

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

3
4 1000 FRIENDS OF OREGON,
5 *Petitioner,*

6
7 and

8
9 ANDREA D'AMICO, RANDY CAMPBELL, LILLIAN STONE,
10 JOHN STONE, TANYA STEELE, and CITY OF TIGARD,
11 *Intervenors-Petitioners,*

12
13 vs.

14
15 WASHINGTON COUNTY,
16 *Respondent.*

17
18 LUBA Nos. 2024-006/007

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Washington County.

24
25 Andrew Mulkey filed the petition for review and reply brief and argued on
26 behalf of petitioner.

27
28 Shelby Rihala filed an intervenor-petitioner's brief and argued on behalf
29 of intervenor-petitioner City of Tigard.

30
31 Ty Wyman filed an intervenor-petitioner's brief and argued on behalf of
32 intervenor-petitioner Tanya Steele. Also on the brief were Damien R. Hall and
33 Dunn Carney LLP.

34
35 Wendie L. Kellington filed an intervenor-petitioner's brief and argued on
36 behalf of intervenors-petitioners Andrea D'Amico, Randy Campbell, Lillian
37 Stone, and John Stone. Also on the brief was Kellington Law Group PC.
38

1 Rob Bovett filed the respondent's brief and argued on behalf of
2 respondent.

3
4 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
5 Member, participated in the decision.

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7 REMANDED 07/30/2024

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

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NATURE OF THE DECISION

Petitioner appeals the county board of commissioners’ adoption of (1) B-Engrossed Ordinance 882, an amendment to the county’s Transportation System Plan (TSP), and (2) Resolution and Order 24-9, findings in support of the Ordinance.

MOTION TO FILE LATE REPLY BRIEF

OAR 661-010-0039 provides that a reply brief “shall be permitted” and “shall be filed * * * within seven days of the date the respondent’s brief is filed.” On June 18, 2024, the county filed its respondent’s brief. Accordingly, reply briefs were due June 25, 2024. On June 26, 2024, petitioner filed its motion to file a late reply brief and a copy of its reply brief. OAR 661-010-0005 provides that “[t]echnical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or a limited land use decision.” Petitioner argues that the late filing is a technical violation of our rules and should be allowed.

OAR 661-010-0075(2)(b)(B) requires that all parties be contemporaneously served copies of filed documents “in person, by first class or priority mail, or by commercial delivery service.” Petitioner maintains that the parties are not prejudiced by the late filing because courtesy copies of the reply brief were emailed to the parties on June 26, 2024, and therefore received by the parties in a timely manner.

1 No oppositions to the motion to file the late reply brief have been filed.
2 LUBA received the reply brief on June 28, 2024, four days prior to oral argument.
3 Petitioner’s motion to file the late reply brief is granted.

4 **OTHER PENDING MOTIONS¹**

5 Intervenor-petitioners Andrea D’Amico, Randy Campbell, Lillian Stone,
6 and John Stone (collectively D’Amico) advised the board at oral argument that
7 the 2019 TSP in effect at the time the Ordinance was adopted was not readily
8 available online and that the parties had agreed to submit a copy if the board
9 requested. On July 5, 2024, the board issued an order directing the county to file
10 a complete copy of the 2019 TSP in effect prior to the adoption of the Ordinance.

11 On July 11, 2024, the county filed documents with LUBA, along with a
12 pleading titled “Respondent Washington County’s Submission of the
13 Washington County Transportation System Plan in Effect Immediately Prior to
14 Adoption of Ordinance 882.” On July 16, 2024, D’Amico filed their “Objection
15 to Respondent’s Submission, Motion to Strike or Disregard and Motion to Take
16 Official Notice of Ordinance 851 (Exhibit A).” D’Amico argues that the county’s
17 submission was not limited to the 2019 TSP in effect prior to the adoption of the
18 Ordinance, that we should not consider documents that were not part of the 2019
19 TSP and that we should instead consider its Exhibit A, the ordinance adopting

¹ We refer to intervenor-petitioner City of Tigard as city, intervenor-petitioner Steele as Steele, and intervenors-petitioners’ D’Amico *et al.* as D’Amico.

1 the 2019 TSP, in order to determine what was and was not adopted. On July 16,
2 2024, petitioner also filed an objection to the county’s filing, a motion to strike
3 and a motion to take judicial notice.

4 None of these documents are necessary or relied upon by us in our review
5 of the appeal and we do not address the documents or motions further.

6 **BACKGROUND**

7 On January 30, 2024, the county’s board of commissioners adopted
8 Ordinance 882 (the Ordinance) and the Resolution and Order 24-9 (the
9 Resolution). LUBA No. 2024-006 is petitioner’s appeal of the Ordinance. LUBA
10 No. 2024-007 is petitioner’s appeal of the Resolution. We consolidated these
11 appeals in our February 22, 2024, order.

12 The Ordinance’s text explains that it amends the “Roadway Element of the
13 [TSP] and maps to include” three refinement areas and associated text. Record 8.
14 The Resolution explains that one refinement area “is located entirely within the
15 urban growth boundary; one is partially outside the current urban growth
16 boundary; and one is entirely outside the current urban growth boundary. The
17 adopted refinement areas facilitate additional study of potential alignments
18 during future comprehensive planning.” Record 21. The Resolution also contains
19 findings intended to demonstrate, in part, that the Ordinance is consistent with
20 the Statewide Planning Goals (Goals), as well as “Metro’s Urban Growth
21 Management Functional Plan (UGMFP) and Washington County’s

1 Comprehensive Plan (Plan) and the Regional Transportation Functional Plan.”
2 Record 21.

3 Petitioner’s and intervenors-petitioners’ assignments of error overlap in
4 multiple respects and we address them together.

5 **OAR 660-012-0025²**

6 **A. Introduction**

7 Goal 12 (Transportation) is “[t]o provide and encourage a safe, convenient
8 and economic transportation system.” Land Conservation and Development
9 Commission (LCDC) rules implementing Goal 12 are found in OAR 660
10 Division 12, the Transportation Planning Rule (TPR). Under the TPR,
11 transportation planning has two phases, transportation system planning and
12 transportation project development. OAR 660-012-0010(1). “Transportation
13 system planning establishes land use controls and a network of facilities and
14 services to meet overall transportation needs. Transportation project development
15 implements the TSP by determining the precise location, alignment, and
16 preliminary design of improvements included in the TSP.” *Id.*

17 A TSP is “a plan for one or more transportation facilities that are planned,
18 developed, operated, and maintained in a coordinated manner to supply
19 continuity of movement between modes, and within and between geographic and

² This section addresses D’Amico’s First Assignment of Error First and Second Subassignments and the city’s First Assignment of Error.

1 jurisdictional areas.” OAR 660-012-0005(60). Counties are required to include a
2 local TSP as part of the county comprehensive plan for land within the county’s
3 planning jurisdiction. OAR 660-012-0015(3). Required TSP elements are set out
4 in OAR 660-012-0020(2) and include “[a] determination of transportation needs
5 as provided in OAR 660-012-0030.” The TSP must include a discussion of:

6 “A road plan for a system of arterials and collectors and standards
7 for the layout of local streets and other important non-collector street
8 connections. Functional classifications of road in regional and local
9 TSP’s shall be consistent with the functional classifications of roads
10 in state and regional TSP’s and shall provide for continuity between
11 adjacent jurisdictions. The standards for the layout of local streets
12 shall provide for safe and convenient bike and pedestrian circulation
13 necessary to carry out OAR 660-012-0045(3)(b). New connections
14 to arterials and state highways shall be consistent with designated
15 access management categories. The intent of this requirement is to
16 provide guidance on the spacing of future extensions and
17 connections along existing and future streets which are needed to
18 provide reasonably direct routes for bicycle and pedestrian travel.
19 The standards for the layout of local streets shall address:

20 “(A) Extensions of existing streets;

21 “(B) Connections to existing or planned streets, including arterials
22 and collectors; and

23 “(C) Connections to neighborhood destinations.” OAR 660-012-
24 0020(2)(b).

