

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

MICHAEL MEYER,
Petitioner,

vs.

CITY OF KING CITY,
Respondent,

and

TNHC OREGON LLC,
Intervenor-Respondent.

LUBA No. 2024-004

FINAL OPINION
AND ORDER

Appeal from City of King City.

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

No appearance by City of King City.

Steven Hultberg filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Radler White Parks & Alexander LLP.

RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

RYAN, Board Chair, did not participate in the decision.

AFFIRMED 05/31/2024

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

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NATURE OF THE DECISION

Petitioner appeals the city council’s adoption of an ordinance annexing and applying city zoning to a portion of the Kingston Terrace Planning Area (KTPA).

FACTS

The 528-acre KTPA is located south of SW Beef Bend Road and north of the Tualatin River and the Beef Bend Natural Area, and includes a portion of SW Elsner Road. In 2018, Metro brought the KTPA into the city’s urban growth boundary (UGB). In 2023, the city council adopted a master plan for the KTPA (the KTMP) and incorporated the KTMP into its comprehensive plan. Also in 2023, the city council adopted King City Development Code (KCDC) 16.114 establishing land use regulations implementing the KTMP. In *Meyer v. City of King City*, we affirmed the city council decision adopting the KTMP. ___ Or LUBA ___ (LUBA No 2023-059, Feb 14, 2024), *aff’d*, 332 Or App 807 (2024) (nonprecedential memorandum opinion) (*Meyer KTMP appeal*). The city council decision adopting KCDC 16.114 was not appealed and is now final.¹

This appeal concerns the city council’s 2024 adoption of an ordinance annexing and applying city zoning to approximately 40 percent of the KTPA. Intervenor-respondent (intervenor) applied to the city for annexation and

¹ On June 14, 2023, the city council adopted a transportation system plan (TSP). *Meyer v. City of King City*, ___ Or LUBA ___ (LUBA No 2023-052, Apr 18, 2024) (*Meyer TSP appeal*). In *Meyer TSP appeal*, we affirmed the city council’s adoption of its TSP into its comprehensive plan.

1 rezoning of approximately 216 acres of the KTPA. On December 6, 2023, the
2 planning commission held a public hearing and adopted a decision
3 recommending that the city council annex and apply city zoning to the subject
4 property. On December 20, 2023, and January 17, 2024, the city council held a
5 public hearing to consider the planning commission recommendation, hear public
6 testimony, and apply the approval criteria. On January 22, 2024, the city council
7 adopted an ordinance annexing and applying city zoning to the subject property
8 (the ordinance). This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 **A. Introduction**

11 ORS 222.111(1) provides:

12 “When a proposal containing the terms of annexation is approved in
13 the manner provided by the charter of the annexing city or by ORS
14 222.111 to 222.180 or 222.840 to 222.915, the boundaries of any
15 city may be extended by the annexation of territory that is not within
16 the city and that is contiguous to the city or separated from it only
17 by a public right of way or stream, bay, lake or other body of water.
18 Such territory may lie either wholly or partially within or without
19 the same county in which the city lies.”

20 In *Morsman v. City of Madras*, we acknowledged that annexation decisions are
21 subject to an implied reasonable standard framed by

22 “*Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 160-65,
23 241 P2d 1129 (1952), as explained and amplified in [*Dept. of Land*
24 *Conservation v. City of St. Helens*, 138 Or App 222, 907 P2d 259
25 (1995). (*City of St. Helens*)]. In *Portland Gen. Elec. Co.*, 194 Or at
26 159, the Supreme Court, evaluating the validity of an oddly shaped
27 annexation under the predecessor to the current annexation statute

