

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

07/19/17 at 10:25 LUBA

3
4 COLUMBIA PACIFIC BUILDING TRADES
5 COUNCIL, PORTLAND BUSINESS ALLIANCE, and
6 WESTERN STATES PETROLEUM ASSOCIATION,
7 *Petitioners,*

8
9 and

10
11 WORKING WATERFRONT COALITION,
12 *Intervenor-Petitioner,*

13
14 vs.

15
16 CITY OF PORTLAND,
17 *Respondent,*

18
19 and

20
21 COLUMBIA RIVERKEEPER, OREGON
22 PHYSICIANS FOR SOCIAL RESPONSIBILITY,
23 PORTLAND AUDUBON SOCIETY, and CENTER
24 FOR SUSTAINABLE ECONOMY,
25 *Intervenors-Respondents.*

26
27 LUBA No. 2017-001

28
29 FINAL OPINION
30 AND ORDER

31
32 Appeal from City of Portland.

33
34 William L. Rasmussen, Portland, filed a petition for review. With him
35 on the brief was Miller Nash Graham & Dunn LLP. William L. Rasmussen and
36 Steven G. Liday argued on behalf of petitioners.

37
38 Phillip E. Grillo, Portland, filed a petition for review on behalf of

1 intervenor-petitioner. With him on the brief was Davis Wright Tremaine LLP.

2
3 Lauren A. King, Deputy City Attorney, Portland, filed a response brief
4 on behalf of respondent. Lauren A. King and Maja K. Haium argued on behalf
5 of respondent.

6
7 Maura C. Fahey and Scott Hilgenberg, Portland, filed a response brief on
8 behalf of intervenors-respondents. With them on the brief was Crag Law
9 Center. Scott Hilgenberg argued on behalf of intervenors-respondents.

10
11 BASSHAM, Board Member, participated in the decision. RYAN, Board
12 Chair, and HOLSTUN, Board Member, did not participate in the decision.

13
14 REVERSED 07/19/2017

15
16 You are entitled to judicial review of this Order. Judicial review is
17 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal Portland city Ordinance No. 188142, which adopts legislative text amendments (FFT amendments) to the city’s zoning ordinance to prohibit new bulk fossil fuel terminals (FFTs) and the expansion of existing FFTs.¹

REPLY BRIEFS

Petitioners and intervenor-petitioner Working Waterfront Coalition (WWC) move to file reply briefs to address alleged “new matters” raised in the response briefs. OAR 661-010-0039 (allowing a reply brief to address new matters raised in a response brief). Intervenors-respondents (collectively, Riverkeepers) oppose the reply briefs, arguing that they do not respond to “new matters” within the meaning of OAR 661-010-0039, but instead embellish arguments already made in the petitions for review, or simply offer rebuttal to responses to arguments made in the petition for review.

We agree with Riverkeepers. “New matters” within the meaning of OAR 661-010-0039 include (1) responses that an argument in the petition for review should fail regardless of its stated merits (*i.e.*, something in the nature of an affirmative defense), and (2) responses to assignments of error that otherwise could not reasonably have been anticipated. *Foland v. Jackson County*, 61 Or

¹ To assist the reader, an index of the many acronyms in this opinion is attached as an appendix.

1 LUBA 264, 266-67, *aff'd* 239 Or App 60, 243 P3d 830 (2010). Reply briefs
2 that simply embellish or elaborate arguments made in the petition for review,
3 rebut direct responses to the merits of arguments made in the petition for
4 review, offer new arguments in support of an assignment of error, or advance
5 new bases for reversal or remand are not authorized by OAR 661-010-0039.

6 With one exception, the two reply briefs consist entirely of one or more
7 of the latter type of arguments. Riverkeepers concede that WWC's reply brief
8 at page 4, lines 6-15 addresses a new matter raised in the response briefs.
9 Accordingly, that portion of WWC's reply brief is allowed. Otherwise, LUBA
10 will not consider the arguments in the two reply briefs.

11 **FACTS**

12 The city of Portland is one of the largest ports on the West Coast, located
13 at the confluence of the Columbia and Willamette Rivers, and at the western
14 end of a low gradient rail and barge passage through the Cascade Mountains, at
15 a strategic commercial position for regional, national and international trade.²

² The Portland Freight Master Plan (FMP) states:

“From its early days, Portland has been a center of trade and commerce in the Pacific Northwest. The city's growth has been driven by its role in the movement of commodities. At the turn of the 21st century, Portland has established strong international trade connections * * *. Today, Portland is a competitive gateway for international and domestic trade. It is a ‘trans-shipment’ center, where freight is handled on the way to somewhere else. In fact, more goods move through its transportation network to national and international destinations than are consumed here in the

1 Prior to adoption of the FFT amendments, the city’s zoning code, Portland City
2 Code (PCC) Title 33, regulated freight terminals of any description, including
3 what the city now calls FFTs, under the general land use category of
4 “Warehouse and Freight Movement.” The use category “Warehouse and
5 Freight Movement” is generally allowed in employment and industrial zones
6 under standards that do not limit the size or number of such terminals. The
7 challenged zoning code amendments establish FFTs as a new land use
8 category, defined as sites that

9 “rely on access by marine, railroad, or regional pipeline to
10 transport fuels to or from the site, and either have transloading
11 facilities for transferring a shipment between transport modes, or
12 have storage capacity exceeding 2 million gallons for fossil fuels.”

13 PCC 33.920.300(A). Examples include crude oil terminals, petroleum products
14 terminals, natural gas terminals, propane terminals and coal terminals. PCC
15 33.920.300(C). The amendments include a number of exceptions to the
16 definition of FFTs, listed in n 30. “Fossil fuel” is defined as “petroleum
17 products (such as crude oil and gasoline), coal, methanol, and gaseous fuels
18 (such as natural gas and propane) that are made from decayed plants and
19 animals that lived millions of years ago and are used as a source of energy.
20 Denatured ethanol and similar fuel additives, with less than 5 percent fossil fuel
21 content, biodiesel/renewable diesel with less than 5 percent fossil fuel content,

region.” Portland Freight Master Plan (FMP) 1; App-248. [All citations to appendix (App) are to Petitioner’s Appendix, unless otherwise noted.]

1 and petroleum-based products used primarily for non-fuel uses (such as
2 asphalt, plastics, lubricants, fertilizer, roofing and paints) are not fossil fuels.”
3 PCC 33.910.030.

4 At least 11 existing terminals within the city of Portland meet the newly-
5 adopted definition of FFT: 10 petroleum terminals and one natural gas
6 terminal. The 11 terminals are clustered in the city’s northwest industrial area,
7 at the terminus of the Olympic Pipeline, which delivers petroleum products to
8 Oregon and southwest Washington from four refineries in the Puget Sound
9 area. Record 44-45. At the terminals, petroleum and gas are stored in
10 approximately 300 tanks and transloaded into other modes of transportation
11 (marine, train, truck, and the in-state Kinder Morgan pipeline) to distribution
12 sites all over the state of Oregon.³ Record 316. The terminals range from 11.6
13 to 67 million gallons, with most facilities having more than 25 million gallons
14 of storage capacity. Record 55. Together, these 11 terminals handle
15 approximately 90 percent of fossil fuel for the State of Oregon. Record 316.
16 Much of the city’s northwest industrial area is located in a moderate to high-

³ The Oregon Freight Plan (OFP) defines “transloading” as “[t]ransferring bulk shipments from the vehicle/container of one mode to that of another at a terminal interchange point.” OFP E-3; App-1205. Relatedly, the Oregon Transportation Plan (OTP) defines “intermodal facilities” as “[f]acilities that allow passenger and/or freight connections between modes of transportation. Examples include airports, rail stations, marine terminals and truck-rail facilities.” OTP 122; App-813. The term “multimodal” is defined as “[t]he movement of goods or people by more than one transportation mode.” OTP 123; App-814.

1 risk earthquake liquefaction zone. Record 33, 1866. Many of Portland’s fossil
2 fuel storage tanks were built before seismic design requirements in building
3 codes were adopted. Record 2.

4 In 2015, in response to concerns regarding proposals to establish fossil
5 fuel export terminals in the region, the city began efforts to limit future
6 establishment or expansion of fossil fuel terminals within the city.⁴ According
7 to the city, that effort was intended to further two objectives: (1) reducing
8 potential for catastrophic damage in the event of an earthquake, and (2)
9 reducing the city’s contribution to greenhouse gas emissions and climate

⁴ The city’s findings state on this point:

“The energy distribution market in the Pacific Northwest is changing. Production of crude oil and natural gas, particularly from North Dakota, has substantially increased in the U.S. since 2009, as shown in Figure 1. In turn, several large new fuel distribution terminals have been proposed in the Pacific Northwest to access West Coast and export markets, as shown in Figure 2. Similar trends have occurred in Alberta and British Columbia.

“[The FFT amendments] propos[e] a prompt, focused response to these market changes. The recommended code amendments will restrict development of new fossil fuel terminals and limit the expansion of existing terminals, consistent with City and State objectives on climate change and public safety.” Record 316.

Figure 2 lists nine oil, gas and coal export terminals that have been proposed in recent years in the Pacific Northwest, including one (the Pembina propane terminal, discussed further below) proposed in an industrial area in north Portland.

1 change, and encouraging a transition within the city to cleaner, renewable
2 energy sources.

3 On November 12, 2015, the city council passed Resolution 37168, which
4 states that the city council “will actively oppose expansion of infrastructure
5 whose primary purpose is transportation or storing fossil fuels in or through
6 Portland or adjacent waterways.” Record 3761. The resolution directed the city
7 Bureau of Planning and Sustainability (BPS) to develop zoning code
8 amendments to implement the resolution. *Id.* Relatedly, in June 2016, the city
9 adopted a new comprehensive plan, the 2035 Comprehensive Plan (2035 PCP).
10 The 2035 PCP includes a new policy, Policy 6.48, which states that it is city
11 policy to “[l]imit fossil fuel distribution and storage facilities to those necessary
12 to serve the regional market.”⁵ Record 3317.

⁵ The 2035 PCP is not effective until January 1, 2018, although the city’s decision cites it as “guidance.” In this opinion, unless otherwise noted, we will use “PCP” to refer and cite to the version of the acknowledged comprehensive plan in effect when the city council adopted the zone amendments challenged in this appeal.

Policy 6.48 does not define “regional” market, and neither does the city’s decision. Because resolving the issues raised in this appeal requires terminology with some geographic precision, we will attempt to use the term “local” to describe the city of Portland and its larger urban area (essentially the Metro region or urban growth boundary), plus small areas of southwest Washington that rely on the city’s FFTs to meet local demand for fossil fuels. Record 339. We will use the term “regional” to describe the larger area currently served by transloading via the city’s FFTs and the in-state Kinder Morgan pipeline, which apparently includes 90 percent of the state of Oregon. We will use “state,” “statewide” or “intrastate” to refer to the market

1 Pursuant to Resolution 37168, BPS developed a draft of proposed zoning
2 code amendments (proposed draft). The proposed draft prohibited FFTs
3 citywide, and made existing FFTs nonconforming uses. The proposed draft
4 defined FFT in part to include facilities with a storage facility of five million
5 gallons. The city Planning and Sustainability Commission (PSC) held hearings
6 on the proposed draft, and approved modifications resulting in the
7 recommended draft. The PSC recommended draft also prohibited new FFTs
8 but allowed up to a 10 percent expansion of existing FFTs, if in conjunction
9 with tank replacement for seismic and safety upgrades. The recommended
10 draft also modified the proposed definition of FFT to include facilities with a
11 storage facility of only two million gallons, in order to capture FFT storage
12 facilities sized to handle a “unit train,” which is a uniform trainload of a single
13 commodity (*e.g.*, coal) designed to be transloaded to other shipping modes as a
14 single unit.⁶ Expanding the scope of the definition of FFT to include facilities
15 with as little as two million gallons of storage capacity captures an additional
16 24 smaller facilities in the Portland area, in addition to the 11 larger terminals
17 that were the subject of the proposed draft. Record 55.

represented by the entire state of Oregon. We will also refer to “interstate” and “international” markets, which have their obvious meanings.