1 OAR 660-012-0020(2)(c) requires that the TSP also include a public
2 transportation plan. OAR 660-012-0020(2)(d) requires that the TSP also include
3 a bicycle and pedestrian plan.³

4 Each element of the TSP required by OAR 660-012-0020(2)(b) through
5 (d) is required to include:

6 “(a) An inventory and general assessment of existing and
7 committed transportation facilities and services by function,
8 type, capacity and condition:

9 “(A) The transportation capacity shall include information on:

10 “(i) The capacities of existing and committed
11 facilities;

12 “(ii) The degree to which those capacities have been
13 reached or surpassed on existing facilities; and

14 “(iii) The assumptions upon which these capacities are
15 based.

16 “* * * * *

17 “(C) The transportation facility condition analysis shall
18 describe the general physical and operational condition
19 of each transportation facility (e.g., very good, good,
20 fair, poor, very poor).

21 “(b) A system of planned transportation facilities, services and
22 major improvements. The system shall include a description
23 of the type or functional classification of planned facilities
24 and services and their planned capacities and performance
25 standards;

³ The TSP must also consider air, rail, and water transportation and pipelines.

1 “(c) A description of the location of planned facilities, services
2 and major improvements, establishing the general corridor
3 within which the facilities, services or improvements may be
4 sited. This shall include a map showing the general location
5 of proposed transportation improvements, a description of
6 facility parameters such as minimum and maximum road
7 right of way width and the number and size of lanes, and any
8 other additional description that is appropriate;

9 “(d) Identification of the provider of each transportation facility or
10 service.” OAR 660-012-0020(3)(a)-(d).

11 The Ordinance amends the county’s TSP to add the Tile Flat Road
12 Extension Refinement Area, the Tile Flat Road/Mountainside Way Extension
13 Refinement Area, and the Mountainside Way Southern Extension Refinement
14 Area. Record 8. In addressing compliance with Goal 12, the board of
15 commissioners’ findings conclude:

16 “These amendments improve consistency with other adopted or
17 acknowledged planning efforts and are consistent with the County’s
18 acknowledged policies and strategies for the provision of
19 transportation facilities and services as required by Goal 12 (the
20 Transportation Planning Rule or TPR, implemented via OAR
21 Chapter 660, Division 12)

22 “* * * Brief summaries of the applicable TPR provisions followed
23 by findings of compliance are contained in Part 4 of this findings
24 document.” Record 26.

25 With that background, we turn to the parties’ arguments concerning OAR
26 660-012-0025.

27 **B. OAR 660-012-0025**

28 Generally, a TSP will “constitute the land use decision regarding the need
29 for transportation facilities, services and major improvements and their function,

1 mode, and general location.” OAR 660-012-0025(1). A TSP may, however, defer
2 “decisions regarding function, general location and mode” of some transportation
3 facilities if the local government adopts findings that:

4 “(a) Identify the transportation need for which decisions regarding
5 function, general location or mode are being deferred;

6 “(b) Demonstrate why information required to make final
7 determinations regarding function, general location, or mode
8 cannot reasonably be made available within the time allowed
9 for preparation of the TSP;

10 “(c) Explain how deferral does not invalidate the assumptions
11 upon which the TSP is based or preclude implementation of
12 the remainder of the TSP;

13 “(d) Describe the nature of the findings which will be needed to
14 resolve issues deferred to a refinement plan; and

15 “(e) Set a deadline for adoption of a refinement plan prior to
16 initiation of the periodic review following adoption of the
17 TSP.” OAR 660-012-0025(3).

18 **1. Misconstruction of Law**

19 The board of commissioners found:

20 “OAR 660-012-0025(3) establishes provisions for a local
21 government to defer decisions regarding the function, general
22 location, and mode to a refinement plan. B-Engrossed Ordinance
23 No. 882 identifies three such refinement areas for future
24 consideration of the function, general location and mode for one or
25 more connecting roadways consistent with this provision.” Record
26 31.

27 D’Amico argues that the county misconstrued OAR 660-012-0025(3) because
28 the Ordinance adopted a refinement plan and the rule does not permit the deferral

1 of the identification of the transportation need.⁴ D’Amico Petition for Review 14.
2 The county responds that OAR 660-012-0025(3) is not applicable. The county
3 maintains that its adopted refinement areas are not refinement plans and instead
4 the decision set the stage for further, future planning. Respondent’s Brief 12. The
5 county provides a copy of a map from a different ordinance amending a TSP
6 classification map and argues that map differs in level of specificity from those
7 in the Ordinance, and reflects the type of detail provided in a refinement plan.

8 We will remand a local government decision that “improperly construes
9 the applicable law, but is not prohibited as a matter of law.” OAR 661-010-
10 0071(2)(d). In interpreting the law, we consider the text and context. *State v.*
11 *Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and*
12 *Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We give no deference to a
13 governing body’s interpretation of a local provision that implements state law.
14 *Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076, *rev den*, 315
15 Or 271 (1992).

16 The TSP defines “refinement areas” as: “locations that have been
17 identified where further study is needed to determine the mode, function *and/or*
18 general location of a future solution or transportation improvement.” Record 14
19 (emphasis added). OAR 660-012-0005(44) defines “refinement plan” as

⁴ The city adopts this assignment of error in its petition for review. City Petition for Review 2.

1 “an amendment to the [TSP], that resolves, at a systems level,
2 determinations on function, mode *or* general location which were
3 deferred during transportation system planning because detailed
4 information needed to make those determinations could not
5 reasonably be obtained during that process.” (Emphasis added.)

6 For the reasons set out below, we agree with D’Amico that the county’s adoption
7 of an amendment to its TSP is a refinement plan as defined in OAR 660-012-
8 0005(44).

9 First, the TSP definition of “refinement area” references further study of
10 “mode, function *and/or* general location.” Record 14 (emphasis added). The
11 definition of “refinement plan” in OAR 660-012-0005(44) similarly references
12 resolution of “function, mode *or* general location,” as do OAR 660-012-
13 0025(3)(a) and (b). (Emphasis added.) In fact, as D’Amico observes, the findings
14 equate refinement areas and refinement plans. D’Amico Petition for Review 13.
15 The board of commissioners found: “The definition of Refinement Areas in the
16 Washington County TSP was adopted in 2014 * * *. *This definition is consistent*
17 *with the requirements of OAR 660-012-0025(3).*” Record 32 (emphasis added).
18 The board of commissioners later found “* * * [the Ordinance] *identifies*
19 *refinement areas, consistent with the provisions of OAR 660-012-0025,* on urban
20 land and on rural land that is not designated as urban or rural reserve.” Record 36
21 (emphasis added).

22 These board of commissioner’s conclusions are consistent with the TSP.
23 The TSP includes

24 “Goal 7 Connectivity

1 “Objective 7.2: Identify as Refinement Areas where new Arterial or
2 Collector connections or other improvements are necessary, but the
3 specific location, mode and/or function has not been determined.”
4 Record 499.

5 The TSP thus includes an objective to identify as refinement areas places where
6 transportation improvements are necessary but a specific location, mode or
7 function has not been identified. Similarly, refinement plans may identify general
8 locations of transportation facilities and defer the determination of specific
9 locations.

