

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

3  
4                   OREGON COAST ALLIANCE,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                   CITY OF BROOKINGS,  
10                                  *Respondent,*

01/06/15 AM 8:50 LUBA

11  
12                                  and

13  
14                   MAHAR/TRIBBLE, LLC,  
15                                  *Intervenor-Respondent.*

16  
17                                  LUBA No. 2014-087

18  
19                                  FINAL OPINION  
20                                  AND ORDER

21  
22                   Appeal from City of Brookings.

23  
24                   Sean T. Malone, Eugene, filed the petition for review and argued on  
25                   behalf of petitioner.

26  
27                   No appearance by City of Brookings.

28  
29                   Daniel B. O'Connor, Medford, filed the response brief and argued on  
30                   behalf of intervenor-respondent. With him on the brief was Huycke O'Connor  
31                   Jarvis, LLP.

32  
33                   BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board  
34                   Member, participated in the decision.

35  
36                                  REMANDED                                  01/06/2015

37  
38                   You are entitled to judicial review of this Order. Judicial review is  
39                   governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a city council decision that (1) annexes land into the city, (2) amends the property's comprehensive plan and zoning map designations from commercial and industrial to residential, and (3) amends the shoreland boundary on the property.

**FACTS**

The annexation area is 13.33 acres in size, consisting of two parcels, tax lots 1500 and 2000, together with 3,294 feet of the North Bank Chetco River Road (Chetco River Road) connecting the tax lots to the city limits over a distance of about one-third mile. Tax lot 2000 carries Curry County Light Commercial (C-1) zoning, while tax lot 1500 carries Curry County Industrial (I) zoning. The two parcels lie between the Chetco River Estuary to the south, and the Chetco River Road on the north. The two parcels are currently vacant, but have historically been used for mining and construction staging and storage. Ferry Creek traverses the property to empty into the Chetco River. Ferry Creek is located entirely within a 6-foot diameter culvert that crosses under the Chetco River Road to the river.

The county comprehensive plan provides that the Chetco River Estuary Shorelands Boundary, which implements Statewide Planning Goal 17 (Coastal Shorelands), is located at the edge of the 100-year floodplain, as delineated by the Federal Emergency Management Agency (FEMA). At the southern edge of the property, the 100-year floodplain and hence the coastal shorelands boundary is located adjacent to the Chetco River Road, *i.e.*, the entire southern portion of the property is within the floodplain and hence the coastal shoreland boundary.

1 Intervenor-respondent Mahar/Tribble, LLC (intervenor) applied to the  
2 city to (1) annex the two tax lots and the connecting portion of the Chetco  
3 River Road, (2) amend the city comprehensive plan designation for the two tax  
4 lots from Commercial and Industrial to Residential, (3) amend the city zoning  
5 designation from Commercial/Industrial to Two-Family Residential (R-2), and  
6 (4) amend the shoreland boundary in the southern portion of the property,  
7 based on intervenor’s pending application to revise the FEMA 100-year  
8 floodplain boundary. Under the proposed zoning, the two tax lots could be  
9 developed with up to 59 dwelling units.

10 The city planning commission held a public hearing on the applications  
11 and recommended approval. On September 8, 2014, the city council held a  
12 hearing on the planning commission’s recommendation, and voted to approve  
13 the annexation and plan and zoning amendments, which were subsequently  
14 adopted by ordinance. This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioner contends that the city erred in adopting inconsistent findings  
17 under disjunctive prongs of ORS 222.111(1), one of the statutes governing the  
18 annexation proposal.

19 ORS 222.111(1) provides, in relevant part that a city may annex territory  
20 that is “contiguous to the city or separated from it only by a public right of  
21 way[.]” In Ordinance 14-O-738, the board of commissioners declared that that  
22 subject property “is contiguous to the City of Brookings, and the same is  
23 hereby annexed to the City of Brookings.” Record 8. However, in a staff  
24 report that was adopted by incorporation staff proposed a finding stating that  
25 “the proposed territory for annexation is separated only by right of way that is a  
26 County Road being [the] Chetco River Road.” Record 56.

