of North Portland Road, the city’s  
26 identified eastern boundary for the North Reach. The 2009 EOA concludes that there are



1 approximately 100 acres of vacant and unconstrained sites in the Columbia Harbor  
2 geographic area. Record 3276. The 2009 EOA also concludes:

3       “*Columbia Harbor*: Columbia Harbor reports the widest variation in land  
4 demand, from a low of 230 [acres] to a high of 1,230 [acres] (more than any  
5 other geography). It also contains more vacant land than any other geography,  
6 much of it constrained by contamination and environmental overlays.

7       “For the industrial areas, only vacant land was included in the tally of ‘easiest  
8 to develop parcels’ (for commercial geographies, both vacant and low-value  
9 parcels were included). Columbia Harbor is a special geography as the  
10 appropriate host of regional transportation land demand. Without this demand  
11 source, the geography has sufficient available vacant acreage in both the low  
12 and mid scenarios, and shortage of about 170 acres in the high scenario.  
13 When regional transportation needs are included, all scenarios report a  
14 shortage: about 100 acres in the low scenario, 600 in the mid and over 800 in  
15 the high scenario.

16       “Without regional transportation land, the high scenario requires that 4% of  
17 Columbia Harbor’s developed land redevelop. No redevelopment is required  
18 in the low and mid scenarios. When regional transportation needs are  
19 included, the required redevelopment rate increases to 2%, 14% and 19% in  
20 the low, mid and high demand scenarios. The redevelopment need would be  
21 reduced is added industrial land is annexed to the City.” Record 3284.

22       The 2009 EOA analyzes vacant and partially vacant parcels with existing  
23 environmental overlays, which are described as “environmental overlays (covering more than  
24 10% of the parcel) that impacts development. The relevant environmental overlays are \* \* \*  
25 newly proposed p, c, and e (protection, conservation, environmental) overlays within the  
26 North Reach. Beyond the North Reach, land impacted by a p overlay has been removed from  
27 the vacant land inventory as unbuildable.”<sup>6</sup> Record 3276. The 2009 EOA appears to have

---

<sup>6</sup> The 2009 EOA describes the effect of the c, p, and e overlays:

“The implications of environmental overlays for parcel developability vary widely. For wetlands/riparian areas, development requires balanced land cut & fill, which reduces the portion of the site on which buildings can locate. Environmental overlays also tend to increase the cost and timeline of development. For this analysis, it is assumed that some portion of sites with environmental overlays will not develop. No data exists to fully ground-truth this assumption in past trends, especially as the portion of vacant land impacted by environmental zoning has risen steadily over time (as vacant land decreases and environmental

1 considered the effect of the new on-site mitigation requirements that accompany some  
2 development of property within the RE overlay zone in its analysis of vacant and partially  
3 vacant land with environmental constraints, but it does not appear to have considered the  
4 effect of the new VE standards on the availability of land within the RI, RG, and RR zones  
5 for development.

6 We also question the appropriateness of the 2009 EOA's analysis of a geographic area  
7 that lumps together land that does not have any river access with river-accessible land in  
8 determining the availability of industrial land for development, given that Goal 9, paragraph  
9 3 requires the city to provide an adequate supply of industrial land, not only with respect to  
10 total acreage, but also with regard to size, type, location, and service levels. *See Opus Dev.*  
11 *Corp. v. City of Eugene*, 28 Or LUBA 670 (1995) (rezoning industrial land to a mixed use  
12 zone that allows both industrial and residential uses requires a demonstration under Goal 9  
13 that the city retains an adequate supply of industrial and commercial lands). The city has  
14 apparently recognized through the "River" overlay zoning (RI and RG) that is reserved for  
15 river-dependent and river-related uses that industrial land with river access has unique site  
16 characteristics.

17 Finally, even assuming that the 2009 EOA's lumping together of the North Reach  
18 area with other non-river access industrial districts to analyze land availability is appropriate,  
19 it is not entirely clear from the 2009 EOA, and in particular the passage quoted above from  
20 the report's "Reconciliation and Results" section, that it does in fact conclude that the city  
21 has an adequate supply of industrial land for development within the next five years. The  
22 passage quoted above does not set forth a particular time frame after which the city will have  
23 a shortage of industrial land in the Columbia Harbor geographic area, but appears to conclude  
24 that if no Columbia Harbor land is developed for transportation improvements, under the low

---

zoning increases). The portion of land projected to develop varies by geography across the low, mid, and high scenarios." Record 3276.

1 and mid-range scenarios there will be a sufficient supply of industrial land within that  
2 geographic area for industrial use for some unspecified period of time. But the report  
3 recognizes that the Columbia Harbor geographic area will supply the majority, if not all, of  
4 the land to be developed for transportation needs, and also appears to assume that no land  
5 within the Columbia Harbor will be developed for transportation needs during the first five  
6 years of the planning period. Record 3264-66. The underlying basis for that assumption is  
7 not apparent from the report, given that the report identifies rail yard expansion and marine  
8 terminal expansion as potential sources of industrial land development that do not readily  
9 correlate to projected employment needs. Record 3269-70. With respect to marine terminal  
10 expansion, the report notes a historic trend of approximately 16 acres per year being  
11 developed for marine cargo uses, but it does not indicate why that historic trend is  
12 inapplicable to the first five years of the planning period. Record 3270.

13 In sum, for the reasons explained above, it was error for the city to rely on the 2009  
14 EOA to determine whether after adoption of the NRRP the city continues to have an adequate  
15 supply of industrial lands under Goal 9, and we agree with petitioners that the 2009 EOA  
16 does not constitute an adequate factual base to support the city's conclusion that the city will  
17 continue to have an adequate supply of industrial land after the restrictions on development  
18 take effect.