10 As D’Amico points out, the adoption of the refinement areas resolves, at a
11 systems level, the general location for road extensions. D’Amico Petition for
12 Review 13. The Ordinance includes a map showing the refinement areas. For the
13 Tile Flat Road Extension Refinement Area, the Ordinance identifies the general
14 location and mode of “an extension of Tile Flat Road from its current terminus
15 at Scholls Ferry Road to connect south to Vandermost Road,” with “the specific
16 alignment and function of the roadway” to be determined at a later time. Record
17 14. The Ordinance similarly identifies the general location and mode for the Tile
18 Flat Road/Mountainside Way Extension Refinement Area as “an extension of
19 Tile Flat Road/Mountainside Way from Vandermost Road to the intersection of
20 Bull Mountain Road and Roy Rogers Road,” with “[t]he specific alignment and
21 function of the roadway” to be determined at a later time. *Id.* Lastly, the
22 Ordinance identifies a general location, mode and function for the Mountainside
23 Way Southern Extension Refinement Area, identifying it as a proposed
24 “Collector roadway to extend south from Bull Mountain Road west of Roy

1 Rogers Road to connect to Roy Rogers Road at a point to be determined within
2 the refinement area.” *Id.*

3 Similarly, the Resolution describes the refinement areas as follows:

4 “*The Tile Flat Road Extension Refinement Area is intended to result*
5 *in a multimodal connection between the intersection of SW Tile Flat*
6 *Road at SW Scholls Ferry Road and Vandermost Road. The*
7 *multimodal connection is envisioned as a component of a connected*
8 *multimodal roadway network that serves this area.” Record 32*
9 *(emphasis added.)*

10 “*The Tile Flat Road/Mountainside Way Extension Refinement Area*
11 *envisions a roadway, or multiple connected roadways, that would*
12 *provide internal connectivity within the River Terrace 2.0*
13 *community as well as connections to the existing roadway system*
14 *consistent with the Regional System Connectivity Standard. The*
15 *road or roads would also provide for a suitable connection between*
16 *Vandermost Road and Roy Rogers Road, at the intersection of Bull*
17 *Mountain Road.” Record 32-33 (emphases added.)*

18 “*The Mountainside Way Southern Extension Refinement Area*
19 *envisions a continuation of the urban roadway network to the south,*
20 *connecting to Roy Rogers Road in the vicinity of Beef Bend Road.*
21 *Continuation of the Mountainside Way Extension beyond Bull*
22 *Mountain Road provides measurable benefits to the multimodal*
23 *transportation network, though additional evaluation is warranted*
24 *and should be considered through the comprehensive land use*
25 *planning process. An extension of Mountainside Way south of Bull*
26 *Mountain Road should not be precluded by land development inside*
27 *the [urban growth boundary (UGB)].” Record 33 (emphasis added.)*

28 The general location of these facilities is sufficiently identified in that the
29 Ordinance includes a statement that “[b]efore development may occur on land
30 within a Refinement Area, in addition to other requirements, the development
31 application must demonstrate how potential solutions to the transportation need

1 will (at a minimum) not be precluded by the proposed development.” Record 14.
2 We agree with D’Amico that the three refinement areas are also refinement plans
3 as defined in OAR 660-012-0005(44).

4 We also agree with D’Amico that OAR 660-012-0025(3) may not be
5 construed to allow deferral of identification of the transportation need. OAR 660-
6 012-0025(3)(a) requires the board of commissioners to “[i]dentify the
7 transportation need for which decisions regarding function, general location or
8 mode are being deferred.” Given the provision’s plain meaning, need must be
9 identified before function, general location or mode may be deferred.

10 We agree with D’Amico that the rule does not allow the deferral of the
11 identification of need and that the board of commissioners misconstrued the law
12 when it concluded, as discussed in more detail below, that need would be
13 determined at a later date.

14 **2. Adequacy of Findings**

15 The board of commissioners adopted findings responding to OAR 660-
16 012-0025(3). D’Amico argues that the findings addressing OAR 660-012-
17 0025(3), which applies to refinement plans, are inadequate. The county responds
18 generally that the Ordinance does not adopt a refinement plan. We rejected the
19 county’s conclusion that the Ordinance adopting refinement areas does not adopt
20 a refinement plan above.

21 OAR 660-012-0025(2) and (3) provide that decisions that would otherwise
22 be made within a TSP may be deferred if certain findings are made. Given that

1 the amendments of the TSP to add refinement areas are refinement plans, the
2 county's deferral of decisions concerning the three refinement areas requires
3 compliance with OAR 660-012-0025(3). We will "remand a land use decision
4 for further proceedings" when "[t]he findings are insufficient to support the
5 decision, except as provided in ORS 197.835(11)(b)." OAR 661-010-0071(2)(a).
6 Adequate findings identify the applicable law, the facts relied upon and explain
7 how the facts lead to the conclusion as to whether the applicable law is met.
8 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

9 **a. OAR 660-012-0025(3)(a)**

10 Again, OAR 660-012-0025(3)(a) requires that the county "[i]dentify the
11 transportation need for which decisions regarding function, general location or
12 mode are being deferred." D'Amico argues that the county has failed to identify
13 a present transportation need. The county responds that the adoption of the
14 Ordinance is the determination of need.

15 The Resolution includes the following statements of need:

16 For the Tile Flat Road Extension Refinement Area:

17 "Need: Provide a connected network immediately adjacent to the
18 River Terrace 2.0 Urban Expansion Area. Provide an alternative to
19 increase the motor vehicle capacity at the intersection of Roy Rogers
20 Road and Scholls Ferry Road." Record 32.

21 For the Tile Flat Road/Mountainside Way Extension Refinement Area:

22 "Need: Provide a connected network within the River Terrace 2.0
23 UGB expansion area as well as connections to the existing roadway
24 system, consistent with the Regional System Connectivity

1 Framework. Provide an alternative to increasing the motor vehicle
2 capacity of the intersection of Roy Rogers Road and Scholls Ferry
3 Road.” Record 33.

4 For the Mountainside Way Southern Extension Refinement Area:

5 “Need: Provide a connected network in and adjacent to the River
6 Terrace 2.0 Urban Expansion Area as well as connections to the
7 existing roadway system consistent with the Regional System
8 Connectivity Standard. Provide an alternative to increasing the
9 motor vehicle capacity of the intersection of Roy Rogers Road and
10 Bull Mountain Road.” Record 33.

11 Although characterized as statements of “need,” these statements instead reflect
12 objectives, that is, a goal or aim to achieve a connection without explaining the
13 reason a connection is needed or why the existing intersection does not meet the
14 identified need.

15 The TSP text amendment adopted by the Ordinance describes

16 “*a future need* for an extension of Tile Flat Road from its current
17 terminus at Schools Ferry Road to connect south to Vandermost
18 Road. * * * *A demonstration of need for the roadway, as well as the*
19 *specific alignment and function of the roadway is to be determined*
20 *through comprehensive planning and/or other processes related to*
21 *planning for development in the vicinity or a future Urban Growth*
22 *Boundary expansion.” Record 14 (emphases added.)*

23 “*a potential future need* for an extension of Tile Flat
24 Road/Mountainside Way from Vandermost Road to the intersection
25 of Bull Mountain Road and Roy Rogers Road. * * * *the potential*
26 *future section of the roadway* from Vandermost to Mountainside
27 Way would serve the developing community as well as provide
28 additional connectivity for the broader community. The specific
29 alignment and function of the roadway will be determined through
30 comprehensive planning in the vicinity.” *Id.* (emphases added.)

1 *“a potential future need for a north-south Collector roadway to*
2 *extend south from Bull Mountain Road west of Roy Rogers Road to*
3 *connect to Roy Rogers Road at a point to be determined within the*
4 *refinement area. * * *A demonstration of need for the roadway is to*
5 *be determined through concept planning or other process, related to*
6 *Urban Growth Boundary expansion and development in nearby*
7 *areas” Id. (emphases added.)*

8 The findings do not identify an existing need and are inadequate to address OAR
9 660-012-0025(3)(a).

10 **b. OAR 660-012-0025(3)(b) through (e)**

11 OAR 660-012-0025(3)(c) requires that the board of commissioners
12 “[e]xplain how deferral does not invalidate the assumptions upon which the TSP
13 is based or preclude implementation of the remainder of the TSP.”⁵ We agree
14 with D’Amico that the findings do not discuss, and therefore do not explain, how
15 deferral of the details does not invalidate assumptions in the TSP.

16 OAR 660-012-0025(3)(d) requires that the board of commissioners
17 “[d]escribe the nature of the findings which will be needed to resolve issues
18 deferred to a refinement plan.” We agree with D’Amico that the findings do not
19 discuss, and therefore do not describe, the nature of findings needed to resolve
20 the deferred findings.