⁶ The OFP defines a “rail unit train[]” as a “train of a specified number of railcars handling a single commodity type which remain as a unit for a designated destination or until a change in routing is made.” OFP E-3; App-1205; *see* discussion under the ninth assignment of error, below.

1 The city council held hearings on the PSC recommended draft on
2 November 10 and 16, 2016. The city council voted to adopt the PSC
3 recommended draft, with seven changes. The changes included eliminating the
4 proposal to allow a 10 percent expansion of existing terminals. On December
5 14, 2016, the city council adopted the recommended draft, as amended, as
6 Ordinance No. 188142. This appeal followed.

7 **JURISDICTION**

8 Riverkeeper argues that if LUBA concludes that FFTs are
9 “transportation facilities” as petitioners contend, then the consequence is that
10 LUBA lacks jurisdiction over the appeal of the FFT amendments pursuant to
11 ORS 197.015(10)(b)(D), which excludes from the definition of “land use
12 decision” a decision that determines the “operation, maintenance, repair or
13 preservation of a transportation facility that is otherwise authorized by and
14 consistent with” the comprehensive plan and city code. We reject the
15 argument. The exclusion at ORS 197.015(10)(b)(D) encompasses technical
16 decisions regarding operation, maintenance etc., of transportation facilities that
17 are planned and authorized under the plan and zoning code. The exclusion
18 does not encompass decisions that adopt or modify plan or zoning code text
19 regarding transportation facilities.

20 **STANDARD OF REVIEW**

21 As all parties recognize, the challenged decision is a legislative decision
22 that amends the city’s land use regulations. Because it is a legislative decision,

1 principles of preservation that would govern a quasi-judicial decision, *e.g.*, the
2 “raise it or waive it” requirements of ORS 197.763(1), do not apply. In
3 addition, a local government is not necessarily required to adopt findings
4 supporting a legislative decision; nonetheless the record on appeal must be
5 sufficient to demonstrate that “required considerations were indeed
6 considered.” *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12,
7 16 n 6, 38 P3d 956 (2002).

8 PCC 33.835.040(A) provides that:

9 “Text amendments to the zoning code must be found to be
10 consistent with the Comprehensive Plan, Urban Growth
11 Management Functional Plan, and the Statewide Planning Goals.
12 In addition, the amendments must be consistent with the intent or
13 purpose statement for the base zone, overlay zone, plan district,
14 use and development, or land division regulation where the
15 amendment is proposed, and any plan associated with the
16 regulations * * *.”

17 LUBA’s standard of review of a decision that amends a local
18 government’s land use regulations is subject to ORS 197.835(7), which
19 provides:

20 “[LUBA] shall reverse or remand an amendment to a land use
21 regulation or the adoption of a new land use regulation if:

22 “(a) The regulation is not in compliance with the comprehensive
23 plan; or

24 “(b) The comprehensive plan does not contain specific policies
25 or other provisions which provide the basis for the
26 regulation, and the regulation is not in compliance with the
27 statewide planning goals.”

1 In addition, ORS 197.835(9) provides that LUBA shall reverse or remand a
2 land use decision if LUBA finds that the local government “[i]mproperly
3 construed the applicable law,” or “[m]ade an unconstitutional decision[.]”
4 ORS 197.835(9)(a)(D) and (E).

5 Finally, under ORS 197.829, LUBA must affirm a governing body’s
6 interpretation of its comprehensive plan or land use regulations, unless the
7 interpretation is inconsistent with the express language, purpose or policy
8 underlying the local legislation under interpretation, or the interpretation is
9 contrary to a statewide planning goal, statute, or administrative rule that the
10 local legislation implements.⁷

⁷ ORS 197.829 provides:

- “(1) [LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:
- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
 - “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
 - “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
 - “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.

1 **ORGANIZATION OF THIS OPINION**

2 Petitioners and WWC advance a number of overlapping assignments of
3 error, arguing that the FFT amendments are inconsistent with city
4 comprehensive plan provisions, statewide planning goals, Metro regional plan
5 provisions, and statewide transportation plans. Petitioners and WWC also
6 argue that the FFT amendments violate the dormant Commerce Clause of the
7 United States Constitution.

8 As discussed below, we conclude under petitioners’ ninth assignment of
9 error that the FFT amendments violate the dormant Commerce Clause of the
10 United States Constitution. OAR 661-010-0071 provides that LUBA shall
11 reverse a land use decision when the Board finds that the decision is
12 unconstitutional. Accordingly, reversal is the appropriate disposition.
13 However, given the likelihood that LUBA’s opinion is not the last stop on the
14 appellate ladder, and to minimize potential for multiple trips up and down that
15 ladder, we deem it appropriate to also resolve challenges to the city’s decision
16 under local, regional and statewide standards. Additionally, in our view, those
17 challenges inform the analysis under the dormant Commerce Clause.

“(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct.”

1 We address the local, regional and statewide standards roughly in that
2 order. As discussed below, we sustain some of the challenges under local and
3 state standards. In ordinary circumstances, sustaining such challenges would
4 result in remand to the city for additional evidence or consideration. However,
5 in the present circumstances our resolution of those challenges is necessarily, if
6 unfortunately, somewhat advisory.

7 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**
8 **SECOND ASSIGNMENT OF ERROR, Subsection (iii) (WWC)**

9 These assignments and sub-assignments of error concern whether the
10 FFT amendments are consistent with the Portland Comprehensive Plan (PCP)
11 and subordinate plans, including the city’s Transportation System Plan (TSP),
12 the city’s Freight Master Plan (FMP), and the Guild’s Lake Industrial
13 Sanctuary Plan (GLISP), an industrial area within the city of Portland that
14 includes most of the existing fossil fuel terminals affected by the FFT
15 amendments.

16 **A. PCP Policies**

17 Petitioners and WWC argue that the city’s decision is inconsistent with a
18 number of PCP goals and policies, which generally require the city to support
19 its industrial areas and its multimodal and intermodal freight system.⁸ The city

⁸ Petitioners and WWC cite PCP Goal 5 (Economic Development), Policy 5.1, Objective C; Policy 5.4; Policy 5.4, Objective A; Policy 5.12; PCP Goal 6 (Transportation), Policy 6.9, Objective A; Policy 6.18; Policy 6.29; and Policy 6.31.

1 adopted findings addressing consistency with the PCP goals and policies it
2 deemed relevant, which include almost all of the PCP goals and policies that
3 petitioners and WWC cite.

4 The city and Riverkeeper respond that petitioners and WWC fail to
5 demonstrate that the city erred in concluding that the FFT amendments are
6 consistent with the applicable PCP goals and policies. For most of the cited
7 PCP goals and policies, we agree with respondents. Most of the cited PCP
8 goals and policies are generally worded expressions of support for the city's
9 industrial areas and multimodal transportation facilities. The city council
10 adopted findings addressing most of the cited PCP goals and policies.
11 Petitioners and WWC disagree with the city council's findings of consistency,
12 and invite us to second guess those conclusions. However, given the generally-
13 worded language of most of the goals and policies at issue, and the leeway a
14 governing body has in balancing and weighing consistency of a zoning text
15 amendment with a variety of sometimes competing policy objectives,
16 petitioners and WWC must do more than simply disagree with the city's
17 conclusions. Petitioners and WWC must demonstrate that the city council
18 failed to meaningfully consider a reasonably specific and pertinent PCP goal or
19 policy.

20 We have considered petitioners' and WWC's challenges to the county's
21 findings regarding consistency with PCP goals and policies, and for the most

1 part reject them without further discussion. In our view, only two challenges
2 warrant further review.

3 PCP Policy 5.1, Objective C, is to “[r]etain industrial sanctuary zones
4 and maximize use of infrastructure and intermodal transportation linkages with
5 and within these areas.” PCP 5-1; App-3. Petitioners and WWC argue that
6 prohibiting new and expanded FFTs is clearly inconsistent with
7 “maximiz[ing]” intermodal transportation linkages.

8 The city’s finding addressing consistency with PCP Policy 5.1, Objective
9 C does not address the objective to “maximize * * * intermodal transportation
10 linkages.” After paraphrasing the language of Policy 5.1 and Objective C, the
11 city’s findings state:

12 “The zoning code amendments support this policy and objectives
13 and will not affect the City’s supply of land for economic
14 development and employment growth because there are no
15 changes proposed to the Comprehensive Plan or Zoning Map that
16 will impact the overall size or intensity of development in the
17 industrial areas of Portland.” Record 9.

18 The city appears to conclude that the FFT amendments are consistent with
19 Objective C as long as the amendments do not affect the *supply* of land zoned
20 for economic or industrial use. However, that finding is not responsive to the
21 language of Objective C. It is not clear to us what land supply has to do with
22 the obligation to “maximize use of infrastructure and intermodal transportation
23 linkages” with and within industrial sanctuaries. On its face, prohibiting new
24 and expanded intermodal fossil fuel transportation facilities appears to be

1 inconsistent with the objective of “maximiz[ing] * * * intermodal
2 transportation linkages” in “industrial sanctuaries.” It is an apparent
3 inconsistency that, in our view, requires some analysis and a direct explanation,
4 both of which are missing from the city’s decision, the record, and the
5 respondents’ briefs on appeal.

6 Second, PCP Policy 5.4, Objective A is to

7 “Support multimodal freight transportation improvements to
8 provide competitive regional access to global markets and
9 facilitate the efficient movement of goods and services in and out
10 of Portland’s major industrial and commercial districts. Ensure
11 access to intermodal terminals and related distribution facilities to
12 facilitate the local, national, and international distribution of goods
13 and services.” PCP 5-2; App-4.

14 Petitioners and WWC argue that prohibiting new and expanded FFTs is
15 inconsistent with the obligation to “[s]upport multimodal freight transportation
16 improvements to provide competitive regional access to global markets and
17 facilitate the efficient movement of goods and services in and out of Portland’s
18 major industrial” districts.

19 The city adopted no findings addressing Policy 5.4, Objective A. In its
20 brief, the city argues that the record demonstrates that the amendments are
21 consistent with Policy 5.4, Objective A because the amendments exempt
22 multimodal terminals that handle the growing markets for aviation fuel and
23 non-fossil fuels, and further because the amendments do not restrict existing
24 FFTs from increasing throughput. However, the city’s explanations on appeal
25 are insufficient to demonstrate that “required considerations were indeed

1 considered.” *Citizens Against Irresponsible Growth*, 179 Or App at 16 n 6. As
2 explained elsewhere in this opinion, one of the city’s stated purposes of the
3 FFT amendments is to effectively prohibit the siting of fossil fuel export
4 terminals in the city. It is difficult to square that purpose with the policy
5 objective of supporting “multimodal freight transportation improvements to
6 provide competitive regional access to global markets and facilitate the
7 efficient movement of goods and services in and out of Portland’s major
8 industrial” districts. Had the city adopted findings addressing Policy 5.4,
9 Objective A, it might be able to explain why the FFT amendments are
10 consistent with this objective. However, the city’s decision did not address
11 Objective A, there is no evidence that the city in fact considered that objective,
12 and the city’s attempt to demonstrate consistency on appeal falls short of
13 demonstrating consistency with the objective. That the city’s code as amended
14 continues to allow new or expanded terminals for aviation fuel or non-fossil
15 fuels does nothing to demonstrate that prohibiting new or expanded fossil fuel
16 terminals is consistent with Objective A. Further, the city cites no evidence
17 supporting its assertion that existing FFTs have the excess capacity or ability to
18 increase throughput to meet any increased demand for fossil fuels in local,
19 regional, statewide, interstate, or international markets.