19 **b. 1989 Economic Opportunities Analysis (1989 EOA)**

20 The city argues that even if its reliance on the 2009 EOA was improper, a 1989  
21 economic opportunities analysis (1989 EOA) that was acknowledged by LCDC during the  
22 city's periodic review proceedings and is part of the PCP provides an adequate factual base to  
23 support its conclusion that the proposed NRRP will not decrease the city's industrial land  
24 supply. The 1989 EOA is attached to the city's brief at Appendix 214-231, and a portion of  
25 the 1989 EOA is also located at Record 3248-3255. According to the city, the 1989 EOA  
26 shows that the city has an adequate supply of industrial land. However, the problem with the

1 city's argument is that the findings above at n 4 make clear that the city did not rely on that  
2 1989 EOA to support its conclusion; rather it relied exclusively on the 2009 EOA. The fact  
3 that the city might have relied upon the 1989 EOA to provide an adequate factual base to  
4 support the city's decision does not cure that reliance problem. *See Dundee*, 203 Or App at  
5 215 (refusing to consider whether the city might have relied on the inventory in its  
6 comprehensive plan when the city clearly relied on an inventory that was not adopted as part  
7 of the city comprehensive plan).

8 In addition, even if the city had relied on the 1989 EOA, the 1989 EOA does not  
9 provide an adequate factual base to support the decision. The 1989 EOA does not indicate  
10 any definite planning period or include projections about future demand, or otherwise contain  
11 a forecast or estimate of projected industrial land needs in 2010 based on employment or  
12 other need projected over any specific period of time that we can see.<sup>7</sup> Although the 1989  
13 EOA states that incorporated results from a 1987 vacant lands analysis led the city to  
14 conclude that the city had a "sufficient inventory of vacant buildable commercial and  
15 industrial land," it is not clear from that EOA what the city meant by use of the word  
16 "sufficient" because the EOA does not include an analysis of or projections about future land  
17 supply or needs. Response Brief App. 227. As far as we can tell, the 1989 EOA evaluates  
18 current supply but lacks any evaluation of future demand for industrial and commercial land  
19 and lacks any projections regarding the amount of land needed to meet that demand. The  
20 1989 EOA concluded that in 1989 the city had a sufficient amount of industrial land. But

---

<sup>7</sup> The 1989 EOA quotes the then-applicable version of OAR Chapter 660, division 09, which required in relevant part that "[p]lans for areas of 2,500 or more population must designate enough serviceable sites *to meet needs of the next five years.* \* \* \*" Response Brief Appendix 215 (emphasis added.) However, there is no projection of supply and demand, even for a five year period.

1 that 1989 EOA does not provide support for the city’s argument that, based on the 1989  
2 EOA, the city has a sufficient supply of vacant industrial land in 2010.<sup>8</sup>

3 **B. Goal 9, Paragraph 4**

4 Goal 9, paragraph 4 requires the city’s plan and land use regulations in relevant part to  
5 “[l]imit the uses on or near sites zoned for specific industrial and commercial uses to those  
6 which are compatible with proposed uses.” WWC argues that the NRRP requirements for  
7 vegetation amount to *de facto* conversion of that land into use as nature preserves and that  
8 use of industrial-zoned property for a nature preserve is incompatible with industrial uses in  
9 general.

10 The city responds that the vegetation and mitigation requirements do not convert  
11 property into “nature preserves” in violation of Goal 9, paragraph 4 because vegetation is not  
12 a “use” of the property. According to the city, the reference in the goal to “uses” refers to  
13 zoning classifications that are incompatible with industrial zoning, not incidental activities  
14 that might occur on industrial land. In addition, the city responds, the mitigation  
15 requirements and the VE standards are not “uses” but are development standards that might  
16 result in planting of vegetation.

17 We agree with the city. Petitioners do not explain how, even if vegetation could be  
18 viewed as a “use” as that word is used in Goal 9, that use is “incompatible” with industrial  
19 and commercial uses.

---

<sup>8</sup> Another problem with the city’s reliance on the 1989 EOA as adequate support for its decision is that the 1987 vacant lands analysis contains no identifiable analysis of the area that is impacted by the NRRP, but rather analyzes vacant industrial parcels by industrial district. Although some of those districts may have land located within the North Reach that is subject to the NRRP, such as the Guilds Lake Industrial District, the Linnton Industrial District, and the St. Johns Industrial District, it is simply not clear from the 1987 vacant lands analysis whether the analysis includes the area that the city has now designated as the North Reach and subjected to the NRRP’s provisions.

1           **C.     OAR 660-009-0010(4)**

2                   **a.     McCormick & Baxter Site Redesignation**

3           Where a local government amends the plan designation of two or more acres of land  
4 from an industrial use designation to a non-industrial use designation, OAR 660-009-0010(4)  
5 requires in relevant part that the local government “[d]emonstrate that the proposed  
6 amendment is consistent with *its most recent economic opportunities analysis \* \* \**.”  
7 (Emphases added.)<sup>9</sup> The city found that the redesignation on the PCP map of the 42-acre  
8 McCormick & Baxter site from Industrial Sanctuary to Mixed Employment fell within the  
9 ambit of the rule, and adopted findings that the redesignation of the site is consistent with  
10 both the 1989 EOA and the 2009 EOA.<sup>10</sup>

---

<sup>9</sup> OAR 660-009-0010(4) provides:

“For a post-acknowledgement plan amendment under OAR chapter 660, division 18, that changes the plan designation of land in excess of two acres within an existing urban growth boundary from an industrial use designation to a non-industrial use designation, or an other employment use designation to any other use designation, a city or county must address all applicable planning requirements, and:

“(a) Demonstrate that the proposed amendment is consistent with its most recent economic opportunities analysis and the parts of its acknowledged comprehensive plan which address the requirements of this division; or

“(b) Amend its comprehensive plan to incorporate the proposed amendment, consistent with the requirements of this division; or

“(c) Adopt a combination of the above, consistent with the requirements of this division.”

<sup>10</sup> Although the city in its brief asserts that the redesignation of the site is not a change in the plan designation from an industrial to a non-industrial designation and that OAR 660-009-0010(4) does not apply, the city’s decision concluded that compliance with OAR 660-009-0010(4) was required and adopted the following findings:

“In general, post acknowledgement comprehensive plan amendments are not required to comply the Goal 9 rule outside of the periodic review process. However, post-acknowledgement plan amendments that change the plan designation of land in excess of two acres must comply with the Goal 9 rule. The River Plan / North Reach amendments change the comprehensive plan map designation of a 42-acre parcel known as the McCormick and Baxter site from Industrial Sanctuary to Mixed Employment. This amendment exceeds the two acre threshold thus triggering the analysis required by section 660-09-0010(4).