21 OAR 660-012-0025(3)(e) requires that the board of commissioners “[s]et
22 a deadline for adoption of a refinement plan prior to initiation of the periodic

⁵ For example, OAR 660-012-0020(3)(a)(A) provides that the TSP must include an inventory and assessment of existing and committed transportation facilities, including the assumptions on which the capacities of existing and committed facilities are based.

1 review following adoption of the TSP.” General statements in the findings
2 identifying the timing as sometime after land is included in the UGB or after an
3 exception to a Statewide Planning Goal is taken do not establish deadlines.⁶ We
4 agree with D’Amico that the findings do not address OAR 660-012-0025(3)(e)’s
5 requirement that a deadline be identified.

6 OAR 660-012-0025(3)(b) requires that the board of commissioners
7 “[d]emonstrate why information required to make final determinations regarding
8 function, general location, or mode cannot reasonably be made available within
9 the time allowed for preparation of the TSP.” The county argues that D’Amico is
10 “seemingly ignoring that the change in the Urban Growth Boundary and
11 anticipated City of Tigard Comprehensive Planning are discussed throughout the
12 record in this matter.” Respondent’s Brief 33. We agree with D’Amico that the
13 findings do not discuss, and therefore do not demonstrate, why information
14 required to make final determinations regarding function or mode cannot
15 reasonably be made available within the time allowed for preparation of the TSP.

16 The board of commissioners misconstrued OAR 660-012-0025 and did not
17 adopt adequate findings addressing OAR 660-012-0025(3)(a) through (e).

⁶ See Record 32 (“Timing” section for Tile Flat Road Extension Refinement Area: “After the Refinement Area is included inside the UGB or a future exception to Statewide Planning Goals is taken.”); Record 34 (“Timing” section for the Mountainside Way Southern Extension Refinement Area: “Outside the UGB, after the Refinement Area is included inside the UGB or a future exception to Statewide Planning Goals is taken.”).

1 The OAR 660-012-0025 assignment of error is sustained.

2 **OAR 660-012-0030⁷**

3 OAR 660-012-0020(2)(a) provides that the TSP is required to include “[a]
4 determination of transportation needs as provided in OAR 660-012-0030.” OAR
5 660-012-0030 provides:

6 “(1) The TSP shall identify transportation needs relevant to the
7 planning area and the scale of the transportation network
8 being planned including:

9 “(a) State, regional, and local transportation needs;

10 “(b) Needs of the transportation disadvantaged;

11 “(c) Needs for movement of goods and services to support
12 industrial and commercial development planned for
13 pursuant to OAR chapter 660, division 9 and Goal 9
14 (Economic Development).

15 “(2) Counties or MPO’s preparing regional TSP’s shall rely on the
16 analysis of state transportation needs in adopted elements of
17 the state TSP. Local governments preparing local TSP’s shall
18 rely on the analyses of state and regional transportation needs
19 in adopted elements of the state TSP and adopted regional
20 TSP’s.

21 “(3) Within urban growth boundaries, the determination of local
22 and regional transportation needs shall be based upon:

23 “(a) Population and employment forecasts and distributions
24 that are consistent with the acknowledged
25 comprehensive plan, including those policies that

⁷ This section addresses D’Amico’s First Assignment of Error Third Subassignment and the city’s First Assignment of Error.

1 implement Goal 14. Forecasts and distributions shall be
2 for 20 years and, if desired, for longer periods; and

3 “(b) Measures adopted pursuant to OAR 660-012-0045 to
4 encourage reduced reliance on the automobile.

5 “(4) In MPO areas, calculation of local and regional transportation
6 needs also shall be based upon accomplishment of the
7 requirement in OAR 660-012-0035(4) to reduce reliance on
8 the automobile.”⁸

9 D’Amico argues that the board of commissioners’ findings are conclusory,
10 simply listing previous studies. D’Amico maintains:

11 “The challenged findings refer to those studies and statements that
12 a facility is needed without including any analysis, based on
13 substantial evidence, of an actual need for these specific facilities
14 (the Tile Flat Road extension and the Mountainside Way extension),
15 what the demonstrated need is that the facilities would address, and
16 what type of facilities are required to address those needs.”
17 D’Amico Petition for Review 22.

18 D’Amico argues that the findings are inadequate because they:

19 “[E]rroneously conclude, without any supporting evidence, that
20 OAR 660-012-0030(3) requirements are met simply because the
21 needs assessment in the TSP Technical Appendix is based on the
22 2018 Metro RTP model. The use of a regionally-accepted model for
23 forecasting traffic patterns may be good practice, but that does not

⁸ An “MPO” (Metropolitan Planning Organization) is:

“[A]n organization located within the State of Oregon and designated by the Governor to coordinate transportation planning in an urbanized area of the state including such designations made subsequent to the adoption of this rule. The Longview-Kelso-Rainier and Walla Walla Valley MPOs are not considered MPOs for the purposes of this division.” OAR 660-012-0005(25).

1 lead inherently to a conclusion that whatever facility the County
2 wishes to add to their TSP has been supported by evidence of a
3 demonstrated need.”⁹ D’Amico Petition for Review 23.

4 The board of commissioners concluded that it had identified

5 “transportation needs as required by OAR 660-012-0030 as
6 documented within these findings:

7 “• Transportation system needs were initially listed as a
8 deficiency in the technical appendix of the Washington
9 County TSP. The needs have been further considered through
10 multiple studies including the Cooper Mountain
11 Transportation Study and the Urban Reserves Transportation
12 Study.

13 “• B-Engrossed Ordinance No. 882 is consistent with the OHP
14 and Metro’s RTP and findings of compliance with the OHP
15 and RTP are included herein. B-Engrossed Ordinance No.
16 882 is consistent with the requirements of OAR 660-012-
17 0030(1).

18 “• B-Engrossed Ordinance No. 882 is not a regional TSP;
19 therefore OAR 660-012-0030(2) is not applicable.

20 “• As prescribed by OAR 660-012-0030(3), the transportation
21 needs assessment included in TSP Technical Appendix, is
22 based upon the Metro 2018 RTP regional travel demand
23 model and mode split assumptions. Many efforts to reduce
24 reliance upon the automobile were considered during the
25 development of A-Engrossed Ordinance No. 768 and A-
26 Engrossed Ordinance No. 783, as described below in the
27 findings for OAR 660-012-0045.

⁹ D’Amico briefly raises an issue that we address later in this opinion – that the need identified by prior studies is for transportation facilities that can improve regional movement of persons and freight and that a goal exception is required. D’Amico Petition for Review 21.

1 “• Additionally, alternative modes were considered during the
2 analysis conducted for the Cooper Mountain Transportation
3 Study and the Urban Reserves Transportation Study. Each of
4 these studies has failed to identify a solution that would
5 mitigate the need for, or provide a reasonable alternative to,
6 the Tile Flat Road extension. Additional analysis of
7 alternative modes is presented in the TSP Technical
8 Appendix.

9 “• Metro’s RTP modal targets were applicable to A-Engrossed
10 Ordinance No. 783. As explained in the findings of
11 compliance with the RTP, A-Engrossed Ordinance No. 783 is
12 consistent with the mode share target implementation
13 measures of the RTP. Technical Appendix 3 discusses how
14 A-Engrossed Ordinance No. 783 meets the modal targets
15 within the RTP. B-Engrossed Ordinance No. 882 is based on
16 the same procedures for assessing the transportation system
17 adopted in A-Engrossed Ordinance No. 783. Appropriate
18 findings are provided herein under OAR 660-012-0035.”
19 Record 34.