1           Petitioner argues that the two findings that the annexation territory is  
2 “contiguous” with the city and that the territory is “separated” only by a public  
3 right of way are inconsistent and unreconciled in the city’s findings. However,  
4 petitioner has not established that any inconsistency in the findings warrants  
5 reversal or remand. Petitioner does not dispute that the city council correctly  
6 concluded that the annexed territory, which includes the county road, is  
7 contiguous with the city limits. The incorporated staff finding that the annexed  
8 territory is separated from the city by the county road is clearly incorrect,  
9 because the annexed territory includes the county road.

10           There are circumstances where adoption of inconsistent findings  
11 warrants remand, but the present case is not one of them. Because ORS  
12 222.111(1) sets out disjunctive requirements, the city’s above-quoted findings  
13 can be viewed as alternatives. Adoption of alternative findings to address  
14 disjunctive requirements is not inconsistent or inherently erroneous. An error  
15 with one alternative is not a basis to remand, if the other alternative is sufficient  
16 to establish compliance with applicable standards. As noted, petitioner does not  
17 dispute that the annexation territory is contiguous with city limits. Absent a  
18 more developed argument, petitioner has not demonstrated that adoption of the  
19 above-quoted findings provides a basis for reversal or remand.

20           The first assignment of error is denied.

21 **SECOND ASSIGNMENT OF ERROR**

22           Goal 17 requires that lands contiguous to estuaries be identified as  
23 coastal shorelands, and describes seven types of areas or resources that must be  
24 included within the coastal shoreland boundary, including what the parties  
25 refer to as Criterion 3. Criterion 3 requires that the coastal shoreland boundary  
26 include: “[n]atural or man-made riparian resources, especially vegetation

1 necessary to stabilize the shoreline and to maintain water quality and  
2 temperature necessary for the maintenance of fish habitat and spawning  
3 areas[.]”

4 As noted, the county comprehensive plan designates the coastal  
5 shorelands boundary on the subject property to coincide with the 100-year  
6 floodplain. Intervenor proposed to obtain FEMA approval to recognize a new  
7 location for the 100-year floodplain on tax lot 2000, based on placement of fill  
8 in the floodplain, and requested that the city move the coastal shorelands  
9 boundary to coincide with the proposed new 100-year floodplain boundary on  
10 that parcel. The proposal would remove 3.4 acres of TL 2000 from coastal  
11 shorelands protection.

12 The city addressed the Goal 17 coastal shorelands identification  
13 standards, including Criterion 3’s requirement to include “[n]atural or man-  
14 made riparian resources[.]” Record 52-55, 71. The city rejected intervenor’s  
15 proposed coastal shorelands boundary for reasons we need not describe, but  
16 nonetheless concluded that a smaller reduction in the coastal shorelands  
17 boundary would comply with Goal 17.

18 Petitioner first argues that the city failed to address the Goal 17 coastal  
19 shorelands identification standards. However, as noted, the city in fact  
20 addressed the identification standards. Record 52-55, 71. Petitioner does not  
21 acknowledge or challenge those findings.

22 Next, petitioner argues that the city erred in failing to include Ferry  
23 Creek within the coastal shorelands boundary. As noted, Ferry Creek crosses  
24 the subject property, located entirely within a pipe from the Chetco River Road  
25 to where the pipe discharges into the Chetco River. The lower portion of the  
26 pipe and the discharge point is located within the amended shorelands

1 boundary. Petitioner apparently argues that the upland portion of the piped  
2 creek should also be included within the shorelands boundary under Criterion  
3 3, because the creek constitutes “[n]atural or man-made riparian resources[.]”

4 Intervenor responds, initially, that no issue was raised below that the  
5 upland portion of Ferry Creek should be included within the shoreland  
6 boundary under Criterion 3 or for any other reason. Petitioner contends that  
7 the issue was raised at Record 249-51. However, our review of Record 249-51  
8 does not show that an issue was raised regarding whether the upland portion of  
9 Ferry Creek should be included within the shoreland boundary based on  
10 Criterion 3 or any other identification standard. The only reference to Ferry  
11 Creek is in regards to flooding, and the only arguments regarding Criterion 3  
12 did not concern Ferry Creek.

13 Even if the issue was not waived, we also agree with intervenor that  
14 petitioner had not demonstrated that the city erred in failing to include the  
15 upland portion of Ferry Creek within the shorelands boundary as “[n]atural or  
16 man-made riparian resources[.]” While “riparian resources” are not limited to  
17 areas with “vegetation necessary to stabilize the shoreline and to maintain  
18 water quality and temperature necessary for the maintenance of fish habitat and  
19 spawning areas,” petitioner has not established that the upland portion of a  
20 piped creek that has no apparent hydrologic or other connection with the  
21 adjacent land it traverses has “riparian resources” within the meaning of  
22 Criterion 3.