---

“The McCormick and Baxter site is a brownfield site. The property is located on the Willamette River south of the railroad bridge, and was used as a wood treatment facility from 1941 to 1991. The site has been vacant since 1991. \* \* \*

“ \* \* \* \* \*

“As mentioned above, the City’s most recent economic opportunities analysis was prepared in July 2009, and will be reviewed and adopted as part of the periodic review process and update of the Comprehensive Plan. The draft EOA indicates that over the next five years the City has an adequate supply of unconstrained vacant land to meet forecast industrial and employment demand. Therefore, in the short-term, the amendment to comprehensive plan designation for the McCormick and Baxter site is consistent with the City’s most recent EOA.

“However, the draft EOA further indicates that over the following twenty years the City could face a shortfall of industrial and employment lands. The predicted shortfall is based partially on the impact of the cost constraints on land absorption including constraints associated with brownfield clean up and development. The conclusions of the draft EOA are based partly on an estimation that only 30 percent of the brownfield sites will be available for redevelopment in the next 25 years. The River Plan / North Reach includes an amendment that will encourage redevelopment of brownfield sites in the North Reach thereby reducing the potential industrial land supply shortfall. The amendments recommend implementation of the HarborReDI project which will result in an action plan to redevelop 18 identified brownfield sites along the Portland Harbor. Few of these brownfield sites are expected to be available as current short-term land supply, but the HarborReDI project aims to facilitate both short-term redevelopment opportunities as specific sites (Linnton Plywood, Time Oil and Simplot), and over the long-term, full redevelopment of all of the identified sites. In addition, the City’s intends to address the predicted long-term industrial land supply shortfall through citywide policies and programs adopted through the periodic review process.

“The draft EOA also concludes that the City is facing a potential shortfall of campus institutional land between 2015 and 2035. The amendment of the McCormick and Baxter site is intended to facilitate the expansion of the University of Portland which help reduce the predicted shortfall.

“The Goal 9 rule requires the City to demonstrate that the amendment to the McCormick & Baxter site is consistent with the City’s ‘most recent economic opportunities analysis’. The City’s most recent adopted EOA is in the form of industrial and commercial land inventories adopted as background documentation for the City’s Comprehensive Plan Goal 5, Economic Development. According to a 1987 vacant land analysis cited in the City’s adopted report responding to its first periodic review order, the City has ‘a sufficient inventory of vacant buildable commercial and industrial land’ (pg. 135, City of Portland, Oregon Comprehensive Plan Periodic Review: Proposed Local Review Order, March 1989; Resolution No. 34523). The 1987 report identifies that the City has 2,290.56 acres of vacant buildable industrial land available and deems that figure sufficient. The report also identifies another 3,441.36 acres of industrial land within a hazard area [on] the floodplain and states that much of the vacant industrial land within the floodplain can be developed. LDCD acknowledged the determination that the City has sufficient commercial and industrial land in the City’s first periodic review.

“Given that in 1987 the City had a sufficient supply of vacant buildable industrial land and had a substantial surplus beyond that which was deemed sufficient, the change to the comprehensive plan map designation for the 42 acres McCormick and Baxter site is not

1           Petitioners challenge the city’s reliance on the 2009 EOA as prohibited by Goal 2 and  
2 the Court of Appeals’ reasoning in its *Parklane* and *Dundee* opinions, and also challenge the  
3 city’s conclusion that the map change is consistent with the 1989 EOA. We generally agree  
4 with petitioners that where OAR 660-009-0010(4) applies, the city cannot satisfy the rule  
5 based on an unadopted, draft EOA. *Freedman v. City of Grants Pass*, 57 Or LUBA 385, 390  
6 (2008) (citing *Parklane* and *Dundee*). However, based on the city’s findings quoted at n 10,  
7 we understand the city to have relied on the 1989 EOA to conclude that the redesignation is  
8 consistent with that EOA. For that reason, we disagree with petitioners that the city erred as  
9 a matter of law in referring to the 2009 EOA in its findings.

10           However, for the reasons explained above, we agree with petitioners that the 1989  
11 EOA does not provide evidentiary support for the city’s conclusion. As explained above, the  
12 1989 EOA included only a present calculation of the city’s supply of industrial land and a  
13 conclusion that the city possessed, at that time, an adequate supply of industrial land. It did  
14 not project the city’s land needs for any period of time, and particularly did not project the  
15 city’s industrial land needs in 2010. Although the language of OAR 660-009-0010(4) is  
16 difficult to apply where there is apparently no projection of land need contained in the city’s  
17 most recently adopted EOA, a determination of “consistency *with*” an adopted document  
18 appears to require at a minimum something against which the new planning action is  
19 measured, and where there is no baseline determination to measure against, it is not possible

---

significant because it is offset by the portion of the 3,441 acres of partially buildable industrial land that can be developed. Therefore, the amendment of the comprehensive plan map designation from Industrial Sanctuary to Mixed Employment for the 42 acres McCormick and Baxter site is consistent with the City’s most recent adopted economic opportunities analysis. Furthermore, the amendment of the comprehensive plan map designation for the McCormick and Baxter site is consistent with the City’s draft economic opportunities analysis to the extent that the draft shows an adequate supply of industrial and employment land for the next five years.” Record 1437-39.

Given those findings, we reject the city’s attempt in its brief to assert that OAR 660-009-0010(4) does not apply. The city is free to change and attempt to defend that position on remand, but it may not recharacterize the legal position that the city took in the decision on appeal.



1 to make a determination that the new planning action is “consistent with” anything. For that  
2 reason, we agree with petitioners that the city’s findings are inadequate to explain why the  
3 redesignation of the 42-acre site is “consistent with” the 1989 EOA.

4 **b. RE Overlay and VE Standards**

5 In a portion of its first assignment of error, Schnitzer additionally argues that the new  
6 VE standards and the River Review mitigation requirements within the NRRP are a *de facto*  
7 change in the plan designation for more than two acres of land to a non-industrial use and that  
8 the city erred in failing to determine whether those provisions meet the requirements of OAR  
9 660-009-0010(4) based on the city’s 1989 EOA. The city responds, and we agree, that  
10 application of the RE overlay is not a *de facto* change in the plan designation for the  
11 properties that are within the overlay, and we similarly agree that imposition of the VE  
12 Standards for development of RI, RG, and RR zoned property does not change the plan  
13 designation for property within those base industrial zones.