20 **B. Guild’s Lake Industrial Sanctuary Plan (GLISP)**

21 Most of the city’s large FFTs are located within the Guild’s Lake
22 Industrial Sanctuary Plan (GLISP) area. The introduction to the GLISP notes

1 that the sanctuary is “equipped with intermodal transportation facilities that
2 enable it to serve the nation, the Pacific Rim and other worldwide markets.
3 The [sanctuary’s] businesses and facilities help make Portland the leading
4 exporter in the state, and Oregon one of the top ten exporting states in the
5 country.” GLISP 6; App-103. The GLISP is incorporated into the city’s
6 comprehensive plan, and the city does not dispute that PCC 33.835.040(A)
7 requires the city to demonstrate that the FFT amendments are consistent with
8 the GLISP. However, the city adopted no findings addressing consistency with
9 the GLISP.

10 As relevant here, the GLISP includes three policies, each of which is
11 refined by a number of objectives. Petitioners argue that the FFT amendments
12 are inconsistent with these three GLISP policies and objectives. We address
13 each in turn.

14 **1. Policy 1, Objective 2**

15 GLISP Policy 1 (Jobs and Economic Development), Objective 2 is to:

16 “Maintain and expand industrial business and employment
17 opportunities in the Guild’s Lake Industrial Sanctuary. Stimulate
18 investment in the area’s public and private infrastructure and
19 industrial facilities.

20 “Objective 2: Foster a business and policy environment that
21 promotes continued private and public sector investments in
22 infrastructure, facilities, equipment and jobs.” GLISP 34; App-
23 131.

24 Petitioners and WWC argue that the FFT amendments fail to foster a business
25 environment that promotes continued investment in infrastructure and facilities

1 within the sanctuary, because it discourages continued investments in the
2 sanctuary's FFTs, which are a significant component of the sanctuary,
3 occupying approximately 242 acres. Record 331.

4 The city responds that while the FFT amendments limit one type of
5 industrial use, the amendments do not affect the industrial land supply within
6 the sanctuary. Further, the impacts of the amendments are moderated by
7 exempting new and expanded terminals handling the growing market in non-
8 fossil fuels. The city argues that nothing in Policy 1, Objective 2 requires the
9 city to allow the unlimited expansion of any one particular land use.

10 While it is certainly true that Policy 1, Objective 2 does not require the
11 city to allow unlimited expansion of existing industrial land uses in the
12 sanctuary, Objective 2 does require the city to foster a policy environment that
13 promotes *continued* private investment in the sanctuary. Arguably, that
14 requires the city to protect the ability of existing industrial uses in the sanctuary
15 to expand, or at least consider that objective balanced against other policy
16 objectives. But we do not know how the city council views Objective 2, or
17 how it would balance it against other policy objectives, because the city
18 adopted no findings addressing Objective 2, and apparently gave no
19 consideration to whether the amendments are consistent with the GLISP. The
20 city's arguments on appeal are insufficient to establish that these required
21 considerations were indeed considered.

1 **2. Policy 2, Objective 1**

2 GLISP Policy 2 (Transportation), Objective 1 is to:

3 “Maintain, preserve and improve the intermodal and multimodal
4 transportation system to provide for the smooth movement of
5 goods and employees into and through the Guild’s Lake Industrial
6 Sanctuary.

7 “Objective 1: Maintain, protect, and enhance the public and
8 private transportation investments in the [sanctuary], including rail
9 and marine terminal facilities, to ensure its continued viability as a
10 major center for the import and export of industrial products in the
11 State of Oregon.” GLISP 38; App-135.

12 Petitioners and WWC argue that prohibiting new and expanded FFTs in the
13 sanctuary fails to protect and enhance rail and marine terminal facilities in the
14 sanctuary, and reduces the sanctuary’s viability as a major center for fuel
15 imports and exports.

16 The city responds that Policy 2, Objective 1 is not particularly concerned
17 with fuel terminals, and does not require the city to allow unlimited expansion
18 of existing fuel terminals. The city also argues that the FFT amendments do
19 not limit the ability of existing FFTs to increase throughput via efficiency or
20 other measures.

21 However, Policy 2, Objective 1 requires the city to maintain, protect and
22 *enhance* private transportation investments, with particular emphasis on rail
23 and marine terminals, and does not exclude fossil fuel terminals from the scope
24 of the objective. Further, Objective 1 states that the purpose of maintaining,
25 protecting and enhancing such investments is to ensure the sanctuary’s

1 “continued viability as a major center for the import and export of industrial
2 products in the State of Oregon.” As explained elsewhere in this opinion, one
3 purpose of the FFT amendments is to preclude new or expanded fossil fuel
4 export terminals within the city. That purpose seems difficult to square with
5 the language of Policy 2, Objective 1, and in its decision, the city council did
6 not even make the attempt.

7 The city’s attempt on appeal to articulate a demonstration of consistency
8 with Policy 2, Objective 1 falls far short. As noted, the city cites no evidence
9 that the existing terminals have the capacity or ability to increase throughput
10 without expansion of storage or transloading capacity.

11 **3. Policy 3, Objective 7**

12 GLISP Policy 3 (Land Use), Objective 7 is to:

13 “Preserve and protect land primarily for industrial uses, and
14 minimize land use conflicts in the Guild’s Lake Industrial
15 Sanctuary. Allow compatible nonindustrial uses within the
16 [sanctuary] that provide retail and business services primarily to
17 support industrial employees and business.

18 “Objective 7: Preserve the [sanctuary’s] Willamette River
19 waterfront as a location for river-dependent and river-related
20 uses.” GLISP 42; App-139.

21 WWC argues that approximately 242 acres of the industrial sanctuary are
22 occupied by waterfront FFT’s that depend in part on marine transportation.
23 Because those sites are already committed to use as fossil fuel terminals, and
24 the amendments prohibit any expansion of those FFTs, WWC argues that the

1 amendments effectively fail to preserve the GLISP's river waterfront as a
2 location for river-dependent and river-related uses.

3 The city responds that the focus of Policy 3 and its objectives is on
4 protecting industrial uses within the sanctuary from competition with non-
5 industrial uses. According to the city, restricting expansion of one type of
6 river-dependent and river-related industrial use is not inconsistent with Policy
7 3, Objective 7, because the waterfront will remain available for other types of
8 river-dependent and river-related industrial uses.

9 We understand WWC to argue that the city ignores practical reality if it
10 expects that potential expansion areas of existing waterfront FFTs, which are
11 massively committed to fossil fuel operations, will be developed or
12 redeveloped with other types of water-dependent industrial uses.

13 The city is correct that Policy 3 and Objective 7 are focused on
14 preserving industrial areas from non-industrial development, and preserving
15 waterfront for river-dependent and river-related uses, and are not expressly
16 concerned with preserving existing types of river-dependent industrial uses
17 against competition with other types of river-dependent industrial uses. WWC
18 is also probably correct that it is optimistic to expect that prohibiting expansion
19 of existing waterfront FFTs will simply result in displacing one type of river-
20 dependent industrial use with another. The practical result may well be that the
21 sanctuary's waterfront will be underutilized, compared to its potential.
22 However, while that result might be inconsistent with some other GLISP policy

1 or objective, we agree with the city that it does not appear to offend Policy 3,
2 Objective 7.

3 Petitioners' sixth and seventh assignments of error are sustained in part.
4 WWC's Second Assignment of Error, Subsection (iii), is sustained in part.

5 **FIFTH ASSIGNMENT OF ERROR**
6 **SECOND ASSIGNMENT OF ERROR, Subsection (ii) (WWC)**

7 These assignments and sub-assignments of error concern whether the
8 FFT amendments are consistent with the plans adopted by the Metro regional
9 government.

10 PCP Goal 1 requires that the city comprehensive plan shall "support
11 regional goals, objectives and plans adopted by" Metro. PCP 1-1; App-1. The
12 Metro Regional Framework Plan (Framework Plan) is Metro's overarching
13 plan for the region. It is implemented by several sub-plans, including the
14 Metro Regional Transportation Plan (Transportation Plan). The Transportation
15 Plan in turn is implemented by the Metro Regional Transportation Functional
16 Plan (Functional Plan). Petitioners and WWC argue that the city's decision is
17 inconsistent with several goals, objectives and vision statements in either the
18 Framework or Transportation Plan. At one point in the petition for review,
19 petitioners refer to the Functional Plan, but all cites to specific language are to
20 either the Metro Framework or Transportation Plans.

21 Initially, the city argues that the PCP Goal 1 obligation to "support"
22 Metro "plans" does not mean that the city must evaluate whether the FFT
23 amendments are consistent with either the Framework or Transportation Plan.

1 According to the city, Metro *functional* plans are the vehicles that Metro uses
2 to require changes in city and county comprehensive plans. See Framework
3 Plan Policy 7.5.2 (it is the policy of the Metro Council to “[u]se functional
4 plans as the identified vehicle for requiring changes in city and county
5 comprehensive plans in order to achieve consistence and compliance with this
6 Plan”). MRFP 3; R-App-39. The city argues that the city achieves consistency
7 with the Framework Plan by achieving consistency with applicable elements of
8 Metro’s functional plans. As noted, petitioners and WWC do not argue that the
9 FFT amendments are inconsistent with any provision of any Metro functional
10 plan, including the Transportation Functional Plan. Further, the city and
11 Riverkeeper argue that PCP Goal 1 requires only that the city *comprehensive*
12 *plan* support regional goals, objectives and plans; it does not require that city
13 land use regulations provide such support. Respondents note that PCC
14 33.835.040(A) governs zoning text amendments, and expressly requires only
15 that the city evaluate whether the text amendment is consistent with the Metro
16 Urban Growth Management Functional Plan, which the city did. We
17 understand respondents to argue that if the city intended to obligate itself to
18 consider whether a zoning text amendment is consistent with other Metro
19 plans, it knows how to do so, and the omission of that express obligation in
20 PCC 33.835.040(A) should be understood as a deliberate choice.

21 We agree with respondents. Petitioners and WWC have not
22 demonstrated that PCP Goal 1 or any other source of authority cited to us

1 obligates the city to evaluate whether a text amendment to its zoning code is
2 consistent with the Framework or Transportation Plans. Absent a more
3 developed argument, petitioners and WWC’s arguments do not provide a basis
4 to reverse or remand the challenged decision.

5 Petitioners’ fifth assignment of error, and WWC’s second assignment of
6 error, subsection (ii), are denied.

7 **SECOND, THIRD, FOURTH ASSIGNMENTS OF ERROR**
8 **SECOND ASSIGNMENT OF ERROR, Subsection (i) (WWC)**

9 These assignments and sub-assignments of error concern whether the
10 FFT amendments are consistent with state transportation plans and
11 requirements.

12 **A. Background**

13 Statewide Planning Goal 12 (Goal 12) (Transportation) is:

14 “To provide and encourage a safe, convenient and economic
15 transportation system.”