23 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 City of Brookings Municipal Code (BMC) 17.144.020 requires the  
3 application for annexation to include written findings of fact that address a  
4 number of considerations, including:

5 “Urban services needed and necessary to serve the territory  
6 proposed to be annexed, including the availability of the same  
7 relative to capacity, condition and cost of extension and/or  
8 improvement to urban standards and an estimated timeline for any  
9 required improvements. City staff will provide written information  
10 regarding existing infrastructure and any improvements that would  
11 be necessary to serve the territory proposed to be annexed, as well  
12 as any other properties within the urban growth area that would  
13 also be served by these improvements in the future.” BMC  
14 17.144.20(J)(5).

15 The application included findings to address BMC 17.144.20(J)(5). With  
16 respect to water service, the findings state that “[t]here is adequate water  
17 supply available to serve the project. The main water supply line for the City  
18 of Brookings runs in a right of way in the \* \* \* Chetco River Road which  
19 fronts” the property. Record 426. Based on those findings, which the city  
20 council adopted by incorporation, the city council concluded that “the site can  
21 feasibly and will be served by urban services that are appropriate for urban  
22 intensity development of the site.” Record 64.

23 On appeal, petitioner argues that the applicant and city failed to evaluate  
24 the availability of water service “relative to capacity,” as BMC 17.144.20(J)(5)  
25 requires. Petitioner argues that a determination of the availability of water  
26 “relative to capacity” requires evidence and findings addressing how much  
27 water residential development of the property would use, compared to the  
28 city’s capacity. Petitioner cites to testimony below that the city has recently  
29 curtailed water supplies to the city golf course and other uses within the city,

1 and argues that the mere proximity of the city main water line to the subject  
2 property does not mean that the city water system has the actual capacity to  
3 serve the subject property while meeting the city's other obligations.

4 Intervenor responds, first, that BMC 17.144.20(J)(5) is an application  
5 requirement, not an approval standard, and that the annexation approval  
6 standards are located at BMC 17.144.030. BMC 17.144.030(B) requires a  
7 finding that "adequate level of urban services and infrastructure to  
8 accommodate anticipated future development either is available, or can  
9 reasonably be made available," and in relevant part defines "adequate level of  
10 urban services" to include "water service" that meets the requirements in the  
11 city's public facilities plan. Intervenor contends that because petitioner cites  
12 only to an application requirement rather than the related approval standard,  
13 LUBA should reject this assignment of error for that reason alone.

14 We disagree with intervenor that petitioner's reliance on BMC  
15 17.144.20(J)(5) or failure to cite BMC 17.144.030(B) warrants summary  
16 rejection of this assignment of error. The city council's findings address BMC  
17 17.144.20(J)(5), adopt by incorporation the findings required by that provision,  
18 and conclude based on those findings that the property can be served by  
19 appropriate urban services. Record 64. Based on those same incorporated  
20 findings, the city council found compliance with BMC 17.144.030(B), and  
21 concluded in relevant part that the water main in the right-of-way "is expected  
22 to be adequate in condition and capacity to [serve the] R-2 development on the  
23 subject property." Record 65. Because the city council treated BMC  
24 17.144.20(J)(5) as more than an application or informational requirement, and  
25 the findings and evidence relied upon to address both BMC 17.144.20(J)(5)



1 and BMC 17.144.030(B) are the same, we decline to summarily reject this  
2 assignment of error as intervenor suggests.

3 On the merits, intervenor argues that findings concluding that the city's  
4 water system is "adequate" to serve the subject property are sufficient to satisfy  
5 both BMC 17.144.20(J)(5) and BMC 17.144.030(B), and statements to that  
6 effect in the record constitute substantial evidence supporting those findings.  
7 Intervenor cites to a "Water/Sewer/Storm Drain Service Availability Request"  
8 completed by the city that notes the 14-inch water main nearby and includes a  
9 check for "Yes" under the question "Adequate?" Record 422. Further,  
10 intervenor cites to a summary of issues discussed at a pre-application  
11 conference, prepared by the city's public works director, which lists a number  
12 of "[i]ssues which must be resolve[d,]" including "1. Water availability in the  
13 development area is adequate with a 14[-inch] water main in North Bank  
14 Chetco River Road." Record 475.