14 Gunderson’s First Assignment of Error, Schnitzer’s First Assignment of Error, and  
15 the portions of WWC’s First through Fourth Assignments of Error that address Goal 9 are  
16 sustained, in part.

17 **STATEWIDE PLANNING GOAL 12**

18 In its seventh assignment of error, WWC argues that the NRRP violates OAR 660-  
19 012-0060. Under OAR 660-012-0060, when an amendment to a comprehensive plan or land  
20 use regulation would significantly affect an existing or planned transportation facility, the  
21 local government must address the effects by taking one of the steps identified in OAR 660-  
22 012-0060(2). Under OAR 660-012-0060, a plan amendment significantly affects a  
23 transportation facility if it would reduce the performance of the facility below the minimum  
24 acceptable standard identified in the relevant transportation system plan, or worsen the  
25 performance of a facility otherwise projected to perform below that minimum acceptable  
26 standard, as measured at the end of the planning period identified in the transportation system

1 plan. WWC argues that the NRRP will significantly affect the Willamette River, a  
2 transportation facility as defined in OAR 660-012-0005(30), because it restricts, limits, and  
3 in some cases prevents access to the river as a mode of transportation on river-dependent and  
4 river-related parcels in such a manner that it reduces the performance of the river as a  
5 transportation facility below minimum performance standards identified in the city's Freight  
6 Master Plan, which WWC asserts is part of the PCP. In support of its argument, WWC cites  
7 provisions of the Freight Master Plan that WWC maintains provide performance standards  
8 for freight that is moved on the water. WWC Petition for Review 37-38.

9 The city responds that the NRRP will not significantly affect the functional  
10 classification of the River because there is no functional classification of the River and there  
11 are no performance standards for the River in the PCP. In addition, the city responds, the  
12 NRRP will not prevent access to the river, because even if proposed development is subject  
13 to River Review, River Review will require on-site mitigation of effects to natural resources,  
14 but would not allow the city to deny an application for river development.

15 While we tend to agree with the city that the goal of River Review is not to prevent  
16 development of river-related transportation facilities from occurring, we need not resolve that  
17 question because we agree with the city that the Freight Master Plan does not provide  
18 performance standards for the river as a transportation facility. The general language in the  
19 Freight Master Plan that is cited by WWC does not rise to the level of a performance  
20 standard. *See People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181, 207  
21 (2006) (a general statement in a comprehensive plan is not a "minimum acceptable  
22 performance standard" as used in OAR 660-012-0060(1) and cannot be the basis for a  
23 challenge under that rule).

24 WWC's seventh assignment of error is denied.

1     **STATEWIDE PLANNING GOAL 2**

2             Statewide Planning Goal 2 (Land Use Planning) requires in relevant part that the city  
3     “assure an adequate factual base for [all decisions and actions related to use of land].” *See n*  
4     5.

5             **A.     Adequate Factual Base (Natural Resources Inventory)**

6             As part of the NRRP, the city adopted a Natural Resources Inventory (NRI) that  
7     catalogued properties within the North Reach based on their value as habitat and riparian  
8     areas. In selecting properties to include within the RE overlay zone, the city ranked riparian  
9     corridor values and wildlife habitat values within the North Reach as high, medium, or low,  
10    and assigned the RE overlay to properties with high and medium rankings. In its second  
11    assignment of error, Gunderson argues that the city’s decision to designate properties for  
12    inclusion in the RE overlay zone, and its property in particular, is not supported by an  
13    adequate factual base. Gunderson maintains that the record is devoid of an explanation about  
14    what resource attributes of its property led the city to include it within the RE overlay zone.  
15    According to Gunderson, the city applied the RE overlay to some properties based on the  
16    presence of non-native vegetation, which is inconsistent with city and state policies that  
17    encourage the removal of non-native and invasive vegetation. Because Gunderson’s property  
18    includes only non-native vegetation, Gunderson argues the city erred in assigning it high and  
19    medium resource values.

20            The city responds by pointing to evidence in the record that explains that portions of  
21    Gunderson’s property possess riparian corridor values and were assigned a combined  
22    medium and high rank. The city explains that the city’s model for preparing the NRI did not  
23    distinguish between native and non-native vegetation, because the fact that certain vegetation  
24    has been designated for some purposes as invasive does not mean that that vegetation has no  
25    value for riparian corridor functions. The city also responds that the NRRP contains both a

1 formal and an informal process for correcting RE overlay zone mapping errors if property  
2 owners believe the designation is erroneous. Record 2493, 2686 and 3119.

3 The city cites to hundreds of pages in the record that support the city's conclusion that  
4 the RE overlay properties have resource value as riparian corridors and habitat areas. We  
5 agree with the city that there is an adequate factual base in the record to support its  
6 designation of RE overlay properties and its designation of Gunderson's property within the  
7 RE overlay zone.

8 Gunderson's second assignment of error is denied.

9 **B. Consistency with PCP Policies**

10 Goal 2 provides in relevant part that "city \* \* \* plans and actions related to land use  
11 shall be consistent with the comprehensive plans of cities and counties \* \* \*." In addition,  
12 OAR 660-009-0010(4) requires that the city must demonstrate that "\* \* \* the proposed  
13 [McCormick & Baxter site plan] amendment is consistent with \* \* \* the parts of its  
14 acknowledged comprehensive plan which address the requirements of [OAR 660, Division  
15 9]." See n 9.<sup>11</sup> PCP Goal 5, Economic Development, implements Goal 9.

16 Petitioners argue that the NRRP is inconsistent with various provisions of the PCP  
17 that implement Goal 9.<sup>12</sup>

18 **1. Guild's Lake Industrial Sanctuary Plan (GLISP)**

19 PCP Goal 5, Policy 5.12 provides that one of the purposes of PCP Goal 5 is to:

---

<sup>11</sup> The city found that the redesignation of the McCormick & Baxter site is consistent with PCP policies that implement Goal 9:

"The amendment is also consistent with the parts of the comprehensive plan that address the requirements of Goal 9 because the amendment is consistent with [PCP Goal 5 and PCP Policy 2.14]. These two [PCP] goals addressed the requirements of Goal 9. The findings for these two comprehensive plan goals also address why the [NRRP] s consistent with the requirements of \* \* \* Goal 9 and are incorporated here." Record 1439.