16 Goal 12 generally requires local governments to adopt transportation plans,
17 which among other things must “facilitate the flow of goods and services so as
18 to strengthen the local and regional economy[.]”⁹ Goal 12 is implemented by

⁹ Goal 12 continues:

“A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing

1 OAR 660, chapter 012, the Transportation Planning Rule (TPR), one purpose
2 of which is to “[f]acilitate the safe, efficient and economic flow of freight and
3 other goods and services within regions and throughout the state through a
4 variety of modes including road, air, rail and marine transportation[.]” OAR
5 660-012-0000(1)(d). The TPR requires the Oregon Department of
6 Transportation (ODOT), regional governments, and local governments to adopt
7 Transportation System Plans (TSPs), consistent with the standards and
8 requirements set out in the rule. Local TSPs must include an “air, rail, water
9 and pipeline transportation plan which identifies where public use airports,
10 mainline and branchline railroads and railroad facilities, port facilities, and
11 major regional pipelines and terminals are located or planned within the
12 planning area.” OAR 660-012-0020(2)(e).

13 **B. Transportation Facility**

14 Both Goal 12 and its implementing regulations at OAR 660-012-
15 0005(30) define “transportation facilit[y]” as “any physical facility that moves
16 or assist[s] in the movement of people or goods including facilities identified in

differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) *facilitate the flow of goods and services so as to strengthen the local and regional economy*; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.” (Emphasis added.)

1 OAR 660-012-0020 but excluding electricity, sewage and water.” Initially,
2 petitioners argue that under those definitions FFTs are clearly “transportation
3 facilities.” *See also* OAR 660-012-0045(1)(a)(A) (identifying “major regional
4 pipelines and terminals” as transportation facilities). Petitioners contend that in
5 its findings the city failed to recognize that FFTs are transportation facilities for
6 purposes of Goal 12 and the Goal 12 rule, and hence failed to address the
7 impacts of the amendments on the FFTs themselves.¹⁰

8 The city responds that a “transportation facility” as defined in Goal 12
9 and the Oregon Transportation Planning Rule (TPR) does not include a storage
10 facility, such as a warehouse. That may be the case, but we do not understand
11 the city to dispute that the scope of “transportation facility” includes intermodal
12 facilities that transfer persons or cargo from one transportation mode to

¹⁰ The city council did not adopt findings addressing Goal 12 itself, but adopted findings addressing a section of the TPR, OAR 660-012-0060 (discussed below) and PCP Goal 6, Transportation. The findings addressing OAR 660-012-0060 are quoted in n 14, below. The only finding that appears to address impacts on the existing terminals themselves is as follows:

“These amendments create a new land use category, but impose prohibitions and limits that restrict the level of development to less than what is allowed under the current standards. The zoning code currently allows Bulk Fossil Fuel Terminals as a Warehouse and Freight Movement use without any limits on the size of terminals. The amendments will prohibit new terminals and limit the expansion of existing terminals.” Record 20.

1 another.¹¹ As defined by PCC 33.920.300, the category of FFT includes
2 facilities that engages in both the transport *and* the bulk storage of fossil fuels.
3 Therefore, the FFTs subject to the amendments are “transportation facilities,”
4 because they move or assist in the movement of goods, notwithstanding that
5 they also involve storage of fossil fuels.

6 Petitioners are correct that the city’s findings do not appear to recognize
7 that the existing FFTs are “transportation facilities,” for purposes of evaluating
8 compliance with Goal 12 and the TPR. However, the city’s failure to adopt
9 findings directly addressing impacts on existing FFTs as transportation
10 facilities is not, in itself, reversible error. The question is whether the decision
11 and record demonstrate that the amendments comply with the substantive
12 requirements of the goal and rule. *See* n 7. We first turn to the parties’
13 arguments under the TPR, and then to Goal 12 and state-level plans such as the
14 Oregon Transportation Plan (OTP) and Oregon Freight Plan (OFP).

15 **C. Transportation Planning Rule (TPR)**

16 OAR 660-012-0060, part of the Oregon Transportation Planning Rule
17 (TPR) implementing Goal 12, requires that local governments determine

¹¹ The city may be correct that the natural gas facility located in the city’s northwest industrial district may not constitute a “transportation facility” as defined in Goal 12 and the TPR, if it merely functions as a peak storage facility for natural gas that arrives and leaves the site by same modality (pipeline). However, an intermodal facility, such as an airport or freight transloading terminal, *etc.*, is clearly a “transportation facility” within the meaning of Goal 12 and the TPR.

1 whether an amendment to a land use regulation would “significantly affect an
2 existing or planned transportation facility” in one of three ways and, if so,
3 adopt one or more measures to offset the significant effect.¹²

4 **1. Change the Functional Classification of a Transportation**
5 **Facility**

6 Two of the three ways in which a local government plan or zoning
7 amendment can “significantly affect” a transportation facility involves changes
8 to functional classification or the standards implementing a functional
9 classification system. If the amendment does significantly affect a
10 transportation facility, OAR 660-012-0060(2) requires the local government to
11 adopt one or more measures.¹³ Among the possible measures listed are to

¹² OAR 660-012-0060(1) provides, in relevant part:

“If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule * * *. A plan or land use regulation amendment significantly affects a transportation facility if it would:

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

“(b) Change standards implementing a functional classification system[.]”

¹³ OAR 660-012-0060(2) provides, in part:

1 amend the local transportation system plan to modify the planned function of a
2 transportation facility. OAR 660-012-0060(2)(c).

3 The city council adopted findings concluding that the FFT amendments
4 do not significantly affect any transportation facility in any of the three ways
5 described in OAR 660-012-0060(1).¹⁴ The findings state, in so many words,

“If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, * * *.

“(a) Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.

“* * * * *

“(c) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.”

¹⁴ The city council’s findings state, in relevant part:

“a. These amendments do not change the functional classification of an existing or planned transportation facility, nor change standards that implement a functional classification system.

“b. These amendments create a new land use category, but impose prohibitions and limits that restrict the level of development to less than what is allowed under the current standards. The zoning code currently allows Bulk Fossil Fuel Terminals as a Warehouse and Freight Movement use without any limits on the size of terminals. The amendments

1 that the amendments do not change the functional classification of an existing
2 or planned transportation facility, or change standards that implement a
3 functional classification system.

4 As explained above, intermodal FFTs are a type of “transportation
5 facility” within the meaning of the TPR and OAR 660-012-0060. Petitioners
6 contend that the city’s findings of compliance with OAR 660-012-0060 focus
7 exclusively on impacts to roads and similar types of transportation facilities,
8 and do not evaluate the impacts of the amendments on existing and future FFTs
9 themselves.

will prohibit new terminals and limit the expansion of existing terminals.

- “c. Given the new prohibitions and limits on expansion, the amendments will not reduce or worsen the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan.
- “d. For the same reason, these changes will not have a significant effect on existing or planned transportation facilities because the proposed amendments are minor changes to the allowed uses in industrial uses, and will not increase development intensity in a manner that will be inconsistent with the function or classification of existing transportation facilities or increase automobile traffic.
- “e. There are not changes proposed to the Comprehensive Plan or Zoning Map that will impact the overall size or intensity of development in the industrial areas of Portland.” Record 20.

1 According to petitioners, the amendments “significantly affect” FFTs
2 within the meaning of the meaning of OAR 660-012-0060(1), because the
3 amendments effectively change (1) the functional classification of an existing
4 or planned transportation facility, or (2) the standards implementing a
5 functional classification system. Petitioners argue that PCP Transportation
6 Goal 6.9 and the city’s Freight Master Plan (FMP) provide a functional
7 classification system for freight infrastructure, which includes a system of
8 freight roads as well as “freight facilities,” a classification that includes marine
9 terminals, intermodal rail yards, airports and pipeline terminals.¹⁵ Petitioners

¹⁵ PCP Goal 6.9, entitled “Freight Classification Descriptions,” is to “[d]esignate a system of truck streets, railroad lines, and intermodal freight facilities that support local, national, and international distribution of goods and services.” PCP 6-11; App-19. PCP Goal 6.9(I) describes “Freight Facilities,” and states that “Freight Facilities include the major shipping and marine, air, rail and pipeline terminals that facilitate the local, national, and international movement of freight.” PCP 6-12; App-20.

The FMP states:

“Portland relies on a multimodal classification system to describe the design and function of a street or other transportation facility. There are seven classification categories: Traffic, Transit, Pedestrian, Bicycle, Freight, Emergency Response, and Street Design. When funding, designing, or operating a facility all model classifications are considered.

“Portland’s freight system is comprised of streets, rail lines, and freight facilities including marine terminals, intermodal rail yards, airports, and pipeline terminals. [PCP] Policy 6.9 describes each of the freight system classifications in the hierarchy. The

1 argue that in reclassifying FFTs from the general land use category of
2 “Warehouse and Freight Movement,” formerly allowed without any limit on
3 size or function, to a new land use category (FFT) subject to prohibitions on
4 new terminals and the expansion of existing terminals, the city’s decision
5 effectively changed the city’s freight functional classification system, and the
6 standards implementing the city’s freight functional classification system.

7 The city and Riverkeeper respond that a zoning code amendment that
8 merely adds a new land use category to distinguish one sub-type of freight
9 facility from others does not change the functional classification of that facility,
10 or the standards that determine the functional classification of any facility,
11 within the meaning of OAR 660-012-0060(1).

12 The TPR does not define the term “functional classification,” and as far
13 as we are informed, neither city nor state transportation plans define the term.
14 As applied to transportation facilities such as roads and streets, the term
15 “functional classification” appears to refer to a scheme that sorts the universe
16 of such facilities into a hierarchical classification scheme, *e.g.*, highway,
17 arterial, collector, local street, *etc.*, and assigns different function, capacity,
18 mobility, or access standards to each classification.

classifications correspond to land use activities. For classifying network features, freight movement is divided into two broad categories: industrial-serving and commercial delivery of goods and services.” FMP 21; App-268.

1 Portions of the city’s freight classification system described in PCP Goal
2 6.9 and FMP at pages 21-23 (App-268-70) are similar to the typical
3 hierarchical classification system used for roads and streets. FMP Table 3 lists
4 “Freight Classification by Activity Type,” and describes a hierarchical and
5 interrelated system of truck roads: regional truckway, priority truck street,
6 major truck street, truck access street, local truck street, and freight district.
7 FMP 22; App-269. Each of these classifications serves a distinct function
8 within the city’s freight transportation system, and appears to be subject to
9 different standards. It would be no stretch to describe the portion of the city’s
10 freight classification system that concerns truck roads as a functional
11 classification system, for purposes of OAR 660-012-0060.

12 FMP Table 3 also lists three other types of freight classifications, but
13 these classifications are isolated from the truck road classifications, and do not
14 possess the same hierarchical character as the truck road system described
15 above. FMP 22; App-269. One such stand-alone classification is for “Freight
16 Facilities,” which as noted lumps together the major marine terminals, airport,
17 railyards, and intermodal facilities that are located in Freight Districts. The rest
18 of the FMP includes almost no discussion of the Freight Facilities
19 classification, and there appear to be no standards or functional distinctions
20 among the various sub-types of freight facilities.