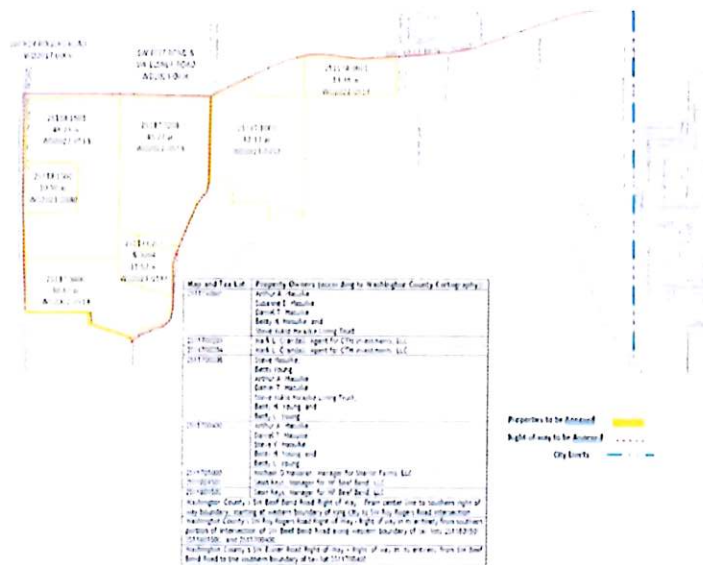
1 held:

2 “From time immemorial, we have consistently held that in
3 the interpretation of state statutes relating to the enactment of
4 legislation or ordinances by a city that the same must be
5 exercised reasonably and not arbitrarily; therefore, in statutes
6 empowering cities to legislate annexation proceedings, there
7 is implied within the legislative grant that such cities must
8 legislate reasonably and not arbitrarily, and such
9 reasonableness is part of the legislative grant to the same
10 extent as if it were written literally into the statute.” 191 Or
11 App 149, 152, 81 P3d 711 (2003).

12 Petitioner’s first assignment of error is that city council’s annexation fails to
13 comply with the implied reasonableness requirement. Petition for Review 9.
14 Petitioner argues that the city council misconstrued the law and that we should
15 reverse or remand the decision as provided in ORS 197.835(9)(a)(D).

16 **B. Reasonableness of Cherry Stem Annexation**

17 Petitioner describes the city council’s annexation as utilizing a practice
18 known as “cherry stemming.” Petition for Review 9. “The term ‘cherry
19 stem[ming]’ * * * refers to the annexation of a noncontiguous ‘target parcel’ (the
20 ‘cherry’), together with the territory between that parcel and the city (‘the stem’),
21 that is necessary to make the parcel and the city contiguous.” *City of St. Helens*,
22 138 Or App at 225 (footnote omitted). The city council relied upon the annexation
23 of a portion of Beef Bend Road to achieve the contiguity with existing city
24 boundaries required by ORS 222.111. Using the cherry stem terminology, the
25 southern half of Beef Bend Road serves as the stem and the remainder of the
26 annexed area is the cherry.



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Record 15. Petitioner maintains that the city council’s use of the approximately 3,275-foot Beef Bend Road “stem” to establish contiguity to the existing city boundaries is unreasonable. Petitioner contends:

“While cherry stemming is not unreasonable *per se*, the sheer length of roadway used to meet the connectivity requirements of ORS 222.111(1) greatly exceeds anything at issue in the case law, renders the term ‘contiguous’ meaningless, and pushes the reasonableness requirement beyond its breaking point.” Petition for Review 11 (*italics added*).

Intervenor responds that the annexation is reasonable because it is consistent with the phasing set out in the KTMP. In its reply, petitioner argues that the KTMP supports their position, pointing to KTMP language that provides, in part, “Prior to development according to the KTMP, properties must be annexed to the city. *Because a physical connection with the existing city is necessary, the general annexation and development phasing will generally progress from the current city limit to the west[.]*” KTMP 92 (*emphasis added*). Petitioner contends that,

1 coupled with this language from the KTMP, the length of the stem renders
2 annexation unreasonable.