<sup>12</sup> This section addresses Gunderson's Third Assignment of Error, Schnitzer's Third Assignment of Error, and portions of WWC's First through Fourth Assignments of Error.

1 “Encourage the economic stability of the Guild’s Lake Industrial Sanctuary,  
2 maintain its major public and private investments in multimodal  
3 infrastructure, protect its industrial lands and job base, and enhance its  
4 capacity to accommodate future industrial growth by including the Guild’s  
5 Lake Industrial Sanctuary Plan as part of this Comprehensive Plan.”

6 In order to implement Policy 5.12, the city adopted the Guild’s Lake Industrial Sanctuary  
7 Plan (GLISP). The GLISP applies to approximately 1,625 acres of the land in the North  
8 Reach. Petitioners argue that the city’s findings are inadequate to demonstrate that the NRRP  
9 is consistent with various GLISP policies because the findings do not address specific GLISP  
10 policies or otherwise explain how the NRRP is consistent with those policies.<sup>13</sup> Petitioners  
11 also argue that the NRRP is inconsistent with various provisions of the GLISP.

12 The city agrees that there are no findings explicitly addressing the GLISP policies  
13 cited by petitioners, but points out that no statute requires that all legislative land use  
14 decisions be supported by findings. However, even in circumstances where there is no  
15 statutory requirement that a particular legislative decision be supported by findings, “there  
16 must be enough in the way of findings or accessible material in the record of the legislative  
17 act to show that applicable criteria were applied and that required considerations were indeed  
18 considered.” *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d  
19 956 (2002). The city points to other findings regarding similar PCP policies in support of its  
20 response that the NRRP is consistent with the GLISP policies cited by petitioners. In this  
21 case the arguments presented in the city’s brief pointing to other findings are simply not  
22 sufficient to establish that the city considered the GLISP policies cited by petitioners in  
23 determining whether the NRRP is consistent with the GLISP. Additional findings will be  
24 required to make that demonstration.

---

<sup>13</sup> The specific GLISP policies cited by petitioners are Policy 1, Objectives 1 and 3, and Policy 3, Objectives 7 and 9.

1                   2.     **PCP Goal 5, Policy 5.1, Objectives A and C, and PCP Goal 5,**  
2                   **Policy 5.4, Objective A**

3                   PCP Goal 5 Policy 5.1, Objective A requires the city to ensure that it has an adequate  
4 supply of industrial land.<sup>14</sup> The city concluded, based on its findings under Goal 9, that the  
5 NRRP would not affect the city’s short-term supply of industrial land, and that therefore the  
6 NRRP is consistent with Policy 5.1, Objectives A and C. The city also adopted general  
7 findings that the NRRP is consistent with PCP Goal 5.<sup>15</sup> Those general findings repeat in

---

<sup>14</sup> PCP Goal 5, Policy 5.1 provides in relevant part:

“5.1 Urban Development and Revitalization

“Encourage investment in the development, redevelopment, rehabilitation and adaptive reuse of urban land and buildings for employment and housing opportunities.

“Objectives:

“A.     Ensure that there are sufficient inventories of commercially and industrially-zoned, buildable land supplied with adequate levels of public and transportation services.

“ \* \* \* \* \*

“C.     Retain industrial sanctuary zones and maximize use of infrastructure and intermodal transportation linkages with and within these areas.”

<sup>15</sup> The city adopted findings in support of its conclusion that the redesignation of the McCormick & Baxter site is consistent with the PCP and that the NRRP is consistent with PCP Goal 5:

“**Goal 5, Economic Development**, calls for promotion of a strong and diverse economy which provides a full range of employment and economic choices for individuals and families in all parts of the city. The amendments are consistent with this goal because they retain and strengthen the City’s industrial sanctuary policy in the North Reach thereby supporting a thriving working harbor that provides family-wage jobs and help support the economy of the City and region. The amendments:

- “a)     Strictly limit quasi-judicial comprehensive plan map amendments on prime industrial lands in the North Reach;
- “b)     Retain the River Industrial overlay zone which preserves river front parcels in the zone for river-dependent and river-related uses;
- “c)     Identify and prioritize a coordinated program of public investment in infrastructure improvements to support existing and future industrial development;
- “d)     Reduce regulations where possible to encourage development and redevelopment of vacant and underutilized sites;

1 some instances the city's findings under Goal 9 regarding the effect of the NRRP. *Compare*  
2 Record 1435 and 1466. Petitioners challenge the city's conclusion that the NRRP is  
3 consistent with PCP Goal 5. In particular, petitioners challenge the city's characterization of  
4 the NRRP as "reduc[ing] regulations where possible to encourage development and  
5 redevelopment of vacant and underutilized sites," because petitioners argue the NRRP  
6 actually requires undeveloped areas to be dedicated to vegetation and on-site mitigation. The  
7 city responds that the RE overlay and VE standards will not affect the city's supply of  
8 industrial land, a response that we rejected above. Given our agreement with petitioners'  
9 Goal 9 challenges above, we also agree with petitioners that the city's reliance on its  
10 conclusions under Goal 9 that the NRRP would not affect the city's industrial land supply is  
11 not sufficient to explain why the NRRP is consistent with PCP Goal 5.

### 12 3. PCP Goal 5, Policy 5.4, Objective A

13 WWC argues that the NRRP is inconsistent with PCP Goal 5, Policy 5.4, Objective  
14 A, which provides:

#### 15 "5.4 Transportation System

16 "Promote a multi-modal regional transportation system that stimulates and  
17 supports long term economic development and business investment.

#### 18 "Objectives:

19 "A. Support multimodal freight transportation improvements to provide  
20 competitive regional access to global markets and facilitate the

- 
- "e) Reduce the number of discretionary land use reviews required for development by implementing clear and objective development standard where possible;
  - "f) Clarify regulations that have been indentified as vague or ineffective;
  - "g) Implement several fee-in-lieu options for meeting development standards as a way to meet plan objectives and maximize on-site development potential;
  - "h) Identify and facilitate development of the Willamette River Greenway trail which will connect the neighborhoods and work centers in the North Reach with other parts of the City, and increase commuting options for employees." Record 1466.