20 The county responds that “[t]he findings related to OAR 660-012-0030
21 address the requirements of that rule. Washington County applied the regional
22 model consistent with OAR 660-012-0030(3) to assess the need – including the
23 utilization of an appropriate 20-year forecast.” Respondent’s Brief 35-36. The
24 county further responds that “[t]he adoption process followed an evaluation of
25 the need consistent with the requirements of OAR 660-012-0030, including
26 consideration of local connectivity requirements consistent with TSP Objective
27 7.1 to minimize out-of-direction travel for all modes.” Respondent’s Brief 26, 34.
28 The county also responds that the transportation needs assessment included in the
29 TSP Technical Appendix is based on the Metro 2018 regional travel demand

1 model and mode split assumptions and attached to the staff report and found at
2 Record 3090. Respondent’s Brief 25-26.

3 Record 3090 does not identify or explain what the board concluded from
4 the Technical Appendix. In fact, Record 3090 includes the following statement
5 evidencing that the information in the record is subject to differing evaluations:

6 “At its Dec. 15, 2021 public hearing for this ordinance, the Planning
7 Commission (PC) voted on a motion to recommend the Board of
8 Commissioners (Board) adopt Ordinance No. 882. The motion
9 failed on a vote of two to four, and no other motions were
10 considered. Five members of the community testified verbally, and
11 some also provided written testimony. All testimony was opposed
12 to the ordinance.

13 “The PC deliberations were robust and included viewpoints both in
14 favor of and opposed to the ordinance. PC members in favor stated
15 that the ordinance is necessary for long-range planning purposes to
16 support orderly growth and system planning. Others expressed
17 concerns over environmental impacts, the certainty of growth
18 forecasts and urban sprawl.”

19 For the reasons set out in our discussion of the OAR 660-012-0025
20 assignment of error, the refinement areas are refinement plans and must comply
21 with OAR 660-012-0025. As explained in our resolution of the OAR 660-012-
22 0025 assignment of error, the board of commissioners at times refers its findings
23 to potential future need or future need. Although they reference a Cooper
24 Mountain Transportation Study and an Urban Reserves Transportation Study, the
25 findings in response to OAR 660-012-0030 do not explain how the evidence in
26 the referenced materials supports the conclusion that there is a transportation

1 need to be addressed by further planning of the refinement areas. We agree that
2 the board of commissioners' need findings are conclusory.

3 The OAR 660-012-0030 assignment of error is sustained.

4 **OAR 660-012-0035¹⁰**

5 OAR 660-012-0035 provides in part:

6 “(1) The TSP shall be based upon evaluation of potential impacts
7 of system alternatives that can reasonably be expected to meet
8 the identified transportation needs in a safe manner and at a
9 reasonable cost with available technology. The following
10 shall be evaluated as components of system alternatives:

11 “(a) Improvements to existing facilities or services;

12 “(b) New facilities and services, including different modes
13 or combinations of modes that could reasonably meet
14 identified transportation needs;

15 “(c) Transportation system management measures;

16 “(d) Demand management measures; and

17 “(e) A no-build system alternative required by the National
18 Environmental Policy Act of 1969 or other laws.

19 “(2) The following standards shall be used to evaluate and select
20 alternatives:

21 “(a) The transportation system shall support urban and rural
22 development by providing types and levels of
23 transportation facilities and services appropriate to

¹⁰ This section addresses D'Amico's First Assignment of Error Fourth Subassignment and the city's First Assignment of Error.

1 serve the land uses identified in the acknowledged
2 comprehensive plan;

3 “(b) The transportation system shall be consistent with state
4 and federal standards for protection of air, land and
5 water quality including the State Implementation Plan
6 under the Federal Clean Air Act and the State Water
7 Quality Management Plan;

8 “(c) The transportation system shall minimize adverse
9 economic, social, environmental, and energy
10 consequences;

11 “(d) The transportation system shall minimize conflicts and
12 facilitate connections between modes of transportation;
13 and

14 “(e) The transportation system shall avoid principal reliance
15 on any one mode of transportation by increasing
16 transportation choices to reduce principal reliance on
17 the automobile.

18 “(3) Where existing and committed transportation facilities and
19 services have adequate capacity to support the land uses in the
20 acknowledged comprehensive plan, the local government
21 shall not be required to evaluate alternatives as provided in
22 this rule.”

23 D’Amico argues that the county failed to comply with the alternatives
24 analysis process set out in OAR 660-012-0035. The county responds that the
25 Ordinance defers decisions to a later date and therefore no alternatives analysis
26 is required. Respondent’s Brief 36.

27 In our resolution of the assignment of error addressing OAR 660-012-
28 0025, we concluded that the Ordinance is a refinement plan and must comply
29 with OAR 660-012-0025(3), including identifying the transportation need to be

1 served. In our discussion of the assignment of error addressing OAR 660-012-
2 0030, we concluded that the county must address OAR 660-012-0030 when
3 identifying the transportation need. Given that we concluded that the county's
4 findings seeking to defer evaluation and refinement of mode, function or general
5 location of transportation improvements are inadequate and the county has not
6 made the required identification of need, it is premature for us to address the OAR
7 660-012-0035 assignment of error, other than to recognize that the standards set
8 out in OAR 660-012-0035(2) apply when evaluating and refining alternatives of
9 mode, location and function.

10 **PETITIONER'S ASSIGNMENT OF ERROR**

11 Petitioner 1000 Friends of Oregon presents one assignment of error with
12 four subassignments. Petitioner argues broadly in its first subassignment of error
13 that

14 *“the county errs by treating the amendments as ‘refinement plans’*
15 *subject to OAR 660-012-0005(44) and OAR 660-012-0025(3).* The
16 county fails to identify where the existing TSP identifies the
17 facilities and improvements or their local (or regional) need. *See*
18 *OAR 660-012-0025, OAR 660-012-0020(2)(a), and OAR 660-012-*
19 *0030(1).* Second, the county fails to identify where the existing TSP
20 determined that the determination of the function, mode, and general
21 location of the facilities described in its decision would be deferred
22 because of a lack of available detailed information. Third, the
23 county's amendments fail to actually make any ‘determinations’
24 about the function, mode, and general location of the proposed
25 roadways that are required.” 1000 Friends Petition for Review 10
26 (emphasis added).

1 Petitioner begins its assignment of error with the premise that the
2 Ordinance does not adopt a refinement plan, that is, that the Ordinance does not
3 comply with the definition of refinement plan. For example, 1000 Friends
4 concludes:

5 “[T]he county has misconstrued and misapplied the transportation
6 planning rule. OAR 660-012-0005(44); OAR 660-012-0025. *The*
7 *county’s decision does not comply with the definition or required*
8 *purpose of a ‘refinement plan.’ OAR 660-012-0005(44). The county*
9 *erred because it sought to apply the ‘refinement plan’ label and*
10 *process to a decision that does not meet the circumstances or*
11 *purpose for which a refinement plan may be used.” 1000 Friends*
12 *Petition for Review 10-11 (emphasis added).*

13 As we explained in our discussion of OAR 660-010-0025, D’Amico argued that
14 the Ordinance equates the terms “refinement plan” and “refinement area.” For
15 example, D’Amico argued:

16 “OAR 660-012-0005(44) defines the term refinement plan:

17 “‘Refinement Plan’ means an amendment to the
18 transportation system plan, that resolves, at a systems level,
19 determinations on function, mode or general location which
20 were deferred during the transportation system planning
21 because detailed information needed to make those
22 determinations could not reasonably be obtained during that
23 process.’

24 “*The challenged findings equate the refinement areas adopted by*
25 *Ordinance 882 to TPR refinement plans by directly referencing the*
26 *administrative rule for refinement plans, OAR 660-012-0025(3):*

27 “‘The definition of Refinement Areas in Washington County
28 TSP was adopted in 2014 by A-Engrossed Ordinance No.

1 783, exhibit 2, page 4 and 5. This definition is consistent with
2 the requirements of OAR 660-012-0025(3).’ Rec[ord] 32.

3 “* * * * *

4 “The County is correct that Ordinance 882 amends the TSP to
5 resolve, at a systems level, the general location for the extensions to
6 Tile Flat Road and to Mountainside Way. * * * *Ordinance 882*
7 *establishes those two extensions as part of the TSP by adopting*
8 *refinement plans to the County’s TSP under the nomenclature*
9 *‘refinement area.’” D’Amico Petition for Review 12-13 (emphases*

10 added).