21 We understand petitioners to argue that the FFT amendments effectively
22 modify the functional classification of Freight Facilities, creating a new sub-

1 classification in order to distinguish the function of FFTs from other intermodal
2 terminals. According to petitioners, the amendments are intended to restrict
3 existing FFTs to serve only “regional” needs for fossil fuels, *see* n 5, consistent
4 with the intent of PCP Policy 6.48, and to preclude new or expanded terminals
5 that might serve an interstate or international market, for example, a coal or
6 propane export terminal. Freight transloading facilities that serve other bulk
7 commodities, including non-fossil fuels, are allowed to site new facilities or
8 expand existing ones, and the city has expressed no intent to restrict the
9 function of such non-FFT facilities to serve only regional needs. We
10 understand petitioners to argue that the creation of these distinctions among
11 freight facilities constitute a *de facto* “[c]hange [in] the functional classification
12 of an existing or planned transportation facility” for purposes of OAR 660-012-
13 0060(1). Accordingly, petitioners argue, the city must adopt one or more of the
14 measures listed in OAR 660-012-0060(2), such as amending its TSP and FMP
15 to expressly modify the planned function of FFTs, to reflect the change from
16 unrestricted to restricted fossil fuel transportation facilities.

17 We disagree with petitioners that the FFT amendments “change the
18 functional classification” of Freight Facilities or FFTs, within the meaning of
19 OAR 660-012-0060(1). Although the classification of Freight Facilities exists
20 within what appears to constitute a functional classification system, it is a
21 stand-alone classification, lacking the kind of hierarchical, relational
22 connections exhibited by the truck road classifications. Within the

1 classification of Freight Facilities, the various facilities are lumped together
2 indiscriminately, with no functional distinctions among them. No standards
3 appear to apply to distinguish one type of freight facility from another. While
4 the FFT amendments introduce some distinctions between FFTs and other
5 types of freight facilities, those distinctions serve normative purposes
6 extraneous to a functional classification system, and do not have the effect of
7 creating a functional classification system for freight facilities, as petitioners
8 argue. Accordingly, we agree with respondents that the city did not err in
9 concluding that the FFT amendments do not change the functional
10 classification system for any transportation facility, within the meaning of OAR
11 660-012-0060(1).

12 **2. Degrade the Performance of a Transportation Facility**

13 The third, and more common way, in which an amendment can
14 significantly affect a transportation facility is described in OAR 660-012-
15 0060(1)(c), which generally concerns impacts of increased traffic levels
16 generated by uses allowed under the amendment on the function or
17 performance of transportation facilities.¹⁶ Petitioners argue that by prohibiting

¹⁶ OAR 661-012-0060(1)(c) provides that an amendment significantly affects a transportation facility if it would:

“Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP * * *.

1 the expansion of existing FFTs and siting of new FFTs, increased regional
2 demand for fossil fuel transportation projected by city and state transportation
3 plans will have to be met by increased levels of truck traffic. According to
4 petitioners, increased levels of truck traffic on freight roads and streets could
5 significantly affect the function, capacity or performance of such facilities in
6 one of the ways described in OAR 660-012-0060(1)(c)(A)-(C). For example,
7 petitioners cite to testimony that the aviation fuel supply chain relies on FFTs,
8 and that demand for aviation fuel will increase by more than 50 percent by
9 2035, requiring new FFTs for aviation fuel. Record 487. Petitioners argue that
10 by prohibiting the expansion or siting of new FFTs, the amendments will force
11 aviation fuel trucks to drive from out of state and along surface roads,
12 including Airport Way, to deliver fuel directly to the Portland International
13 Airport, which may cause increased levels of truck traffic that would
14 significantly affect the function or performance of Airport Way. We do not

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

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

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

1 know, petitioners argue, because the city made no effort to evaluate the effects
2 of increased truck traffic on city roads and streets that may be indirectly caused
3 by restricting new and expanded FFTs.

4 The city and Riverkeeper respond that petitioners' arguments regarding
5 impacts of increased truck traffic on city freight roads are entirely speculative.
6 Riverkeeper also notes that in response to testimony regarding aviation fuel
7 supply, the city council exempted facilities storing or transloading aviation fuel
8 from any restrictions. Riverkeeper argues that that exemption eliminated the
9 only specific example of potential impacts on city roads that petitioners
10 identify.

11 We agree with respondents that petitioners' arguments do not provide a
12 basis for reversal or remand. OAR 660-012-0060(1)(c) generally concerns
13 circumstances where a proposed plan or zoning amendment has the effect of
14 increasing land development potential, causing increased traffic generation
15 compared to the unamended plan or zoning regulation. In that circumstance,
16 local governments are required to evaluate impacts of traffic generated under
17 the increased development potential on *affected* transportation facilities. In the
18 present case, the FFT amendments effectively freeze the development capacity
19 of FFTs at current levels. This is not the type of amendment that could directly
20 cause increased traffic compared to the unamended zoning regulations (which
21 allowed unrestricted expansion or siting of FFTs). Essentially the FFT
22 amendments downzone the development potential within the city's industrial

1 districts, as the city's findings conclude. Petitioners argue, however, that by
2 effectively restricting one mode of fossil fuel transportation in the city, the
3 amendments will indirectly cause future fuel demand to be met entirely by
4 other modes, such as tanker trucks, which will cause increased levels of truck
5 traffic over that anticipated in the city's transportation plans, which in turn
6 might be inconsistent with the planned function or performance of some city
7 freight routes.

8 However, we do not think that OAR 660-012-0060(1)(c) requires the
9 city to evaluate the possibility that downzoning the intensity of one particular
10 type of land use at one location in the city may indirectly cause compensatory
11 development and related traffic generation elsewhere in the city. For example,
12 an amendment that restricts potential for commercial development on one
13 property need not be supported by an evaluation of the possibility that other
14 commercially-zoned sites in the city will meet future commercial demand by
15 intensifying development, causing increased traffic impacts on city streets
16 elsewhere. Further, to meaningfully evaluate impacts on transportation
17 facilities under OAR 660-012-0060(1)(c), the local government must be able to
18 identify the transportation facilities affected by the amendment. Under
19 petitioners' indirect impact approach, that task would be an impossible burden,
20 potentially requiring evaluation of every freight route in the city. Petitioners
21 identify only one specific transportation facility that might be impacted under
22 that indirect approach, but, as Riverkeeper argues, the city adopted exemptions

1 that appear to moot arguments based on that example. Accordingly, we reject
2 petitioners' arguments that the city erred in concluding that the FFT
3 amendments do not significantly affect any facility within the meaning of OAR
4 660-012-0060(1)(c).

5 **D. Statewide Planning Goal 12**

6 As noted above, Goal 12 requires local governments to adopt
7 transportation system plans that “facilitate the flow of goods and services so as
8 to strengthen the local and regional economy[.]” Further, the TPR requires that
9 TSPs “[f]acilitate the safe, efficient and economic flow of freight and other
10 goods and services within regions and throughout the state through a variety of
11 modes including road, air, rail and marine transportation[.]” OAR 660-012-
12 0000(1)(d).

13 Petitioners argue that the FFT amendments violate Goal 12 and the intent
14 of the Goal 12 rule because rather than “[f]acilitate the safe, efficient and
15 economic flow of freight and other goods and services within regions and
16 throughout the state through a variety of modes including road, air, rail and
17 marine transportation,” the amendments instead will impede the flow of fossil
18 fuels within the region and throughout most of the state, by prohibiting the
19 expansion of existing terminals and the siting of new terminals. Similarly,
20 WWC argues that the unique cluster of intermodal transportation facilities
21 along Portland’s industrial waterfront is a critical component of the statewide
22 fossil fuel transportation system. According to WWC, the FFT amendments

1 create a less economic, less convenient, and less safe transportation system by
2 forcing any future expansion of fossil fuel storage and distribution needed to
3 address increased local, regional or statewide demand to be met through small
4 (two million gallon or less) terminals or terminals that use a single mode of
5 transport—trucks.

6 The city responds that because the city has a TSP that is acknowledged
7 to comply with Goal 12, re-examination of compliance with Goal 12 is
8 triggered only if the FFT amendments trigger evaluation under OAR 660-012-
9 0060(1), *i.e.*, the amendments have a significant effect on a transportation
10 facility. We disagree with the city. PCC 33.835.040(A), as well as state law,
11 require that a zoning code amendment be consistent with the Statewide
12 Planning Goals. While OAR 660-012-0060 provides specific and additional
13 standards for certain types of plan and zoning code amendments, nothing in
14 OAR 660-012-0060 or elsewhere cited to us suggests that an amendment is
15 required to comply only with the OAR 660-012-0060. OAR 660-012-0060 is
16 not particularly concerned, for example, with other Goal 12 and TPR
17 requirements intended to “[f]acilitate the safe, efficient and economic flow of
18 freight and other goods and services within regions and throughout the state
19 through a variety of modes including road, air, rail and marine transportation.”
20 The requirements of Goal 12 and other portions of the Goal 12 rule may well
21 apply to a plan or zoning amendment that does not “significantly affect” a

1 transportation facility in one of the three ways specified in OAR 660-012-
2 0060(1)(c). *See* n 16.

3 The city and Riverkeeper next argue that much of Goal 12 and the Goal
4 12 rule are concerned with the adoption of transportation system plans (TSP),
5 and nothing in the goal or rule is triggered by a plan or zoning amendment that
6 does not amend a TSP. However, that is too facile an answer. A local
7 transportation system plan does not exist in a vacuum, but is highly integrated
8 with local zoning and land use schemes. As discussed below, a local
9 transportation system plan is also integrated to some extent with regional and
10 state transportation system plans. A plan or zoning amendment that changes
11 the zoning classification for a specific type of transportation facility,
12 particularly one that has regional and statewide significance, could potentially
13 affect whether the local TSP remains in compliance with applicable Goal 12 or
14 rule requirements that are in addition to those imposed under OAR 660-012-
15 0060. If so, we believe that the local government is obliged to consider that
16 question in adopting the plan or zoning amendment.

17 On the merits, the city and Riverkeeper argue that the FFT amendments
18 are consistent with Goal 12. According to respondents, the amendments do not
19 limit the ability of the city, under its TSP, to facilitate the flow of goods and
20 services throughout the region and state. Respondents argue that the
21 amendments do not expressly limit the quantity of fuel that flows through
22 pipelines or terminals, or the ability of existing terminals to increase

1 throughput to other parts of the state, if that is required, by operating more
2 efficiently. Respondents also note that the amendments include a number of
3 exemptions, for aviation storage facilities, and for facilities handling non-fossil
4 fuels (ethanol, biodiesel, etc.), for which the city anticipates an increasing
5 demand. The amendments also allow new small terminals (less than two
6 million gallons) and fossil fuel terminals served by a single mode—trucking.
7 Given these considerations, respondents argue that the amendments will have
8 only a minimal effect on the flow of fossil fuel through the city’s terminals to
9 the rest of state.

10 The considerations cited by respondents in their briefs might be the kind
11 of considerations that would justify a conclusion that the FFT amendments do
12 not affect the city TSP’s continued compliance with the Goal 12 requirement to
13 facilitate the flow of goods. However, there is no indication in the city’s
14 decision or in the record that the city in fact evaluated such considerations. For
15 example, no findings or evidence are cited to us that the existing terminals have
16 the ability to increase throughput to the region or the rest of the state by
17 adopting more efficient operations. As noted, the city adopted no findings
18 addressing Goal 12 itself (as opposed to OAR 660-012-0060), and there are no
19 findings or analysis cited to us that evaluates the impact of the FFT
20 amendments on the flow of fossil fuel through the city’s terminals to the region
21 and to the rest of the state. As discussed, the city enjoys a commanding
22 geographic and logistical position with respect to the fossil fuel supply for the

1 state of Oregon: the city’s existing FFTs transload or handle 90 percent of the
2 state’s petroleum supply. Record 31. Under these circumstances, we do not
3 believe the city can adopt zoning amendments that restrict FFTs to their
4 existing number and capacity, without at least considering the impact of the
5 amendments on the flow of fossil fuel to the region and the state. Specifically,
6 the city must consider whether the city’s TSP and zoning regulations, post-
7 amendment, continue to comply with the Goal 12 requirement to facilitate the
8 flow of goods and services.