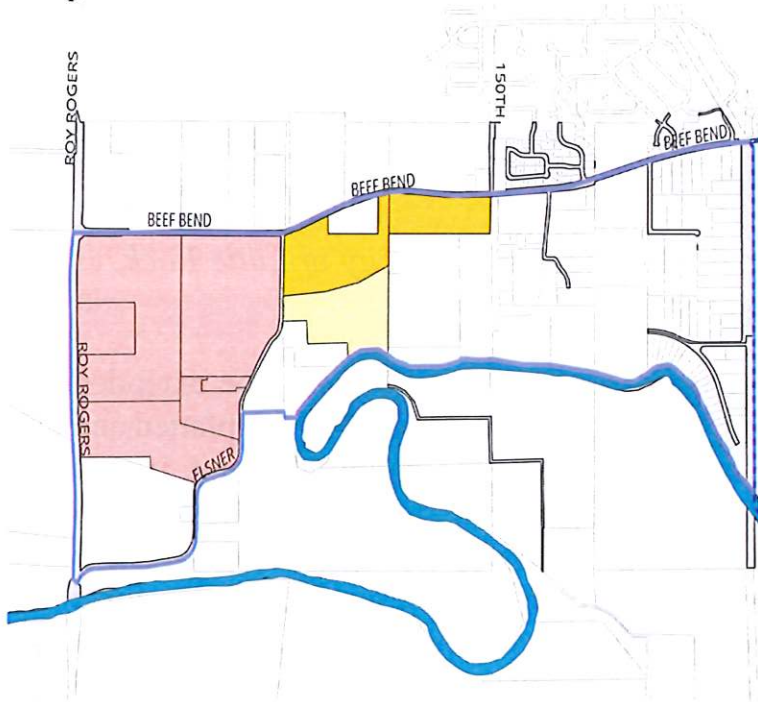
3 In *City of St. Helens*, the city completed a cherry stem annexation and the
4 Court of Appeals concluded that the city's annexation of 1,500 feet of Old
5 Portland Road in order to provide contiguity to the target parcel survived the
6 implied reasonableness test. 138 Or App at 226-28. The court observed that
7 factors favoring reasonableness include "contiguous properties" (1) that
8 "represent the actual growth of the town beyond its legal boundary," (2) are
9 valuable for adaptability for prospective municipal uses, (3) needed for extension
10 of streets, or (4) provide places for resident businesses and homes. *Id.* at 227-28
11 (quoting *Portland Gen. Elec. Co.*, 194 Or at 165). The court concluded "as a
12 matter of law that the annexation of the 'target property' and the connecting road
13 survived the implied reasonable test of *Portland Gen. Elec.*" *Id.* at 228. In
14 *Portland Gen. Elec. Co.*, the court concluded that

15 "[a] sound formula is laid down in *Vestal v. City of Little Rock*, as
16 follows:

17 "That city limits may reasonably and properly be extended
18 so as to take in contiguous lands (1) when they are platted and
19 held for sale as town lots; (2) whether platted or not, if they
20 are held to be brought on the market, and sold as town
21 property, when they reach a value corresponding with the
22 views of the owner; (3) when they furnish the abode for a
23 densely settled community, or represent the actual growth of
24 the town beyond its legal boundary; (4) when they are needed
25 for any proper town purpose, as for the extension of its streets,
26 or sewer, gas, or water system, or to supply places for the

1 abode or business of its residents, or for the extension of
2 needed police regulation; and (5) when they are valuable by
3 reason of their adapt[a]bility for prospective town uses.” 194
4 Or at 165 (citation omitted).

5 The KTMP is a portion of the city’s comprehensive plan and sets out the
6 city’s growth plan for the KTPA. The KTMP describes Kingston Terrace as
7 “consist[ing] of four neighborhoods: Main Street/Town Center, Beef Bend
8 Neighborhood, Central Neighborhood, and Rural Character[.]” KTMP 19. The
9 annexed “cherry” includes six tax lots designated as Town Center Neighborhood
10 in the westernmost part of the KTPA, two lots designated Beef Bend
11 Neighborhood in the western portion the Beef Bend Neighborhood, and one tax
12 lot designated Central Neighborhood, south of one of the Beef Bend
13 Neighborhood tax lots.



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1 Record 40 (tax lot identifiers omitted). The KTMP states that it “generally
2 envisions development to occur in two phases, with more immediate
3 development in the western portion of Kingston Terrace, and slower, more
4 incremental development in the eastern portion over a longer period of time.”
5 KTMP 72.