1 efficient movement of goods and services in and out of Portland's  
2 major industrial and commercial districts. Ensure access to intermodal  
3 terminals and related distribution facilities to facilitate the local,  
4 national, and international distribution of goods and services."

5 Similar to its arguments under Goal 12, WWC argues that the RE overlay zone and River  
6 Review is inconsistent with this PCP provision because the RE overlay zone and River  
7 Review will prevent access to the river to such a degree that it fails to "[e]nsure access to  
8 intermodal terminals and related distribution facilities \* \* \*" as required by Policy 5.4,  
9 Objective A. The city responds that neither the RE overlay zone nor River Review eliminate  
10 access to the river for river-dependent and river-related uses, but that River Review may  
11 require a developer to consider design alternatives that might lessen the impact on natural  
12 resources. As we explain above, River Review in and of itself does not prevent access to the  
13 river and we reject WWC's argument to the contrary. We agree with the city with that the  
14 NRRP is not inconsistent with the above-quoted provision.

#### 15 4. PCP Goal 5, Policy 5.8, Objectives B and C

16 The city adopted findings that the NRRP is consistent with PCP Goal 5, Policy 5.8,  
17 Objectives A, D, and E.<sup>16</sup> In its third assignment of error, Schnitzer argues that the city erred

---

<sup>16</sup> Policy 5.8 provides:

**"Diversity and Identity in Industrial Areas**

"Promote a variety of efficient, safe and attractive industrial sanctuary and mixed employment areas in Portland.

**"Objectives:**

"A. Recognize and promote the variety of industrial areas in Portland through development regulations which reflect the varied physical characteristics of the city's industrial areas. Distinguish between older developed areas and newer, less developed ones.

"B. For each industrial zone, establish specific development requirements, while providing a mechanism to allow modification of the regulations when the proposed project design meets the purpose of the regulation.



1 in failing to adopt findings that the NRRP is consistent with Objectives B and C. According  
2 to Schnitzer, the NRRP is inconsistent with Objective B because the new VE standards do  
3 not include a mechanism for considering whether the proposed design “meets the purpose” of  
4 the regulation and do not provide for modification of the regulations when a proposed  
5 development meets the purpose. According to Schnitzer, the NRRP is inconsistent with  
6 Objective C because it does not “permit[] increased development” or “use flexibility, after  
7 reviews to ensure that the purposes of industrial zoning regulations are met.”

8 The city responds that Objective B, if it is applicable, is satisfied because new PCC  
9 33.865.110 provides a mechanism for modifying the regulations. Response Brief 52, App.  
10 131. We agree with the city.

11 The city responds that Objective C does not apply to the decision. We understand the  
12 city to take the position that there are no industrial parks within the North Reach so that  
13 provision does not apply. Absent any disagreement from Schnitzer on that point, then we  
14 agree with the city that Objective C does not apply and the city did not err in failing to  
15 address it.

---

“C. Promote industrial parks by permitting increased development and use flexibility, after reviews to ensure that the purposes of industrial zoning regulations are met.

“D. Within industrial districts, allow some lands designated for commercial or mixed employment. Provide for this while maintaining the overall industrial orientation of the districts.

“E. Create mixed employment areas which encourage a broad range of employment opportunities by permitting a mix of industrial and commercial activities. Prevent land use conflicts within the mixed employment areas through the use of development standards and by limiting conflicting types of development.

“F. For activities which tend to have substantial off-site impacts or demands on public services, limit the zones where they are permitted outright, and require additional reviews where they may be appropriate.

“G. In determining allowable uses in zones, permit industrial activities outside of industrial sanctuaries when the activity, scale and physical development of the use are compatible with the intent of the base zone.”

1                   **5.     PCP Goal 2, Policy 2.14, Industrial Sanctuaries**

2           PCP Goal 2, Urban Development, includes a policy that the city shall “[p]rovide  
3 industrial sanctuaries \* \* \* [and] [e]ncourage the growth of industrial activities in the city by  
4 preserving industrial land primarily for manufacturing purposes.” The city found that the  
5 NRRP is consistent with Policy 2.14.<sup>17</sup> Petitioners argue that the NRRP is inconsistent with  
6 PCP Policy 2.14 because the NRRP does not preserve the North Reach, and specifically the  
7 Guild’s Lake Industrial Sanctuary, primarily for manufacturing uses, and further it prevents  
8 the growth of manufacturing and industrial uses by requiring undeveloped land to be  
9 dedicated to natural resource creation.

10           The city responds that the industrial land in the North Reach will continue to be  
11 preserved primarily for industrial purposes, and points out that of the approximately 5,000  
12 acres of industrial land in the North Reach, petitioners’ worst case assumption is that less  
13 than 700 acres will eventually be required for vegetation in the North Reach. We agree with  
14 the city. The fact that the NRRP imposes some additional development constraints on

---

<sup>17</sup> The city found:

“**Policy 2.14, Industrial Sanctuaries**, calls for encouraging the growth of industrial activities by preserving industrial land primarily for manufacturing purposes. The amendments are consistent with this policy because they maintain the North Reach as a thriving industrial and employment area that provides family-wage jobs. The plan supports the North Reach as a thriving industrial area by:

- “a)     Preserving the industrial and employment zoning in the North Reach;
- “b)     Limiting quasi-judicial comprehensive plan map amendments on prime industrial land, which will protect the industrial sanctuary and the jobs created by the industrial and employment uses in the area;
- “c)     Preserving the River Industrial overlay zone, which preserves land specifically for river-dependent and river-related uses. This requirement insures that the North Reach will continue to be a working industrial harbor;
- “d)     Identifying and prioritizing public investments in a coordinated program of capital projects that will improve the infrastructure systems in the North Reach based on projected growth.” Record 1460.

1 industrial land or could require some land to be vegetated does not, in itself, mean that it fails  
2 to preserve the area primarily for manufacturing purposes.

### 3                   **6.       The City's IH Zone**

4           The Heavy Industrial (IH) zone is the zone that implements the city's industrial  
5 sanctuary plan designation. PCC 33.140.030(D) provides that "[t]he [IH] zone provides areas  
6 where all kinds of industries may locate including those not desirable in other zones due to  
7 their objectionable impacts or appearance. The development standards are the minimum  
8 necessary to assure safe, functional, efficient, and environmentally sound development."  
9 Gunderson argues that the NRRP is inconsistent with the city's IH Zone because the NRRP  
10 imposes an inconsistent purpose from the stated purpose of the IH zone (to provide an area  
11 where all kinds of industries may locate), and imposes development standards that are more  
12 than the "minimum necessary to assure safe, functional, and environmentally sound  
13 development."