9 **E. Oregon Transportation Plan (OTP)**

10 Petitioners and WWC advance similar arguments based on the Oregon
11 Transportation Plan (OTP) and the Oregon Freight Plan (OFP), which is a
12 component of the OTP. OAR 660-012-0015(3)(a) requires local governments
13 to adopt local TSPs that are consistent with the Oregon TSP. In turn, OAR
14 660-012-0045(1) requires local governments to amend their land use
15 regulations to implement the local TSP. Petitioners argue that the FFT
16 amendments restrict transportation facilities in a manner that cause the city’s
17 zoning regulations to conflict with several OTP goals and policies.

18 Among other OTP goals and policies, petitioners cite to OTP Strategy
19 1.1.2, which is to “[p]romote the growth of intercity bus, truck, air, pipeline and
20 marine services to link all areas of the state with national and international
21 transportation facilities and services.” OTP 47; App-738. OTP Strategy 1.2.2
22 also requires that local governments “[c]oordinate and support the development

1 of intermodal connections between air, marine, pipeline, public transportation,
2 rail and road transportation.” OTP 48; App-739. Further, OTP Policy 3.1 states:
3 “[i]t is the Policy of the State of Oregon to promote an integrated, efficient and
4 reliable freight system involving air, barges, pipelines, rail, ships, and trucks to
5 provide Oregon a competitive advantage by moving goods faster and more
6 reliably to regional, national and international markets.” OTP 54; App-745.
7 Similarly, OTP Goal 7 requires that local governments “remove barriers and
8 bring innovative solutions so the transportation system functions as one
9 system.” OTP 74; App-765.

10 The city responds that because the challenged decision does not amend
11 the city’s TSP, the FFT amendments are not required to be consistent with the
12 OTP. The city notes that the OTP was adopted by the Oregon Transportation
13 Commission (OTC), which explains in a preface to the OTP that it lacks
14 statutory authority to impose OTP goals, policies and performance
15 recommendations on entities other than state agencies.¹⁷

¹⁷ The OTP quotes ORS 184.618(1), which authorizes the Oregon Transportation Commission to develop the OTP to provide a comprehensive, long-range plan for a safe, multimodal transportation system for the state, including aviation, highways, mass transit, pipelines, ports, rails, and waterways, to be used by state agencies and officers to guide and coordinate transportation activities. OTP 34; App-725. The OTP continues:

“ORS 184.618(1) requires state agencies to use the OTP to ‘guide and coordinate transportation activities,’ but it does not give the OTC authority to impose OTP goals, policies and performance recommendations on other than state agencies. However, the OTP

1 The city is correct that nothing cited to us requires that a city zoning
2 code amendment be consistent with the OTP, or applies OTP goals and policies
3 as direct review standards for the challenged FFT amendments. However, it
4 does not follow that OTP goals and policies are completely irrelevant to a
5 zoning code amendment that directly affects key multimodal transportation
6 facility of statewide significance. The FFT amendments do not occur in a
7 vacuum, or concern only local transportation infrastructure. As discussed
8 above, given the nature of the FFT amendments, the city is required to consider
9 whether, post-amendment, the city’s TSP continues to comply with the Goal 12
10 requirement to facilitate the flow of goods and services in the region and state.
11 As the quoted OTP excerpt at n 17 states, the OTP operates within a legal
12 context that includes Goal 12 and the Goal 12 rule. The OTP and the
13 incorporated OFP represent a state-level body of information and policy
14 guidance that speak directly to the state’s interest in maintaining and improving
15 the flow of goods and services throughout the state (and beyond). In essence,
16 the OTP represents the judgment of the highest transportation planning entity
17 in the state about what it means to “facilitate the flow of goods and services.”
18 In considering whether the FFT amendments are consistent with Goal 12, there

operates in the legal context of the State Agency Coordination Program and the Land Conservation and Development Commission’s Transportation Planning Rule which impose additional requirements and authority in the planning process for other jurisdictions. The OTP must also comply with federal legislation.” *Id.*

1 may be no authority that requires the city to apply relevant OTP goals and
2 policies as approval standards; nonetheless, such OTP goals and policies would
3 seem to be pertinent considerations to any such evaluation under Goal 12.

4 **F. Oregon Freight Plan (OFP)**

5 As noted, the Oregon Freight Plan (OFP), adopted in 2011, is an
6 incorporated part of the OTP. The OFP includes a number of projections and
7 estimates regarding demand for freight, including estimates that many areas of
8 the state will experience significant increases in demand for fossil fuels
9 through the year 2035. *See, e.g.*, OFP 47; App-1043 (estimating a compound
10 annual growth rate of 2.3 percent for truck freight of petroleum and natural gas-
11 based products in the state). WWC argues that the OFP estimates contradict
12 the city's apparent presumption, in the findings supporting the FFT
13 amendments, that local and regional demand for fossil fuels will be relatively
14 flat or even decline in the foreseeable future.¹⁸

¹⁸ The city's decision includes the following finding:

“The most recent cargo forecast for Portland Harbor in 2012 projected 1.0% AAG [average annual growth] in liquid bulk tonnage to 2040 as a high scenario and 0.5% AAG as a low scenario (BST Associates, 2012). Based on this forecast, EcoNorthwest (2012) estimated no additional land need for new liquid bulk terminals * * *.” Record 48.

The city also found:

“The potential impacts of the code amendments on constraining the fossil fuel supply to meet regional demand is uncertain. Fossil

1 The city and Riverkeeper respond that the OFP projections and estimates
2 cited by WWC are not in the record, and further are the kind of “adjudicative
3 facts” that cannot be judicially noticed, even if located within documents that
4 are subject to judicial notice. We agree with respondents. *Blatt v. City of*
5 *Portland*, 21 Or LUBA 337, *aff’d* 109 Or App 259, 819 P2d 309 (1991), *rev*
6 *den* 314 Or 727, 843 P2d 454 (1992) (“LUBA does not have authority to take
7 official notice of adjudicative facts, as set out in OEC 201.”). WWC offers no
8 theory we can understand that would allow LUBA to consider the data in the
9 OFP, which is not in the record, for purposes of undermining the city’s reliance
10 on evidence that is in the record. Accordingly, WWC’s arguments regarding
11 the OFP estimates of future demand for fossil fuels in the state do not provide a
12 basis for reversal or remand.¹⁹

13 Petitioners’ second and fourth assignments of error are sustained;
14 Petitioners’ third assignment of error, and WWC’s second assignment of error,
15 subsection (i), are denied.

fuel demand in this growing region has been relatively flat over the last 15 years. At best, the demand for fossil fuel may increase moderately, as indicated by trend-based forecasts, or may plateau and decline with a continued shift to other modes of transportation, more fuel-efficient vehicles, electric vehicles and other carbon reduction strategies.” Record 4.

¹⁹ That said, to the extent Goal 12 or the Goal 12 rule requires the city to evaluate the impacts of the FFT amendments on statewide fossil fuel supply and demand, the OFP appears to provide relevant data that could be used for that evaluation.

1 **FIRST ASSIGNMENT OF ERROR²⁰**

2 Statewide Planning Goal 2 (Goal 2) (Land Use Planning) requires in
3 relevant part that comprehensive plan and implementing measures be
4 “coordinated with the plans of affected governmental units,” and that land use
5 decisions be supported by an “adequate factual base.” Petitioners and WWC
6 argue that the city erred in failing to coordinate with the plans of affected
7 governmental units and in adopting a decision that is not supported by an
8 adequate factual base.

9 **A. Coordination with the Plans of Affected Governmental Units**

10 The Goal 2 requirement to coordinate comprehensive plan and
11 implementing measures with the plans of affected governmental units is
12 satisfied by (1) inviting an exchange of information between the planning
13 jurisdiction and affected governmental units, and (2) using the information
14 gained in that exchange to balance the needs of all affected government units
15 and the citizens they represent. *ODOT v. City of Klamath Falls*, 39 Or LUBA
16 641, 671, *aff'd* 177 Or App 1, 34 P3d 667 (2001); *Rajneesh v. Wasco County*,
17 13 Or LUBA 202, 210 (1985).

18 Petitioners argue that despite proposing to enact major legislation that
19 would have consequences throughout the metropolitan area and state, the city

²⁰ WWC incorporates petitioners’ first assignment of error as its first assignment of error.

1 made no concerted effort to involve Metro, ODOT, other cities, the Port of
2 Portland or other affected governmental units.

3 The city responds that it mailed notice of the proposed amendments to
4 Department of Land Conservation and Development (DLCD) pursuant to ORS
5 197.610, and many multiple notices of the PSC hearings and the city council
6 hearings to Metro (34 notices), ODOT (94 notices) and the Port of Portland
7 (369 notices). Record 1247-81 (city council hearing), Record 3456-3674 (PSC
8 hearings). According to the city, only the Port of Portland submitted
9 comments, expressing concern that the amendments should not impact aviation
10 and marine fuel supplies. In response, the city modified the proposal to
11 exclude aviation and marine fuel storage facilities. The city argues, and we
12 agree, that Goal 2 does not require more from the city.

13 PCP Goal 1 provides that the comprehensive plan shall be coordinated
14 with federal and state law and support regional goals, objections and plans
15 adopted by Metro, to promote regional planning framework. The city council
16 adopted findings concluding that PCP Goal 1 is met basically for the same
17 reasons why the Statewide Planning Goal 2 coordination requirement is met.²¹

²¹ The city council findings state, in relevant part:

“Goal 1, Metropolitan Coordination, calls for the Comprehensive Plan to be coordinated with federal and state law and to support regional goals, objectives and plans. The amendments are consistent with this goal because notification of the proposals, and an opportunity to provide comment at a public hearing before the [PSC], was provided to [DLCD] consistent with ORS 197.610,

1 Petitioners contend that a local coordination requirement such as PCP Goal 1
2 requires more than Statewide Planning Goal 2. Petitioners cite *Twin Rocks*
3 *Water District v. City of Rockaway*, 2 Or LUBA 36 (1980), and *Textronix, Inc.*
4 *v. City of Beaverton*, 18 Or LUBA 473, 479 (1989), for the proposition that
5 local coordination requirements cannot be met by simply providing affected
6 governmental entities with notice and soliciting comments.

7 However, both of the cited cases predate ORS 197.829(1) and caselaw
8 requiring that LUBA defer to a governing body’s interpretation of local land
9 use legislation. *See* n 7. Petitioners do not acknowledge or challenge the city
10 council’s findings of consistency with PCP Goal 1. Under those findings, it is
11 clear that the city council does not interpret PCP Goal 1 to impose more
12 onerous coordination obligations on the city than does Statewide Planning Goal
13 2. Petitioners have not demonstrated that that understanding of PCP Goal 1 is
14 inconsistent with its express language, or otherwise reversible under ORS
15 197.829(1). Petitioners’ arguments regarding PCP Goal 1 do not provide a
16 basis for reversal or remand.

17 **B. Goal 2 Adequate Factual Base**

18 Statewide Planning Goal 2 is:

19 “To establish a land use planning process and policy framework as
20 a basis for all decision and actions related to use of land and to
21 assure an adequate factual base for such decisions and actions.”

and to Metro, Tri-Met, the Port of Portland, and [ODOT]
consistent with [PCC] 33.740.020 * * *.” Record 8.