6 We agree with intervenor that the annexation is reasonable. The goals,
7 policies, and implementation measures in the KTMP support a conclusion that
8 the approved annexation adds lands to the city that are valuable for prospective
9 city uses and to provide places for resident businesses and homes. The goals,
10 policies, and implementation measures in the KTMP include to “[p]rovide a wide
11 range of housing types that are attainable to a diversity of households[,]” and
12 “[p]rovide for orderly and efficient extension of public services, facilities, and
13 utilities[.]” KCDC 16.114.010(2), (6). As the KTMP explains:

14 “The Main Street/Town Center Neighborhood is in the northwestern
15 area of [Urban Reserve Area (URA)]. It will include the majority of
16 Main Street/Town Center commercial and mixed[-]use residential
17 uses, with major activity around the intersection of collector streets
18 visible and accessible from SW Roy Rogers Road and SW Beef
19 Bend Road. This neighborhood will represent the densest
20 development in the Kingston Terrace area * * *. * * *

21 “The Beef Bend Neighborhood * * * has the second highest density,
22 with both attached and detached residential development. There is
23 potential for this area to support a small amount of neighborhood-
24 scale commercial uses in conjunction with housing. Commercial
25 uses would take the form of home-based businesses, and if there is
26 market demand, office or retail uses on the ground floor of
27 residential buildings or in limited-size standalone buildings.”

1 KTMP 22.

2 The KTMP states that the Town Center/Main Street and Beef Bend areas are
3 planned for “more immediate development.” KTMP 72. The KTMP describes
4 developing local sanitary sewer service for Phase 1 as described below:

5 “Phase 1 – More Immediate Development

6 “The western portion of Kingston Terrace, which includes all of
7 Main Street/Town Center and the western portion of the Beef Bend
8 Neighborhood, will be served by the River Terrace South Pump
9 Station. * * *

10 “* * * * *

11 “The eastern portion of the Beef Bend Neighborhood is also
12 expected to develop during Phase 1. This area includes developable
13 lands along the south side of SW Beef Bend Road and east of the
14 natural drainage located adjacent to SW 146th Avenue. Due to
15 topography, this area would be served by a new gravity sewer
16 running east parallel to and south of SW Beef Bend Road.” KTMP
17 72-73.

18 Differently, the KTMP states that “[t]he Central Neighborhood and Rural
19 Character Neighborhoods are expected to develop slowly and incrementally over
20 time[.]” in Phase 2.² KTMP 73. The Central Neighborhood is defined as
21 residential with both “attached and detached dwellings, ample neighborhood
22 parks, and plenty of wild natural areas along the ravine and river edges.” KTMP
23 22. The nearby Rural Character Neighborhood is “the eastern-most section of the

² Although one Central Neighborhood tax lot is included in this Phase 1 annexation, petitioner does not argue that its inclusion is unreasonable.

1 planning area[,]” with “a rural character, low density residential uses[,] and
2 opportunities for modes redevelopment. Context-sensitive low-density
3 development prioritizes clustered housing, cottage clusters, and multifamily
4 configurations with ample green space.” KTMP 23. Discussing development of
5 a sanitary system, the KTMP states:

6 “Phase 2 – Incremental Development

7 “The Central Neighborhood and Rural Character Neighborhoods are
8 expected to develop slowly and incrementally over time. The Rural
9 Character Neighborhood can be served by gravity through new
10 sewers connecting into the existing sanitary system in King City east
11 of the BPA easement on the east side of SW 137th Avenue. For areas
12 to the south that are lower in elevation, new sewer can be
13 constructed to discharge into the existing sewer at SW Montague
14 Way near SW 136th Avenue.” KTMP 73.

15 Reasonableness is not a high bar and supports deference to the city
16 council’s annexation decision if not arbitrary or unreasonable. *Morsman v. City*
17 *of Madras*, 191 Or App at 154. The annexation is consistent with the objective to
18 provide diverse housing opportunities and is consistent with the first phase of
19 development anticipated by the KTMP, even if the easternmost portion of the
20 Beef Bend Neighborhood is not annexed first.³

21 The first assignment of error is denied.

³ This staging of annexation is also consistent with the KTMP provision that annexation will be initiated by the property owner. KTMP 92.