11 For the reasons set forth above, we conclude that the adoption of the refinement
12 areas is the adoption of refinement plans. Because we conclude that the
13 Ordinance does adopt refinement plans and reject petitioner’s opening premise,
14 petitioner’s first subassignment of error is denied.

15 Petitioner’s second and third subassignments of error are that the county
16 misconstrued and misapplied the provisions in OAR 660-012-0025(1) through
17 (3). 1000 Friends Petition for Review 11, 16. Petitioner also argues that the
18 refinement plan process does not allow deferring of a determination of need for
19 transportation facilities. For the reasons set out in discussion of OAR 660-012-
20 0025 and OAR 660-012-0030, these subassignments of error are sustained.

21 In petitioner’s fourth subassignment of error, petitioner argues that the
22 county’s findings of need in the Resolution and the Ordinance are inconsistent,
23 sometimes referring to a need and other times referring to a future need, and
24 therefore lack an adequate factual basis. A legislative decision must be supported

1 by an adequate factual base, a standard equivalent to the substantial evidence
2 standard with

3 “[s]ubstantial evidence exist[ing] to support a finding of fact when
4 the record, viewed as a whole, would permit a reasonable person to
5 make that finding. *Dodd v. Hood River County*, 317 Or 172, 179,
6 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-
7 52, 752 P2d 262 (1988).” *Restore Oregon v. City of Portland*, 80 Or
8 LUBA 158, 162 (2019), *aff’d*, 301 Or App 769, 458 P3d 703 (2020).

9 In the Resolution, the board of commissioners did not refer to “future” or
10 “possible future needs,” but instead made conclusory findings setting out the
11 connections the refinement area would provide. For the reasons set out in our
12 discussion of OAR 660-012-0030, we conclude that the need findings are
13 inadequate. Accordingly, we do not address this assignment of error further.

14 Petitioner’s assignment of error is sustained, in part.

15 **OAR 660-012-0065¹¹**

16 OAR 660-012-0025(2) provides that “[f]indings of compliance with
17 applicable statewide planning goals and acknowledged comprehensive plan
18 policies and land use regulations shall be developed in conjunction with the
19 adoption of the TSP.” D’Amico asserts that the board of county commissioners’
20 decision authorizes transportation facilities not allowed on rural land under OAR
21 660-012-0065, lacks adequate findings, is not supported by an adequate factual

¹¹ This section addresses Steele’s Assignment of Error, D’Amico’s Second Assignment of Error, and the City’s Second Assignment of Error.

1 base, and therefore fails to comply with Goals 3 (Agricultural Land), 4 (Forest
2 Land), 11 (Public Facilities), and 14 (Urbanization.)¹² Steele alleges that the
3 findings do not explain why Goal 3 is inapplicable or met, incorrectly interpret
4 the law, and/or lack an adequate factual base.¹³

5 We will remand a land use decision where a local government amends its
6 comprehensive plan in a manner that is not consistent with the applicable
7 statewide planning goals. ORS 197.835(6) (“The board shall reverse or remand
8 an amendment to a comprehensive plan if the amendment is not in compliance
9 with the goals.”). However, as we explained in our resolution of the OAR 660-
10 012-0030 assignment of error, the county has not correctly addressed the need
11 for the refinement areas or made the requisite findings for deferral of certain
12 transportation decisions. Accordingly, it would be premature for us to address

¹² The city adopts D’Amico’s assignment of error. City Petition for Review 2.

¹³ The board of commissioners found:

“These findings serve as findings of compliance with the applicable statewide planning goals for [the Ordinance] consistent with the provisions of OAR 660-012-0025(2). Previously adopted elements of the comprehensive plans also provided findings. Chapter X of the County Charter sets forth specific requirements for citizen involvement during review and adoption of land use ordinances. The county has utilized these requirements for the adoption of [the Ordinance]. The findings contained herein satisfy the requirement of OAR 660-12-0025(2) and have been adopted in conjunction with [the Ordinance].” Record 31.

1 D’Amico’s, the city’s, and Steele’s arguments regarding compliance with the
2 goals.

3 **OAR 660-012-0060¹⁴**

4 OAR 660-012-0060(1) provides:

5 “If an amendment to a functional plan, an acknowledged
6 comprehensive plan, or a land use regulation (including a zoning
7 map) would significantly affect an existing or planned transportation
8 facility, then the local government must put in place measures as
9 provided in section (2) of this rule, unless the amendment is allowed
10 under section (3), (9) or (10) of this rule. A plan or land use
11 regulation amendment significantly affects a transportation facility
12 if it would:

13 “(a) Change the functional classification of an existing or planned
14 transportation facility (exclusive of correction of map errors
15 in an adopted plan);

16 “(b) Change standards implementing a functional classification
17 system; or

18 “(c) Result in any of the effects listed in paragraphs (A) through
19 (C) of this subsection. If a local government is evaluating a
20 performance standard based on projected levels of motor
21 vehicle traffic, then the results must be based on projected
22 conditions measured at the end of the planning period
23 identified in the adopted TSP. As part of evaluating projected
24 conditions, the amount of traffic projected to be generated
25 within the area of the amendment may be reduced if the
26 amendment includes an enforceable, ongoing requirement
27 that would demonstrably limit traffic generation, including,
28 but not limited to, transportation demand management. This

¹⁴ This section addresses D’Amico’s First Assignment of Error Fourth Subassignment and the city’s First Assignment of Error.

1 reduction may diminish or completely eliminate the
2 significant effect of the amendment.

3 “(A) Types or levels of travel or access that are inconsistent
4 with the functional classification of an existing or
5 planned transportation facility;

6 “(B) Degrade the performance of an existing or planned
7 transportation facility such that it would not meet the
8 performance standards identified in the TSP or
9 comprehensive plan; or

10 “(C) Degrade the performance of an existing or planned
11 transportation facility that is otherwise projected to not
12 meet the performance standards identified in the TSP
13 or comprehensive plan.”

14 The county found “OAR 660-012-0060 is not applicable to B-Engrossed
15 Ordinance No. 882 as it does not amend any land use designations or
16 regulations.” Record 36. D’Amico argues that board of commissioners
17 misconstrued OAR 660-012-0060 because it concluded that OAR 660-012-0060
18 does not apply to the Ordinance *because it is not a land use regulation*. D’Amico
19 Petition for Review 32.

20 ORS 197.015 defines “land use regulation” as “any local government
21 zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046
22 or similar general ordinance establishing standards for implementing a
23 comprehensive plan.” D’Amico argues that the Ordinance is a land use regulation
24 because it “burdens property in the manner of a land use regulation, requiring
25 property owners to demonstrate that certain standards are met before
26 development can be approved.” D’Amico Petition for Review 32. The county

1 responds that the TSP does not directly apply to any future development and that
2 that D’Amico does not develop an argument that the Ordinance has a significant
3 effect on a transportation facility and that OAR 660-012-0060 is applicable to the
4 decision. Respondent’s Brief 40. In their reply, D’Amico identifies zoning code
5 sections requiring development applications to comply with the TSP.

6 OAR 660-012-0060 is potentially applicable because the Ordinance is an
7 amendment to a land use regulation; the zoning code requires development
8 applicants comply with the TSP goals, objectives and strategies.¹⁵ OAR 660-012-
9 0060 does not apply, however, unless an amendment to an acknowledged
10 comprehensive plan or land use regulation “would significantly affect an existing
11 or planned transportation facility.”¹⁶ We agree with the county that D’Amico
12 does not develop an argument that the Ordinance has a significant effect on a
13 transportation facility. In the absence of any developed argument by D’Amico
14 establishing that a transportation facility is significantly affected, we conclude

¹⁵ See, e.g., Washington County Code 401-4.1 (providing that all proposed development authorized by Article III, unless otherwise noted, must comply with TSP Goals 1 through 11, their implementation objectives and their strategies).