1 LUBA has interpreted the Goal 2 requirement to “assure an adequate factual
2 base” to mean that legislative decisions must be supported by substantial
3 evidence, *i.e.*, findings of fact supported by evidence in the record which,
4 viewing the record as a whole, would permit a reasonable person to make that
5 finding. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372,
6 377-78, *aff’d* 130 Or App 406, 882 P2d 1130 (1994).

7 The PSC recommended draft includes findings addressing future
8 regional demand for fossil fuels, noting studies showing a trend toward
9 increased local or regional demand,²² but noting the possibility that increases in

²² The recommended draft includes the following:

“Analysis to date is limited on the energy consumption forecasts and how the recommended code changes would impact the demand for additional fossil fuel storage capacity. Fossil fuel demand in this growing region may increase moderately, as indicated by trend-based forecasts, or may plateau and decline with implementation of climate resilience goals and strategies. National forecasts of energy consumption by the U.S. Energy Information Administration show varying growth trajectories by energy type, including a relatively flat outlook for petroleum fuels, decline for coal, and moderate growth for natural gas and renewables * * *.

“Liquid bulk cargo in Portland Harbor is projected to expand at a range of 0.5% to 1.0% average annual growth (AAG) to 2040 (BST Associates, 2012), providing an estimate of potential market expansion needs for petroleum fuels, which could mean a need for an additional 10-20% increase in storage capacity. However, based on this forecast, ECONorthwest (2012) estimated that there was no additional land needed for new liquid bulk terminals in Portland. The 1.9% average annual growth to 2034 (NW Natural

1 demand for fossil fuel may plateau and decline “with implementation of climate
2 resilience goals and strategies.” Record 330. In part to account for the need to
3 accommodate possible increased future demand, the PSC recommended draft
4 proposed allowing existing terminals to expand by 10 percent. Record 363.

5 The city council adopted a similar finding, noting that the impact of the
6 FFT amendments on constraining the growing regional demand for fossil fuel
7 is “uncertain,” but expressing the hope that such demand may decline “with a
8 continued shift to other modes of transportation, more fuel-efficient vehicles,
9 electric vehicles and other carbon reduction strategies.”²³ However, as noted,

2014 Integrated Resource Plan) provides an estimate of market expansion needs for natural gas distribution facilities.

“Even if regional fossil fuel demand follows trend-based local forecasts, there is a wide margin between the size of recently proposed crude oil, coal, and [liquefied natural gas (LNG)] terminals in the Pacific Northwest and the scale of expected growth of existing Portland fuel terminals that generally serve the regional market area * * *.” Record 330.

²³ The city council findings state, in relevant part:

“The potential impacts of the code amendments on constraining the fossil fuel supply to meet regional demand is uncertain. Fossil fuel demand in this growing region has been relatively flat over the last 15 years. At best, the demand for fossil fuel may increase moderately, as indicated by trend-based forecasts, or may plateau and decline with a continued shift to other modes of transportation, more fuel-efficient vehicles, electric vehicles and other carbon reduction strategies.” Record 17.

1 the city council eliminated the provision for a 10 percent expansion. Record
2 50.

3 Petitioners argue that findings to the effect that regional demand for
4 fossil fuels will plateau or decline are not supported by substantial evidence in
5 the record. According to petitioners, that unsupported finding is the apparent
6 basis for rejecting the PSC recommendation to allow a 10 percent increase in
7 the size of existing terminals, and instead completely prohibiting the expansion
8 of existing terminals. Petitioners argue that the uncontradicted evidence in the
9 record, cited in the city's own decision, is that growing regional demand for
10 fossil fuels will likely require a 10-20% percent increase in storage capacity.²⁴

11 The city responds that the record includes evidence from which a
12 reasonable decision maker could conclude that future fossil fuel demand, while
13 uncertain, may be relatively flat. Record 245 (graph showing relatively flat
14 actual consumption of fossil fuels in Oregon between 2005 and 2014, a period
15 of time that included the recent national recession); Record 330 (staff finding
16 citing a 2016 federal forecast of national energy consumption indicating a

²⁴ In addition, petitioners argue that the city's findings are contradicted by projections in the Oregon Freight Plan (OFP), to the effect that statewide demand for fossil fuels is projected to increase over the next 15 to 25 years. However, as explained, the OFP is not in the evidentiary record, and data contained in the OFP cannot be considered by LUBA to support or controvert evidence in the record to resolve an evidentiary dispute. That said, if the city is again called upon to evaluate evidence regarding future demand for fossil fuels in the region or statewide, we note that the projections in the OFP would seem to be highly probative to that inquiry.

1 relatively flat outlook for petroleum fuels, decline for coal, and moderate
2 growth for natural gas and renewables); Record 247 (2015 graph from the
3 federal Energy Information Administration projecting a relatively lower profile
4 of future increases in national oil consumption, compared to a much higher
5 2003 projection); Record 2127 (state clean fuels program is expected to reduce
6 the consumption of petroleum fuels).

7 However, none of the cited evidence supports the finding that future
8 fossil fuel demand in the region may plateau or decline “with implementation
9 of climate resilience goals and strategies,” or “with a continued shift to other
10 modes of transportation, more fuel-efficient vehicles, electric vehicles and
11 other carbon reduction strategies.” While the cited evidence suggests that
12 future demand for fossil fuel over the region or state may be lower than earlier
13 projections or historical increases, there is nothing cited to us suggesting that
14 the demand may plateau or decline. Based on the portions of the record cited
15 to us, that finding appears to represent pure speculation on the city’s part.

16 Projecting future demand for fossil fuels is an uncertain enterprise, and if
17 the question were merely a matter of estimating local demand for fossil fuels,
18 the city might have wider leeway for applying speculation and assumptions,
19 given the inherent uncertainty of forecasts, in a normative effort to bend the
20 trajectory of the local economy toward a desired policy objective, *i.e.*, reduced
21 local reliance on fossil fuels. However, as explained elsewhere in this opinion,
22 the city is in a unique geographic and logistical position with respect to

1 regional, statewide, interstate and international markets in fossil fuels. We held,
2 above, that the city has obligations under Goal 12 and the Goal 12 rule to
3 ensure that its plan and zoning regulations comply with the obligation to
4 facilitate the flow of goods within the region and statewide. Further, as
5 explained below, the federal dormant Commerce Clause constrains the city's
6 ability to limit interstate or international trade in fossil fuels. Under these
7 circumstances, we do not believe the city can limit the scope of its evidentiary
8 inquiry to evaluating only the local or even regional demand for fossil fuels.
9 The above-quoted findings acknowledge the "wide margin between the size of
10 recently proposed crude oil, coal, and LNG terminals in the Pacific Northwest
11 and the scale of expected growth of existing Portland fuel terminals that
12 generally serve the regional market area," Record 45, but purport to evaluate
13 and address only the latter. However, even focused exclusively on the local or
14 regional demand, the findings essentially ignore uncontradicted projections of
15 moderate growth in demand for fossil fuels, and instead rely on what are no
16 more than unsupported speculations that demand will actually plateau or
17 decline. The city's findings on that point, which appear to be key support for
18 the prohibition on any expansion of existing terminals to meet even local or
19 regional needs, are not supported by substantial evidence, and hence not
20 supported by an adequate factual base.

21 The first assignment of error is sustained.

1 **EIGHTH ASSIGNMENT OF ERROR**²⁵

2 Petitioners argue that the city’s new restrictions on FFTs are inconsistent
3 with Statewide Planning Goal 9 (Goal 9) (Industrial Land).

4 Goal 9 is:

5 “To provide adequate opportunities throughout the state for a
6 variety of economic activities vital to the health, welfare, and
7 prosperity of Oregon's citizens.”

8 Goal 9 also provides:

9 “Comprehensive plans and policies shall contribute to a stable and
10 healthy economy in all regions of the state. Such plans shall be
11 based on inventories of areas suitable for increased economic
12 growth and activity after taking into consideration the health of the
13 current economic base; materials and *energy availability and cost*
14 * * * [.]” (Emphasis added.)

15 Goal 9 is implemented by administrative rules at OAR 660, chapter 009. OAR
16 660-009-0005(3) defines “industrial use” to include facilities that provide
17 storage, importation, distribution and transshipment, and states that industrial
18 uses “may have unique land, infrastructure, energy, and transportation
19 requirements.”

20 Petitioners and WWC contend that the restrictions on FFTs violate the
21 Goal 9 requirement to adopt plans and policies that consider “energy
22 availability and cost[.]” Further, petitioners and WWC argue that the FFT
23 amendments violate the Goal 9 requirement to provide “adequate opportunities

²⁵ WWC incorporates petitioners’ eighth assignment of error as its third assignment of error.

1 for a variety of economic activities” by effectively creating a bottleneck for the
2 multimodal movement and storage of fossil fuels. As noted, 90 percent of the
3 petroleum consumed in the state of Oregon arrives via the Olympic pipeline,
4 and is then transloaded and distributed to the rest of the state by the FFT
5 terminals at the end of the pipeline. By prohibiting expansion of existing FFTs
6 and siting of new FFTs, petitioners argue that the amendments not only restrict
7 a key industrial activity in the city, but also effectively impose economic and
8 energy supply restrictions on the rest of the state, as well as interstate and
9 international market interests.

10 The city responds that Goal 9 does not require local governments to
11 provide for every and any specific kind of economic use, or protect every
12 economic interest from harm, but only to provide an adequate inventory of land
13 zoned for industrial use, and adequate opportunities for a variety of economic
14 activities. *Home Depot USA, Inc. v. City of Portland*, 37 Or LUBA 870, *aff'd*
15 169 Or App 599, 10 P3d 316 (2000), *rev den* 331 Or 583, 19 P3d 355 (2001);
16 *Setniker v. Oregon Department of Transportation*, 66 Or LUBA 54, 68 (2012).
17 The city argues that the FFT amendments do not reduce the supply of
18 inventoried industrial lands, nor threaten the city’s ability to provide an
19 adequate opportunity for a variety of economic activities. With respect to the
20 alleged bottleneck, the city argues that nothing in the amendments prohibit the
21 existing terminals from increasing throughput to the rest of the state.

1 Goal 9 and the Goal 9 rule are largely focused on comprehensive
2 planning, and rather light on specific obligations. The most rigorous and
3 specific obligation is to adopt and maintain an adequate inventory of lands
4 zoned for industrial use. However, the FFT amendments do not reduce at all
5 the city's inventory of industrials lands. The city is correct that Goal 9 does not
6 require a local government to accommodate any and all economic activities, or
7 prevent local governments from restricting some economic activity, based on a
8 balancing of competing economic interests or other policy objectives.

9 It is less clear whether it is consistent with Goal 9 to balance competing
10 policy objectives in a manner that arguably would cause the city to become a
11 bottleneck for the intermodal transportation and storage of fossil fuel supply
12 that 90 percent of the state depends upon, as well as the impact on interstate
13 and international market interests. Because of its unique geographic situation,
14 any restrictions the city places on FFTs has the potential to affect a much
15 greater sphere beyond the city's own infrastructure and industrial capability. If
16 future demand for fossil fuel increases statewide, and no source is available
17 other than the Olympic Pipeline, serious economic consequences could follow
18 for the state. The city's decision does not address the possibility that the FFT
19 amendments could inadvertently cause the city to act as a fossil fuel chokepoint
20 for the entire state.²⁶ On appeal, the city's response that nothing in the FFT

²⁶ The city's only finding regarding Goal 9 states:

1 amendments prevents terminals from increasing throughput assumes, without
2 any evidence, that the existing terminals have extra capacity or can otherwise
3 significantly increase throughput using the existing storage capacity and
4 infrastructure.