1 **SECOND ASSIGNMENT OF ERROR**

2 **A. Introduction**

3 Annexation may be effectuated by consent of a majority of owners and a
4 majority of electors within the annexation territory without a city election. ORS
5 222.170. Here, the city did not hold an election on the proposed annexation and
6 instead found that the proposal complied with the “double majority” standard in
7 ORS 222.170(2), which provides:

8 “The legislative body of the city need not call or hold an election in
9 any contiguous territory proposed to be annexed if a majority of the
10 electors registered in the territory proposed to be annexed consent
11 in writing to annexation and the owners of more than half of the land
12 in that territory consent in writing to the annexation of their land and
13 those owners and electors file a statement of their consent with the
14 legislative body on or before the day:

15 “(a) The public hearing is held under ORS 222.120, if the city
16 legislative body dispenses with submitting the question to the
17 electors of the city; or

18 “(b) The city legislative body orders the annexation election in the
19 city under ORS 222.111, if the city legislative body submits
20 the question to the electors of the city.”

21 In calculating the majority, the city counted seven tax lots and seven
22 electors in the annexation territory, four of whom signed the annexation petition.
23 Petitioner argues that the annexation decision is not supported by substantial
24 evidence because the city council did not consider whether certain annexed land
25 area included electors and asks that we reverse or remand the decision as
26 provided in ORS 197.835(9)(a)(C). We will reverse or remand a decision that is

1 not supported by substantial evidence in the whole record, that is evidence a
2 reasonable person would rely upon to make a decision.

3 **B. Substantial Evidence**

4 Petitioner argues that:

5 “In determining whether a ‘majority of electors’ in the annexation
6 area consented to the annexation, the [c]ity considered seven tax lots
7 in the principal annexation area, which contained a grand total of
8 seven electors, four of whom had signed the annexation petition.
9 The [c]ity’s survey did not include any of the dozen or so separate
10 parcels of land located along the south side of the portions of Beef
11 Bend Road to be annexed.” Petition for Review 13.

12 Petitioner contends that there is a presumption that the owners of the land
13 adjacent to Beef Bend Road own to the centerline of the street, that these owners
14 may be electors properly included in the consent count, and that the findings do
15 not explain how the city determined that there are no electors in the annexed Beef
16 Bend Road right-of-way.

17 We begin by unpacking petitioner’s argument as it relates to the owners of
18 the properties adjacent to the annexed portion of Beef Bend Road. Petitioner
19 argues that it is well established that absent contrary evidence, property owners
20 own to the center line of adjacent public rights-of-way and that the city
21 “neglected to obtain the consent of the owners of the various properties along the
22 3,275 feet cherry stem stretch of Beef Bend Road which is included in the
23 annexation.” Petition for Review 13. Assuming for purposes of this opinion that
24 these property owners own to the centerline of the street, petitioner does not argue

1 that said ownership requires that these owners be included in the calculation of
2 property owners consenting to the annexation. We conclude that their inclusion
3 was not required in the count of owners for purposes of calculating a majority
4 under ORS 222.170(2).

5 ORS 222.170(4) provides that unless they consent or oppose the
6 annexation within the timeframe set out in ORS 222.170(1), owners of property
7 not subject to ad valorem taxation are excluded from the owners counted.⁴

⁴ ORS 222.170(4) provides:

“Real property that is publicly owned, is the right-of-way for a public utility, telecommunications carrier as defined in ORS 133.721 [(Definitions for ORS 41.910 and 133.721 to 133.739)] or railroad or is exempt from ad valorem taxation shall not be considered when determining the number of owners, the area of land or the assessed valuation required to grant consent to annexation under this section unless the owner of such property files a statement consenting to or opposing annexation with the legislative body of the city on or before a day described in subsection (1) of this section.” (Emphases added.)

ORS 222.170(1) and (2) both identify the deadline for indicating consent as on or before the day:

“(a) The public hearing is held under ORS 222.120 (Procedure for annexation without election), if the city legislative body dispenses with submitting the question to the electors of the city; or

“(b) The city legislative body orders the annexation election in the city under ORS 222.111 (Authority and procedure for annexation), if the city legislative body submits the question to the electors of the city.”

1 Petitioner does not argue that the right-of-way is subject to ad valorem taxation
2 and we conclude that these property owners are not properly included in the count
3 of owners for purposes of ORS 222.170(2). Petitioner argues, however, that it is
4 possible that some of these owners are uncounted electors. We therefore turn to
5 whether substantial evidence supports the city council’s conclusion that the right-
6 of-way does not include “electors registered in the territory proposed to be
7 annexed” who must be included in the consent count. ORS 222.170(2).