¹⁶ D’Amico also maintains: “It is well beyond dispute that the County’s [TSP] is a component of the County’s comprehensive plan and implements the comprehensive plan.” D’Amico Petition for Review 32. OAR 660-012-0060 is potentially applicable because the Ordinance adopts an amendment to an acknowledged comprehensive plan, but the Ordinance still must significantly affect a transportation facility.

1 that the county’s finding that OAR 660-012-0060 does not apply because it does
2 not amend any land use designations or regulations is harmless error.

3 The OAR 660-012-0060 assignment of error is denied.

4 **OAR 660-012-0100 THROUGH OAR 660-012-0920¹⁷**

5 **A. Background**

6 OAR 660-012-0011(2)(c) provides that OAR 660-012-0100 through OAR
7 660-012-0920 apply to “portions of counties within the Metro urban growth
8 boundary.” The parties refer to OAR 660-012-0100 through OAR 660-012-0920,
9 adopted on July 21, 2022, as the Climate-Friendly and Equitable Communities
10 (CFEC) rules. Land within the Metro UGB is included within the area addressed
11 by the Ordinance. The county is therefore, unless otherwise excepted, required to
12 comply with the OAR 660-012-0100 through 0920 provisions as regards its
13 transportation planning on lands within the Metro UGB.

14 “Counties may have different applicable rules in different parts of the
15 county.” OAR 660-012-0011(6). OAR 660-012-0010 through OAR 660-012-
16 0045 and OAR 660-012-0055 apply to portions of counties outside urban growth
17 boundaries. OAR 660-012-0011(3). However, “counties that otherwise would be

¹⁷ This section addresses City’s Third Assignment of Error. D’Amico expresses support for the City’s argument stating: “In deference to LUBA’s May 7, 2024, Order requesting the parties consolidate their arguments and not duplicate them, Intervenor do not further explore this error in this brief but support the City’s position the County erred regarding OAR 660-012-0012.” D’Amico Petition for Review 12.

1 required to use rules [applicable outside a UGB], may choose to instead adopt a
2 transportation system plan meeting the rules that apply [within a UGB].” OAR
3 660-012-0011(4). For lands within its planning jurisdiction and outside the Metro
4 UGB, the county may elect to comply with the provisions in OAR 660-012-0010
5 through 0045 and OAR 660-012-0055 *or* to comply with OAR 660-012-0100
6 through 0920.

7 The city argues that board of commissioners erred in finding that the
8 county qualified for an exemption from complying with OAR 660-012-0100
9 through OAR 660-012-0920 on lands within the Metro UGB.¹⁸

10 **B. OAR 660-012-0012**

11 OAR 660-012-0012 provides in part:

12 “(1) The rules in this division adopted on July 21, 2022, and
13 amendments to rules in this division adopted on that date, are
14 effective August 17, 2022, except as provided in this rule.

15 “(2) A city or county subject to the requirements as provided in
16 OAR 660-012-0100 may make interim updates to the local
17 transportation system plan using requirements as provided in
18 OAR 660-012-0015 if the city or county:

19 “(a) Has submitted notice of the proposed change to the
20 comprehensive plan to the department as provided in
21 OAR 660-018-0020 no later than December 31, 2022;
22 or

23 “(b) The interim update is not a major transportation system
24 plan update as provided in OAR 660-012-0105, and the

¹⁸ D’Amico joins in this assignment of error.

1 city or county has submitted notice of the proposed
2 change to the comprehensive plan to the department as
3 provided in OAR 660-018-0020 no later than June 30,
4 2027. Interim updates must comply with applicable
5 requirements in this division within the scope of the
6 transportation system plan amendment but need not
7 bring the entire transportation system plan in
8 compliance with all applicable regulations”¹⁹

9 Accordingly, a county performing an interim update to its TSP is not subject to
10 the requirements in OAR 660-012-0100 if the county provided notice to DLCD
11 as provided in OAR 660-018-0020 no later than December 31, 2022, or, if the
12 interim update is a minor transportation plan update, and the notice required by
13 OAR 660-018-0020 is provided on or before June 30, 2027.²⁰

¹⁹ OAR 660-012-0015(3) provides that counties

“shall prepare, adopt, and amend local TSPs for lands within their planning jurisdiction in compliance with this division:

“(a) Local TSPs shall establish a system of transportation facilities and services adequate to meet identified local transportation needs and shall be consistent with regional TSPs an adopted elements of the state TSP;

“(b) Where the regional TSP or elements of the state TSP have not been adopted, the city or county shall coordinate the preparation of the local TSP with the regional transportation planning boy and ODOT to ensure that regional and state transportation needs are accommodated.”

²⁰ OAR 660-012-0100 provides in part:

“(1) Cities and counties shall develop and adopt a transportation system plan. Cities and counties shall develop a transportation

system plan and amendments to that plan consistent with the provisions of OAR 660-012-0105 through OAR 660-012-0215. A transportation system plan includes the following elements:

- “(a) The core transportation system plan elements as provided in section (2);
- “(b) Funding projections as provided in OAR 660-012-0115;
- “(c) A transportation options element as provided in OAR 660-012-0145;
- “(d) An unconstrained project list as provided in OAR 660-012-0170;
- “(e) A financially-constrained project list as provided in OAR 660-012-0180;
- “(f) Any refinement plans adopted as provided in OAR 660-012-0190;
- “(g) A pedestrian system element as provided in OAR 660-012-0500;
- “(h) A bicycle system element as provided in OAR 660-012-0600;
- “(i) A public transportation system element as provided in OAR 660-012-0700; and
- “(j) A street and highway system element as provided in OAR 660-012-0800.

“(2) A transportation system plan shall include the following core elements:

- “(a) The base and planning horizon years as provided in section (3) of this rule;

1 The board of commissioners found that the Ordinance is not required to
2 comply with the provisions set out in OAR 660-012-0100 because the county
3 provided the required notice to DLCDC prior to December 31, 2022, explaining
4 the Ordinance

5 “fulfills the requirements for an interim TSP update consistent with
6 OAR 660-012-0012(2)(a).

“(b) The land use assumptions as provided in OAR 660-012-0340;

“(c) A list of all elements of the plan, and the date of adoption or amendment of each;

“(d) The coordinated land use and transportation system planning policies in the comprehensive plan;

“(e) The local transportation system plan goals and policies;

“(f) Areas with concentrations of underserved populations as provided in OAR 660-012-0125, identified using best available data;

“(g) A record of the engagement, involvement, and decision-making processes used in development of the plan, as provided in OAR 660-012-0130;

“(h) A major equity analysis as provided in OAR 660-012-0135 or an engagement-focused equity analysis as provided in OAR 660-012-0135 for urban areas under 5,000 in population; and

“(i) The dates of each report made to the director as provided in OAR 660-012-0900, including all applicable city and county reports for the planning area.”

1 “Ordinance No. 882 was initially filed on Sept. 29, 2021. This date
2 is over a year before Dec. 31, 2022, referenced in OAR 660-012-
3 0012(2)(a). Initial engrossments to the Ordinance were directed by
4 the Board on Mar. 1, 2022, and A-Engrossed Ordinance No. 882
5 was filed on Jun. 27, 2022. Subsequent amendments were directed
6 by the Board on Oct. 24, 2023, and B-Engrossed Ordinance No. 882
7 was filed on Nov. 13, 2023.

8 *“Notice of Ordinance No. 882 was submitted to the department as*
9 *provided in OAR 660-018-0020 on Oct. 25, 2021. The notice was*
10 *submitted 52 days prior to the first evidentiary hearing held by the*
11 *Planning Commission on Dec. 15, 2021, and consistent with the*
12 *requirements of OAR 660-018-0020.*

13 “OAR 660-012-0012(2)(a) provides for interim amendments to the
14 TSP as provided in OAR 660-012-0015 if notice of the proposed
15 change to the comprehensive plan has been provided to the
16 department consistent with the requirements of OAR 660-018-0020
17 no later than Dec. 31, 2022.” Record 30 (emphasis added).