15 However, the findings and the evidence cited to us do not appear to  
16 squarely address the "availability" of water "relative to capacity," which is  
17 information and findings required by BMC 17.144.20(J)(5), and presumably  
18 information necessary to determine that adequate levels of water supply are  
19 "available" for purposes of BMC 17.144.030(B). It is impossible to tell from  
20 the conclusory findings that the water supply is "adequate" and statements to  
21 that effect in the record whether the city in fact considered the availability of  
22 water to serve the annexation area "relative to capacity." The "Availability  
23 Request" checklist at Record 422 does not appear to consider that question, and  
24 the pre-application conference summary of issues prepared by the public works  
25 director at Record 475 is contradictory, seeming to indicate both that the water

1 supply is “adequate” and also that the adequacy of water remains an “[i]ssue  
2 which must be resolve[d].”

3 Accordingly, we agree with petitioner that remand is necessary for the  
4 city to adopt more adequate findings, supported by substantial evidence,  
5 considering the availability of the city water supply to serve the annexation  
6 territory relative to capacity.

7 The third assignment of error is sustained.

#### 8 **FOURTH ASSIGNMENT OF ERROR**

9 Statewide Planning Goal 16 (Estuarine Resources), Implementation  
10 Requirement 1, states in relevant part that:

11 “Unless fully addressed during the development and adoption of  
12 comprehensive plans, actions which would potentially alter the  
13 estuarine ecosystem shall be preceded by a clear presentation of  
14 the impacts of the proposed alteration. Such activities include  
15 dredging, fill, in-water structures, riprap, log storage, application  
16 of pesticides and herbicides, water intake or withdrawal and  
17 effluent discharge, flow-lane disposal of dredged material, and  
18 other activities which could affect the estuary’s physical processes  
19 or biological resources.”<sup>1</sup>

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<sup>1</sup> Implementation Requirement 1 goes on to state:

“The impact assessment need not be lengthy or complex, but it should enable reviewers to gain a clear understanding of the impacts to be expected. It shall include information on:

- “a. The type and extent of alterations expected;
- “b. The type of resource(s) affected;
- “c. The expected extent of impacts of the proposed alteration on water quality and other physical characteristics of the estuary, living resources, recreation and aesthetic use,

1 During the proceedings below, a number of persons and federal agencies  
2 submitted comments expressing concerns about impacts on estuarine resources  
3 of residential development allowed under the proposed zoning, resources that  
4 include threatened salmon species in the Chetco River Estuary. For example,  
5 the National Marine Fisheries Service (NMFS) told the city that “development  
6 of lots on these parcels will adversely affect our trust resources[,]” which  
7 include several fish species. Record 236. The city’s findings addressing Goal  
8 16 do not address those comments, but simply conclude that “the application  
9 has taken appropriate precautions to prevent any alteration of the estuarine  
10 ecosystem.”<sup>2</sup>

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navigation and other existing and potential uses of the  
estuary; and

“d. The methods which could be employed to avoid or  
minimize adverse impacts.”

<sup>2</sup> The City Council findings quote Goal 16, Implementation Requirement 1,  
and then state:

“The City Council concludes the proposed amendments are adjacent to (and to a small degree include) properties identified as estuarine resources. The Council concludes the City and County had adopted similar maps for estuarine resources at the subject property and they are based upon the Mean Higher High Water Line (MHHWL). The Council concludes the Application includes more precise mapping of the MHHWL on the subject properties but that the improved precision is consistent with the smaller scale maps adopted by the city. The Council, therefore, concludes the Applicant’s mapping is a refinement to the estuary-wide mapping and no amendments of any material degree are proposed, the Application makes no change to the City’s adopted and acknowledged Goal 16 program and the application has taken appropriate precautions to prevent any alteration of the estuarine ecosystem.” Record 78.