8 Intervenor points out that “elector” is not defined in the statute but refers
9 to registered voters. *Ivie v. City of Oceanlake*, 208 Or 417, 423-24, 302 P2d 221
10 (1956) (discussing former ORS 222.110 (1956), *renumbered as* ORS 222.111
11 (1957)). We agree that “electors” are registered voters. Intervenor argues that the
12 only evidence in the record demonstrates that the required number of electors
13 consented to the annexation. The city council found that intervenor

14 “requested approval of a ‘double majority’ annexation pursuant to
15 ORS 222.170(2). Under the ‘double majority’ annexation method
16 written consent must be obtained from owners of more than half of
17 the land in the territory, and a majority of the electors registered in
18 the territory to be annexed. The Double Majority Worksheet
19 provided in Exhibit J and the Certification of Property Ownership
20 provided by Washington County’s Cartographer, in Exhibit G,
21 demonstrate that the owners of 100 [percent] of land within the
22 territory to be annexed have consented to the annexation, excluding
23 the right-of-way. * * * The Certification of Registered Voters
24 provided by Washington County’s election office, in Exhibit I,
25 demonstrates that 80 [percent] of the electors registered in the
26 territory have consented to the annexation. Inclusion of the right-of-
27 way does not impact the percent of electors registered in the territory
28 who have consented to the annexation, as there are no electors

1 registered within the right-of-way.” Record 70.

2 Intervenor explains that voter registration is attached to the location of the
3 voter’s residence. Intervenor-Respondent’s Brief 14. The evidence relied upon
4 by the city council includes a “Certification of Registered Voters for Annexation
5 Purposes” provided by Washington County linking registered voter certification
6 to tax lot numbers. The county-provided certification of registered voters is
7 evidence of the electors in the area to be annexed upon which a reasonable person
8 would rely. Petitioner does not identify any contrary evidence supporting a
9 conclusion that status as an elector is tied to ownership of property and the
10 evidence relied upon by the city council is evidence that a reasonable person
11 would rely upon to make a decision.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 **A. Introduction**

15 Rezoning property is a post acknowledgment plan amendment (PAPA).
16 *Renken v City of Oregon City*, 79 Or LUBA 82, 93, *aff’d*, 297 Or App 416, 441
17 P3d 733, *rev den*, 365 Or 531 (2019). “As a general rule, [PAPAs] must comply
18 with the statewide planning goals, including [Statewide Planning Goal 5 (Natural
19 Resources, Scenic and Historic Areas, and Open Spaces)]. ORS 197.175(2);
20 197.835(6) and (7).” *Johnson v. Jefferson County*, 56 Or LUBA 72, 96, *aff’d*, 221
21 Or App 156, 189 P3d 30 (2008), *rev dismissed*, 347 Or 259 (2009).

1 Goal 5 is “[t]o protect natural resources and conserve scenic and historic
2 areas and open spaces.” We have explained:

3 “The Land Conservation and Development Commission has
4 adopted an administrative rule that specifies the circumstances in
5 which a local government is obligated to apply Goal 5 when
6 adopting a PAPA. OAR 660-023-0250(3) provides:

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

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

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

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

27 OAR 660-023-0010(1) defines “conflicting use” as “a land use, or other activity
28 reasonably and customarily subject to land use regulations, that could adversely
29 affect a significant Goal 5 resource (except as provided in OAR 660-023-

1 0180(1)(b)). Local governments are not required to regard agricultural practices
2 as conflicting uses.”

3 Because our decision in *Meyer Master Plan* was pending review at the
4 Court of Appeals during the proceedings for this matter, the KTMP is not yet
5 acknowledged. Pursuant to ORS 197.835(5), we “shall reverse or remand a land
6 use decision not subject to an acknowledged comprehensive plan and land use
7 regulations if the decision does not comply with the goals.”⁵

8 **B. Conflicting Uses**

9 Petitioner argues that the rezoning is not consistent with Goal 5 because it
10 allows new uses that could be conflicting with a significant Goal 5 resource on
11 an acknowledged resource list. Petitioner argues that Washington County
12 Comprehensive Plan Map 2.14 identifies locally significant Goal 5 resources

13 “in the immediate vicinity of the annexation area that were not
14 discussed in the [c]ity’s findings, specifically Wildlife Habitat and
15 Mineral and Aggregate Resources. The [c]ity has undertaken no
16 effort to inventory or develop programs to protect these Goal 5
17 resources as a part of the annexation and rezoning process.” Petition
18 for Review 17-18 (footnote omitted).