14           We see no inconsistency between the description of the purpose of the IH zone and  
15 the reference to development standards that are "necessary to assure safe, functional and  
16 *environmentally sound* development" (emphasis added), and the NRRP provisions that  
17 contain development standards that appear to be intended to assure "environmentally sound  
18 development."

19           Gunderson's Third Assignment of Error, Schnitzer's Third Assignment of Error, and  
20 WWC's First through Fourth Assignments of Error are sustained, in part.

## 21       **STATEWIDE PLANNING GOAL 15**

### 22                   **A.       Development Review**

23           Statewide Planning Goal 15 (Willamette River Greenway) requires state and local  
24 governments to "protect, conserve, enhance and maintain the natural, scenic, historical,  
25 agricultural, economic and recreational qualities of lands along the Willamette River as the  
26 Willamette River Greenway." OAR 660-015-0005. Goal 15, Paragraph (A)(1) provides in

1 relevant part that “[i]ntensification of uses, changes in use or developments may be permitted  
2 after this date only when they are consistent with the Willamette Greenway Statute, this goal,  
3 the interim goals in ORS 215.515(1) and the statewide planning goals, as the case may be,  
4 and when such changes have been approved as provided in the Preliminary Greenway Plan or  
5 similar provisions in the completed plan as appropriate.” Goal 15, Paragraph (F)(3) requires  
6 local governments to “establish provisions \* \* \* for the review of intensifications, changes of  
7 use or developments to insure their compatibility with the Willamette River Greenway.”  
8 Goal 15, Paragraph K defines the terms “changes of use” and “intensifications.”<sup>18</sup>

9 Goal 15, Paragraph (C)(3)(j) specifies in relevant part that “[d]evelopments shall be  
10 directed away from the river to the greatest possible degree; *provided, however, lands*  
11 *committed to urban uses within the Greenway shall be permitted to continue as urban uses,*  
12 *including \* \* \* industrial \* \* \* uses.”* (Emphasis added.) Goal 15, Paragraph (C)(3)(k)

---

<sup>18</sup> Those definitions are:

“1. **Change of Use** means making a different use of the land or water than that which existed on December 6, 1975. It includes a change which requires construction, alterations of the land, water or other areas outside of existing buildings or structures and which substantially alters or affects the land or water. It does not include a change of use of a building or other structure which does not substantially alter or affect the land or water upon which it is situated. \* \* \* The sale of property is not in itself considered to be a change of use. An existing open storage area shall be considered to be the same as a building. Landscaping, construction of driveways, modifications of existing structures, or the construction or placement of such subsidiary structures or facilities as are usual and necessary to the use and enjoyment of existing improvements shall not be considered a change of use for the purposes of this Goal.

“ \* \* \* \* \*

“3. **Intensification** means any additions which increase or expand the area or amount of an existing use, or the level of activity. Remodeling of the exterior of a structure not excluded below is an intensification when it will substantially alter the appearance of the structure. \* \* \* Maintenance and repair usual and necessary for the continuance of an existing use is not an intensification of use. Reasonable emergency procedures necessary for the safety or the protection of property are not an intensification of use. Residential use of lands within the Greenway includes the practices and activities customarily related to the use and enjoyment of one's home. Landscaping, construction of driveways, modification of existing structures or construction or placement of such subsidiary structures or facilities adjacent to the residence as are usual and necessary to such use and enjoyment shall not be considered an intensification for the purposes of this Goal. Seasonal increases in gravel operations shall not be considered an intensification of use.”

1 provides that “[a] setback line will be established to keep structures separated from the river  
2 \* \* \* *The setback line shall not apply to water-related or water-dependent uses.*” (Emphasis  
3 added.)

4 Petitioners argue that the River Review standards in the NRRP incorrectly subject  
5 certain developments that are not “changes of use” or an “intensification” under Goal 15,  
6 Paragraph K to River Review. Petitioners also argue that both the River Review and VE  
7 standards will always require an applicant to plant vegetation and thus will establish a *de*  
8 *facto* setback to keep structures that are “water-related or water-dependent” as that term is  
9 used in Goal 15, Paragraph (C)(3)(k) separated from the river.<sup>19</sup> According to WWC, Goal  
10 15, Paragraph (C)(3)(j) protects certain uses from being “directed away from the river” and  
11 from being subjected to River Review as “intensifications” or “changes of use” under Goal  
12 15’s definitions.

13 The city first responds that Goal 15, Paragraph (C)(3)(j) does not provide a blanket  
14 exemption from development review for expansions or intensifications of existing urban uses  
15 that are located within the Greenway, but merely recognizes that urban uses that were already  
16 located along the riverfront at Goal 15’s adoption are allowed to remain along the riverfront  
17 without having to be relocated “away from the river.” The city points out that Goal 15,  
18 Paragraph (A)(1) prohibits development that is a change in use or intensification of use  
19 without demonstrating compliance with the goal, and Goal 15, Paragraph (F)(3) *requires*  
20 development that is a change of use or intensification of use to be reviewed through a local  
21 compatibility review.

22 The city also responds that the NRRP exempts from River Review a multitude of  
23 development activities that the city appropriately determined under Goal 15’s definitions of  
24 “change of use” and “intensification” are important for the continuation of urban uses and

---

<sup>19</sup> This section addresses WWC’s Fifth Assignment of Error and Schnitzer’s Second Assignment of Error.

1 have minimal impact on identified resources. Response Brief App. 65-70. Finally, with  
2 respect to WWC’s argument that the River Review requirements establish a de facto setback  
3 on water-dependent or water-related uses, the city points out that even if mitigation is  
4 required through River Review, the mitigation options include planting vegetation anywhere  
5 on the site or paying a fee in lieu of planting vegetation and thus, no setback is required.