1 On appeal, petitioner argues that the city council findings “fail to  
2 acknowledge *any* impacts from the proposal, but the City failed to respond to  
3 any comments and concerns submitted by federal agencies, citizens, and  
4 environmental organizations about impacts to the estuarine environment[.]”  
5 Petition for Review 33. Petitioner argues that the city’s findings focus on more  
6 precise mapping of estuarine resources, an irrelevant issue for purposes of  
7 Implementation Requirement 1. Finally, petitioner notes that the applicant had  
8 formerly proposed to replace the Ferry Creek piping, which federal agencies  
9 determined would require consultation under the Endangered Species Act  
10 (ESA) because the proposal may affect listed species. Petitioner argues that if  
11 a proposal to replace the Ferry Creek piping required ESA consultation due to  
12 impacts on estuarine resources, then the current proposal to place fill in the  
13 floodplain and zone the property to allow construction of a large residential  
14 development adjacent to estuarine resources with listed species must also  
15 address whether those actions could potentially alter the estuarine ecosystem  
16 under Goal 16.

17 Intervenor argues that the fourth assignment of error is not sufficiently  
18 developed to respond to, and that intervenor is unable to discern petitioner’s  
19 argument. Intervenor notes that the city’s decision does not amend the city’s  
20 comprehensive plan provisions related to Goal 16, or approve any development  
21 or construction that could impact estuarine resources, and argues that petitioner  
22 identifies no “action” approved by the city’s decision that could violate Goal  
23 16.

24 We disagree with intervenor that the fourth assignment of error is  
25 insufficiently developed to allow a response. Petitioner’s argument seems  
26 reasonably clear to us: the city’s findings regarding Implementation

1 Requirement 1 are inadequate, because they do not address issues raised below  
2 regarding impacts on adjacent estuarine resources caused by development  
3 allowed under the proposed residential zoning. It is true that the decision  
4 approves no actual development or construction; such approvals, if any, will  
5 occur based on the R-2 zoning adopted in the present decision and other  
6 acknowledged land use regulations. But Goal 16 will not apply to such  
7 decisions made under acknowledged zoning and land use regulations. The time  
8 to determine whether development allowed under proposed R-2 zoning  
9 complies with Goal 16 is when the zoning is adopted.

10 Issues were raised below by NMFS and others regarding the adverse  
11 impacts on adjacent estuarine resources caused by residential development  
12 allowed under the proposed R-2 zoning. Such testimony appears to concern  
13 “activities which could affect the estuary’s physical processes or biological  
14 resources” for purposes of Implementation Requirement 1. However, the city’s  
15 findings do not address that testimony, or conduct any kind of impact  
16 assessment of the kind described in Implementation Requirement 1. The  
17 findings state only that the applicant “has taken appropriate precautions to  
18 prevent any alteration of the estuarine ecosystem,” but without identifying  
19 those potential alterations or what measures have been adopted to prevent  
20 them. We agree with petitioner that the city’s findings regarding Goal 16 are  
21 inadequate to demonstrate that the proposed amendments are consistent with  
22 the goal.

23 The fourth assignment of error is sustained.

24 **FIFTH ASSIGNMENT OF ERROR**

25 Statewide Planning Goal 6 (Air, Water and Land Resources Quality)  
26 requires that “[a]ll waste and process discharges from future development,

1 when combined with such discharges from existing developments, shall not  
2 threaten to violate, or violate, applicable state or federal environmental quality  
3 statues, rules and standards.”

4 Petitioner argues that intervenor failed to initiate consultation with  
5 federal agencies to determine whether intervenor’s proposed actions that are  
6 subject to federal regulatory authority will comply with all applicable federal  
7 environmental laws, including the ESA. Petitioner refers specifically to  
8 intervenor’s stated intention to renew efforts to obtain federal agency approval  
9 to replace the Ferry Creek piping.

10 Intervenor responds that the city’s decision does not authorize  
11 replacement of the Ferry Creek piping, and that any future effort to seek federal  
12 approval to do so will be pursuant to a federal permit process unrelated to the  
13 present application to annex the property and to apply city plan and zoning  
14 designations. We agree with intervenor that petitioner’s argument does not  
15 establish that the city’s decision is inconsistent with Goal 6. Petitioner’s  
16 argument is based solely on a possible future proposal to replace the Ferry  
17 Creek piping, but that action is not authorized in the present decision. We note  
18 that the city adopted findings concluding that the proposed plan and zoning  
19 amendments are consistent with Goal 6. Record 68. Petitioner does not  
20 acknowledge or challenge those findings.

21 The fifth assignment of error is denied.

22 The city’s decision is remanded.

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2014-087 on January 6, 2015, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 6th day of January, 2015.

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