19 OAR 660-023-0080(b) defines “Regional resource” as “a site containing a
20 significant Goal 5 resource, including but not limited to a riparian corridor,
21 wetland, or open space area, which is identified as a regional resource on a map

⁵ Petitioner cites ORS 197.835(6) and (7)(b) for our standard of review. Petition for Review 15. Intervenor argues that neither standard applies. Intervenor-Respondent’s Brief 18.

1 adopted by Metro ordinance” *See* Petition for Review 17. Petitioner states that in
2 its findings addressing Goal 5, the city council focused almost exclusively on
3 regional resources identified by Metro as part of its Title 13 program. Petitioner
4 maintains that the Metro-identified resources do not include locally significant
5 resources including the Significant Natural Resources (SNRS) on the
6 Washington County Goal 5 maps and that these local, county identified resources
7 must be addressed. The Wildlife Habitat area identified on the county’s
8 Significant Natural and Cultural Resources Map is not in the annexed area.
9 Petitioner argues, however, that there is county-identified significant wildlife
10 habitat in the immediate vicinity of the annexed property and that the city council
11 was required to address these offsite resources. Similarly, petitioner argues that
12 there is an identified significant mineral and aggregate resource in the vicinity of
13 the annexed and rezoned properties that the city council was required to address.

14 We agree with intervenor that petitioner has not shown how the rezone
15 allows conflicting uses with a protected inventoried resource. Intervenor has
16 provided us with copies of two sections of Washington County Code (WCC). We
17 understand that the county addresses Goal 5 as it relates to the identified Wildlife
18 Habitat through regulations in WCC 422. *See, for example,* Intervenor-
19 Respondent’s Brief App, at 13-14 (WCC 422-3.3 (“Development within a
20 Riparian Corridor, Water Areas and Wetlands, and Water areas and Wetlands and
21 Fish and Wildlife Habitat[.]”). Petitioner does not argue in their petition for
22 review that the city council disrupted the county’s Wildlife Habitat zoning and

1 therefore failed to adequately address wildlife habitat. Petitioner argues in its
2 reply that the county's Goal 5 program requires an analysis of wildlife habitat
3 within 250 feet of a wildlife habitat and that the annexation and rezoning includes
4 property within 250 feet of an identified wildlife habitat. The 250 feet issue was
5 not, however, raised in the petition for review and cannot be raised for the first
6 time in the reply. Further, the page in the record listing submittal requirements
7 related to areas within 250 feet of an identified resource to which petitioner
8 directs us is not identified as part of the WCC or more specifically, county
9 approval criteria. Petitioner has not developed their Goal 5 argument as it relates
10 to wildlife habitat and we do not address it further. *Deschutes Development v.*
11 *Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

12 Petitioner also argues that the county has identified a protected mineral and
13 aggregate resource in the vicinity of the annexed property and that the city
14 council has failed to protect that resource in its rezoning action. WCC 379-1.2
15 provides that the intent of the Mineral and Aggregate Overlay Districts includes
16 to “[p]rotect significant aggregate resources from new conflicting uses.” WCC
17 379-1.2(F). The Mineral and Aggregate Overlay District includes Districts A and
18 B. District A may only be applied to specific zones, including FD-20. WCC 379-
19 2.1-2.2. District B may be applied to any Land Use District. WCC 379-2.3. The
20 county's mineral and aggregate zone uses overlays to protect its identified
21 mineral resource sites from conflicting uses. Petitioner does not argue that the
22 city's rezone removes the protection, that the overlay applied to a significant

1 mineral or aggregate resource is in the undefined “vicinity.” We agree with
2 intervenor that petitioner has not shown how the rezone allows conflicting uses
3 with a protected inventoried resource.

4 The third assignment of error is denied.

5 The decision is affirmed.