18 **1. Adequacy of Notice**

19 OAR 660-018-0020, provides, in part:

20 “(1) Before a local government adopts a change to an
21 acknowledged comprehensive plan or a land use regulation,
22 unless circumstances described in OAR 660-018-0022 apply,
23 the local government shall submit the proposed change to the
24 department, including the information described in section (2)
25 of this rule. The local government must submit the proposed
26 change to the director at the department’s Salem office at least
27 35 days before holding the first evidentiary hearing on
28 adoption of the proposed change.

29 “(2) The submittal must include applicable forms provided by the
30 department, be in a format acceptable to the department, and
31 include all of the following materials:

1 “(a) *The text of the proposed change to the comprehensive*
2 *plan or land use regulation implementing the plan, as*
3 *provided in section (3) of this rule;*

4 “(b) If a comprehensive plan map or zoning map is created
5 or altered by the proposed change, a copy of the
6 relevant portion of the map that is created or altered;

7 “(c) A brief narrative summary of the proposed change and
8 any supplemental information that the local
9 government believes may be useful to inform the
10 director and members of the public of the effect of the
11 proposed change;

12 “(d) The date set for the first evidentiary hearing;

13 “(e) The notice or a draft of the notice required under ORS
14 197.763 regarding a quasi-judicial land use hearing, if
15 applicable; and

16 “(f) *Any staff report on the proposed change or information*
17 *that describes when the staff report will be available*
18 *and how a copy may be obtained.*

19 “(3) *The proposed text submitted to comply with subsection (2)(a)*
20 *of this rule must include all of the proposed wording to be*
21 *added to or deleted from the acknowledged plan or land use*
22 *regulations. A general description of the proposal or its*
23 *purpose, by itself, is not sufficient. For map changes, the*
24 material submitted to comply with Subsection (2)(b) must
25 include a graphic depiction of the change; a legal description,
26 tax account number, address or similar general description, by
27 itself, is not sufficient. If a goal exception is proposed, the
28 submittal must include the proposed wording of the
29 exception.

30 “* * * * *

31 “(5) For purposes of computation of time for the 35-day notice
32 under this rule and OAR 660-018-0035(1)(c), the proposed

1 change is considered to have been ‘submitted’ on the day that
2 paper copies or an electronic file of the applicable notice
3 forms and other documents required by section (2) this rule
4 are received or, if mailed, on the date of mailing. The
5 materials must be mailed to or received by the department at
6 its Salem office.” (Emphases added.)

7 The board of commissioners made findings that the CFEC rules did not
8 apply because the requisite notice was given. Record 30. The county also
9 maintains in its brief that it is exempt from compliance with the CFEC rules under
10 OAR 660-012-0012(2)(a) because it complied with the notice requirement.²¹
11 Similarly, in its response brief, the county states: “In response to subsection (3),
12 staff upload[ed] a copy of the filed Ordinance that included all the changes
13 proposed. Record at 3535.” Respondent’s Brief 47.

14 Record 3535 appears to be a printout of a DLCD website submittal page.
15 We assume the materials following Record 3535 in the record were submitted to
16 DLCD. It appears that the only refinement area described in the DLCD submittal
17 is the Mountainside Way Southern Extension Refinement Area at Record 3543.
18 We agree with city that the county did not provide all of the proposed wording to
19 be added to the TSP when it provided DLCD with notice in September 2021 that
20 described only one refinement area.²²

²¹ Although the county observes that the CFEC rules were adopted after the county gave notice to DLCD of its planned TSP amendment, the county does not argue that the amendment is not subject to those rules. Respondent’s Brief 49.

²² In addition, the parties informed the board at oral argument that county counsel had advised them the county did not provide DLCD a copy of the staff

1 ORS 197.835(9)(a) provides:

2 “In addition to the review under subsections (1) to (8) of this section,
3 the board shall reverse or remand the land use decision under review
4 if the board finds:

5 “(a) The local government or special district:

6 “(A) Exceeded its jurisdiction;

7 “(B) Failed to follow the procedures applicable to the matter
8 before it in a manner that prejudiced the substantial
9 rights of the petitioner;

10 “(C) Made a decision not supported by substantial evidence
11 in the whole record;

12 “(D) Improperly construed the applicable law; or

13 “(E) Made an unconstitutional decision[.]”

14 The city identifies ORS 197.835(6) (compliance with statewide planning
15 goals) and (9)(a)(C) and (D), generally, as the applicable standards of review.
16 City Petition for Review 3. ORS 197.835(9)(a)(B) provides that we will not
17 remand for failure to follow applicable procedures unless the substantial rights of
18 petitioner have been prejudiced.²³ The county argues that any error in the notice
19 to DLCD is procedural and that the city has not established prejudice.

report or directions on obtaining a copy of the staff report as required by OAR
660-018-0020(2)(f). Media Recording, LUBA Oral Argument, July 2, 2024, at
6:25 to 7:27.

²³ OAR 661-010-0071(2)(c) provides that we shall remand a land use decision
for further proceedings when “[t]he decision is flawed by procedural errors that
prejudice the substantial rights of the petitioner(s).”

1 The city argues that although a failure in notice is often characterized as a
2 procedural error, the notice in this case is qualitatively different. The city
3 maintains that absent strict compliance with the notice statute, different OARs
4 are applicable to the TSP amendment and that this is a substantive error.

5 The city does not develop any argument that explains how rules applicable
6 to the Ordinance as a result of the county’s failure to strictly comply with the
7 notice statute differ in a substantive as opposed to procedural way.²⁴ We will not
8 develop the city’s argument for it. This assignment of error is denied.

²⁴ For example, provisions in OAR 660-010-0025(3) governing refinement plans appear very similar to provisions in OAR 660-012-0190(1) which provides:

“A city or county may, when adopting a major update to the transportation system plan as provided in OAR 660-012-0105, defer decisions regarding function, general location, and mode of a refinement plan if findings are adopted below that

- “(a) Identify the transportation need for which decisions regarding function, general location, or mode are being deferred;
- “(b) Demonstrate why information required to make final determinations regarding function, general location, or mode cannot reasonably be made available within the time allowed for preparation of the transportation system plan;
- “(c) Explain how deferral does not invalidate the assumptions upon which the transportation system plan is based or preclude implementation of the remainder of the transportation system plan;

1 **2. Major Transportation Plan Update**

2 Again, after December 31, 2022, compliance with the CFEC rules may be
3 avoided if the correct notice is given and the amendment is a minor transportation
4 system plan update. The board also found: “If the [CFEC requirements] were
5 applicable, [the Ordinance] would be consistent with a minor TSP amendment
6 described in OAR 660-012-0105(1).” Record 37. The city argues that the board
7 of commissioners erred in concluding that the Ordinance is a minor transportation
8 update. Given that we are remanding for additional findings and the TSP update
9 may change, it is premature for us to address whether a future amendment will
10 be major or minor.

11 The OAR 660-012-0012 assignment of error is denied.

12 The county’s decision is remanded.

 “(d) Describe the nature of the findings that will be needed
 to resolve issues deferred to a refinement plan; and

 “(e) Set a deadline for adoption of a refinement plan.”

 The above language mirrors the provisions in OAR 660-012-0025(3) except for the additional language in OAR 660-012-0025(3)(e), italicized herein: “(e) Set a deadline for adoption of a refinement plan *prior to initiation of the periodic review following adoption of the TSP.*” OAR 660-012-0025(3)(e). Elsewhere in the findings, the board of commissioners equated OAR 660-012-0025 and 660-012-0190, concluding: “The amendments add three Refinement Areas (one on urban lands) consistent with the provisions of OAR 660-012-0190(1) as described in these findings under OAR 660-012-0025(3). No other provisions of OAR 660-012-0100 through OAR 660-012-0920 would apply and the amendments in [the Ordinance] are consistent with the requirement of OAR 660-012-0100 through OAR 660-012-0920.” Record 37.