6 We agree with the city that Goal 15, Paragraph (C)(3)(j) simply cannot be read as  
7 broadly as petitioners urge to exempt expansions or intensifications of all existing urban uses  
8 from development review, especially given that Goal 15 requires the city to review certain  
9 developments. We also agree with the city that the development that it has categorically  
10 exempted from River Review and/or made subject to a stream-lined review process, as set  
11 forth in PCC 33.475.430(A), is consistent with Goal 15, Paragraph K’s description of actions  
12 that are not a “change of use” or “intensification.” Finally, we agree with the city that River  
13 Review and the VE standards do not create a *de facto* setback applying to water-dependent  
14 and water-related uses in contravention of Goal 15, Paragraph (C)(3)(k). Petitioners have not  
15 explained how the requirement that certain development proposals undergo River Review or  
16 plant vegetation will mean that a setback from the river is automatically imposed on all  
17 development.

18 **B. Greenway Boundary Amendments**

19 **1. Inventory**

20 Goal 15, Paragraph B requires the city to inventory certain features of land to  
21 determine which properties to include within the Greenway boundary. The NRI that was  
22 adopted as part of the NRRP includes the city’s inventory. Based on that inventory, the  
23 NRRP amended the city’s zoning map to amend the location of the Greenway boundary. The  
24 amendments to the Greenway boundary include Schnitzer’s property, which had previously  
25 not been included within the boundary.

1 WWC and Schnitzer argue that the inventory that is required by Goal 15, Paragraph B  
2 is incomplete.<sup>20</sup> According to Schnitzer, it fails to include inventories of multiple features  
3 that are required to be included.<sup>21</sup>

4 The city responds that challenges to the Greenway boundary amendment's  
5 compliance with Goal 15 are not within LUBA's scope of review. ORS 390.322 gives  
6 LCDC jurisdiction to approve greenway boundary amendments, and OAR 660-020-0065(6)  
7 provides that such amendments are to be approved by rule making.<sup>22</sup> According to the city,  
8 because ORS 197.825(2)(d) provides that LUBA does not have jurisdiction to review  
9 administrative agency decisions that result in rule making, LUBA may not review challenges  
10 to the portion of the NRRP that amends the Greenway boundary, including Schnitzer's  
11 challenge to the adequacy of the inventory required by Goal 15, Paragraph B.

12 We agree with the city. Challenges to the city's amendment of the Greenway  
13 boundary are not within LUBA's scope of review. Accordingly, we do not address WWC's  
14 Fifth Assignment of Error and that portion of Schnitzer's Second Assignment of Error that  
15 challenges the Greenway boundary amendment.

## 16 **2. Effective Date**

17 Where a local government seeks to modify the Greenway boundary that has  
18 previously been approved by LCDC, the local government is required to obtain LCDC's

---

<sup>20</sup> This section addresses WWC's Fifth Assignment of Error and a portion of Schnitzer's Second Assignment of Error.

<sup>21</sup> According to Schnitzer, the missing items include public recreation sites, historical and archaeological sites, significant natural and scenic areas, land currently committed to industrial and commercial use, the ownership of property, hydrological conditions, ecologically fragile areas, recreational needs, other uses of land and water in or near the Greenway, and potential areas for acquisition. *See* Goal 15, Paragraph (B)(3),(4),(6) and (9) through (15).

<sup>22</sup> The parties advise us that LCDC is currently considering the city's request to amend the greenway boundary.

1 approval of the modification. OAR 660-020-0065(2).<sup>23</sup> OAR 660-020-0065(7) provides  
2 that “[t]he local jurisdiction shall adopt the Willamette Greenway Plan amendment by  
3 ordinance. *Such ordinance shall not have an effective date which is prior to LCDC's*  
4 *adoption of the plan amendment.*” (Emphasis added). If LCDC approves the amendment to  
5 the Greenway boundary, it adopts an administrative rule so stating. OAR 660-020-0065(6).  
6 The city adopted the NRRP on April 15, 2010 and delayed the effective date of the NRRP to  
7 January 1, 2011. Record 12. After the current appeals were filed, the city adopted an  
8 ordinance that changed the effective date of the NRRP to July 1, 2011.<sup>24</sup>

9 All petitioners argue that the city violated OAR 660-020-0065(7) by providing an  
10 effective date for the NRRP that, it turns out, is to occur before LCDC takes action to  
11 approve or disapprove the Greenway boundary amendments.<sup>25</sup> As noted, LCDC’s review of  
12 the city’s amendments to the Greenway boundary is underway and as far as we know is not  
13 complete as of the date of this opinion.

14 It is unclear to us whether we have authority to reverse or remand the NRRP based  
15 upon an alleged violation of OAR 660-020-0065(7). In any case, assuming we do, the issue  
16 is effectively moot. Ordinance 184726 arguably had the effect of forestalling any violation of  
17 OAR 660-020-0065(7). Even if Ordinance 184726 did not have that effect, as explained  
18 above we must remand the NRRP for other reasons. Our remand makes the NRRP  
19 ineffective, as a matter of law. It is likely that by the time the city completes the proceedings

---

<sup>23</sup> OAR 660 Division 20 implements ORS 390.310 to 390.368, the statutes regulating the Willamette River Greenway. ORS 390.314 places responsibility for coordination of the development and maintenance of a comprehensive plan for the Willamette River Greenway with the Oregon Parks and Recreation Department (OPRD). Under ORS 390.322, LCDC approves the greenway plan and any revisions to the plan are submitted to OPRD for review and then forwarded to LCDC for review. OAR 660-020-0065 establishes the procedure for amending the Greenway Plan.

<sup>24</sup> The city moves LUBA to take official notice of Ordinance 184276 that was adopted on December 1, 2010. As explained above, the city’s motion is granted.

<sup>25</sup> This section addresses Gunderson’s fourth assignment of error, WWC’s sixth assignment of error, and Schnitzer’s fourth assignment of error.



1 on remand the issue of compliance with OAR 660-020-0065(7) will no longer be an issue. If  
2 it is, then the city will have the opportunity to prevent future violation of the rule, for  
3 example, by providing an effective date for the Greenway boundary amendments that is to  
4 occur after LCDC adopts a rule approving the amendments. Accordingly, we decline to  
5 address Gunderson's Fourth Assignment of Error, WWC's Sixth Assignment of Error, and  
6 Schnitzer's Fourth Assignment of Error.

7 The city's decision is remanded.