5 However, petitioners identify no specific obligation under Goal 9 or the
6 Goal 9 rule compelling the city to consider whether and how amendments to its
7 zoning ordinance may indirectly impact the state’s economy (much less
8 interstate and international fossil fuel markets). Absent such an obligation,
9 petitioners have not demonstrated that the city erred in concluding that the FFT
10 amendments are consistent with Goal 9.

11 The eighth assignment of error is denied.

12 **NINTH ASSIGNMENT OF ERROR²⁷**

13 In the ninth assignment of error, petitioners argue that the FFT
14 amendments violate the dormant Commerce Clause of the United States

“Goal 9, Economic Development, requires provision of adequate opportunities for a variety of economic activities vital to public health, welfare and prosperity. The amendments are consistent with this goal because these changes and restrictions only apply to a new land use category, Bulk Fossil Fuel Terminals, and do not have a significant effect on the other allowed uses in industrial and employment zones. There are no changes proposed to the [PCP] or Zoning Map that will impact the overall size or intensity of development in the industrial areas of Portland.” Record 19.

²⁷ WWC incorporates petitioners’ ninth assignment of error as its fourth assignment of error.

1 Constitution because the ordinance impermissibly discriminates against or
2 unduly burdens interstate trade in fossil fuel. For the following reasons, we
3 agree with petitioners.

4 The Commerce Clause of the United States Constitution provides that
5 “Congress shall have Power * * * [t]o regulate Commerce * * * among the
6 several states.” US Const Art I, § 8, cl 3. Where Congress has explicitly
7 exercised that grant of power, states are of course bound to conform to federal
8 law. The “dormant” aspect of the Commerce Clause protects Congress’s latent
9 ability to regulate interstate commerce, even in areas where Congress has not
10 spoken, by prohibiting states (including the municipal arms of a state) from
11 adopting legislation that, by design or effect, regulates or burdens interstate
12 commerce in certain impermissible ways. *Or. Waste Sys. v. Dep’t of Env’tl.*
13 *Quality*, 511 US 93, 114 S Ct 1345 (1994); *Fort Gratiot Sanitary Landfill v.*
14 *Michigan Dep’t of Natural Resources*, 504 US 353, 361, 112 S Ct 2019 (1992)
15 (“[A] State (or one of its political subdivisions) may not avoid the Commerce
16 Clause’s strictures by curtailing the movement of articles of commerce through
17 subdivisions of the State, rather than through the State itself.”)

18 The courts have generally adopted a two-tiered approach to Commerce
19 Clause challenges: When a state or local law directly regulates or facially
20 discriminates against interstate commerce, or when its purpose or practical
21 effect is to favor in-state economic interests over out-of-state interests, courts
22 have generally struck down the law without further inquiry, under an elevated

1 level of scrutiny. *Rocky Mt. Farmers Union v. Corey*, 730 F3d 1070, 1087 (9th
2 Cir 2013) (a law may violate the dormant Commerce Clause if it “discriminates
3 against out-of-state entities on its face, in its purpose, or in its practical
4 effect[.]” (citing *Maine v. Taylor*, 477 US 131, 138, 106 S Ct 2440 (1986))).
5 Discrimination “means differential treatment of in-state and out-of-state
6 economic interests that benefits the former and burdens the latter.” *Id.* (quoting
7 *Or. Waste Sys., Inc.*, 511 US at 99). Where a law is discriminatory in practical
8 effect, the government must demonstrate that the law is supported by a
9 legitimate local purpose that cannot be adequately served by reasonable
10 nondiscriminatory alternatives. *Hunt v. Wash. State Apple Adver. Comm’n*, 432
11 US 333, 353, 97 S Ct 2434 (1977) (“When discrimination against commerce of
12 the type we have found is demonstrated, the burden falls on the State to
13 justify it both in terms of the local benefits flowing from the statute and the
14 unavailability of nondiscriminatory alternatives adequate to preserve the local
15 interests at stake.” (Internal citations omitted.)).

16 On the other hand, where the law is facially non-discriminatory, and does
17 not discriminate against out-of-state economic interests in its purpose or
18 practical effect, the courts engage in a balancing test, subject to a lesser level of
19 scrutiny, that weighs the state’s interest against the indirect burden on interstate
20 commerce. Such a law will only be struck down when the burden on interstate
21 commerce is “clearly excessive” in relation to the local benefits. *Pike v. Bruce*
22 *Church*, 397 US 137, 142, 90 S Ct 844 (1970).

1 Petitioners argue, and we agree, that the city’s FFT amendments fail the
2 Commerce Clause analysis under either test.

3 **A. Discriminatory Purpose or Practical Effect**

4 In the present case, no party argues that the FFT amendments facially
5 discriminate against interstate commerce. The FFT amendments are silent
6 regarding the origin or final destination of fossil fuels stored or transloaded in
7 the affected FFTs. Petitioners argue, however, that it is clear from the record
8 that one of the purposes of the amendments, if not the primary motivating
9 force, was to forestall the possibility that a particular vehicle of interstate and
10 international commerce—fossil fuel *export* terminals—would be established
11 within the city. The apparent impetus for the FFT amendments was a recent
12 proposal to site a propane export terminal in a north Portland industrial area,
13 the Pembina proposal. As the city mayor explained in the proceedings leading
14 to adoption of the FFT amendments:

15 “The rapid development of fossil fuel resources in the western part
16 of our country and Canada has put a lot of pressure on Portland
17 and other cities and has sought to transport and move huge
18 quantities of fossil fuels through and into our communities. As we
19 all experienced with the [P]embina proposal last year, the zoning
20 code actually allows fossil fuel terminals as a warehouse and
21 freight movement use in our zoning code today without any limit
22 on the size of these terminals. We, of course, passed [Resolution
23 37168] saying we’re going in a different direction and today is the
24 proposal to put that into city law, into our code.” Record 206.

25 The Pembina proposal in north Portland was ultimately abandoned in the face
26 of significant local opposition. However, as the mayor notes, one consequence

1 of the Pembina proposal was adoption of Resolution 37168, which resolved
2 that the city council would actively oppose expansion of infrastructure whose
3 primary purpose is the transporting or storing of fossil fuels in Portland or
4 adjacent waterways. The city council later adopted a new comprehensive plan
5 policy, Policy 6.48, which states that the city’s policy is to “[l]imit fossil fuel
6 distribution and storage facilities to those necessary to serve the regional
7 market.” Record 3317.

8 Even though Policy 6.48 is not yet in effect, the city’s findings state that
9 the FFT amendments “specifically implement[]” Policy 6.48. Record 324. As
10 adopted, the FFT amendments have the practical effect of precluding the siting
11 of new fossil fuel export terminals within the city, and indeed it is clear that the
12 city intended that result.²⁸ Notwithstanding the facial neutrality of the

²⁸ As noted earlier, the city’s findings explain:

“The energy distribution market in the Pacific Northwest is changing. Production of crude oil and natural gas, particularly from North Dakota, has substantially increased in the U.S. since 2009, as shown in Figure 1. In turn, several large new fuel distribution terminals have been proposed in the Pacific Northwest to access West Coast and export markets, as shown in Figure 2. Similar trends have occurred in Alberta and British Columbia.

“[The FFT amendments] propos[e] a prompt, focused response to these market changes. The recommended code amendments will restrict development of new fossil fuel terminals and limit the expansion of existing terminals, consistent with City and State objectives on climate change and public safety.” Record 316 (emphasis added).

1 amendments regarding the origin or destination of fossil fuels, it is clear that
2 the city intended the amendments to preclude construction of new or expanded
3 terminals that store and transload fossil fuels to serve interstate or international
4 markets, such as the Pembina proposal (*i.e.*, demand beyond that “necessary to
5 serve the regional market.”). As the commentary to the definition of “Bulk
6 Fossil Fuel Terminal” explains, terminals subject to the FFT amendments
7 function as “regional gateway facilities, where fossil fuels enter and exit the
8 region.” Record 370. Further evidence of the intent to preclude fossil fuel
9 export terminals is the fact that the size of terminals subject to the amendments
10 was deliberately set to capture facilities large enough to handle “unit trains,”
11 *i.e.*, trains with a single load of a bulk fossil fuel that is transported as a unit
12 and not intended for local distribution, but for transloading for more distant
13 markets. *See* n 6. In the amendments, the city implements Policy 6.48 and
14 attempts to freeze the status quo, in which the city’s existing FFTs serve only
15 local, regional and intrastate markets for fossil fuels.²⁹

²⁹ It is true, as the city argues, that nothing in the FFT amendments expressly prohibits changing the 11 existing large FFTs into export terminals, *i.e.*, using existing facilities to store and transship fossil fuels to interstate or international markets, rather than store and transship fossil fuels for local or regional markets, as is the current state of affairs. However, the city cites no evidence that such redevelopment would be a practical or economic reality. Such changes would likely require new facilities and changes in modality, *e.g.*, shifting from a train to truck modality to a train to ship modality, and perhaps different fuels (*e.g.*, petroleum to coal) with different storage and handling characteristics. It seems unlikely that it would be economically feasible to

1 The question before us is whether legislation with that intent and that
2 practical effect is consistent with the dormant Commerce Clause. The parties
3 cite a number of dormant Commerce Clause cases, discussed below, to support
4 their respective positions. Before turning to that discussion, we first note that
5 the city emphasizes that the stated purposes of the FFT amendments include (1)
6 addressing safety issues stemming from vulnerability of many existing FFTs to
7 seismic events in the city’s northwest industrial area, and (2) reducing the
8 city’s contributions to climate change. The city argues that these are legitimate
9 local interests that outweigh any incidental impact on interstate commerce. We
10 address the cited purposes below, both under the discriminatory practical effect
11 analysis, and under the *Pike* balancing test. However, in evaluating
12 discriminatory purpose or practical effect, we note that the Ninth Circuit states
13 that it will “assume that the objectives articulated by the legislature are the
14 actual purposes of the statute, unless an examination of the circumstances
15 forces us to conclude that they could not have been a goal of the legislation.
16 But we will not be bound by the stated purpose when determining the practical
17 effect of the law.” *Rocky Mt. Farmers*, 730 F3d at 1097-98 (citing *Minnesota v.*
18 *Clover Leaf Creamery*, 449 US 456, 463 n 7, 101 S Ct 715 (1981); *Hughes v.*
19 *Oklahoma*, 441 US 332, 336, 99 S Ct 1727 (1979) (internal citations and
20 quotation marks omitted)). Similarly, in the present case, even if the two

abandon long-standing investments in existing facilities serving local and regional markets in order to redevelop those facilities to handle different modalities or types of fossil fuels.

1 purposes stated above are among the actual purposes of the FFT amendments,
2 it does not follow that they are the exclusive purposes, or that those two stated
3 purposes limit the analysis of the practical effect of the FFT amendments.

4 We make one other preliminary observation. Most of the dormant
5 Commerce Clause cases cited to us involve claims of economic protectionism
6 in one guise or another. The present case does not involve economic
7 protectionism in the classic sense of a state or municipality trying to favor local
8 economic interests by restricting or burdening *competition* from out-of-state
9 actors. *See, e.g., Hunt v. Wash. State Apple Adver. Comm'n*, 432 US 333, 351
10 (regulations that burdened out-of-state apple growers, to the indirect economic
11 benefit of in-state growers). The city, and Oregon, have no local refineries or
12 sources of fossil fuel to promote or protect against competitors. Nonetheless,
13 we believe that the FFT amendments embody elements of economic protection
14 for local interests—protections from the burdens that the city is willing to
15 impose on interstate commerce—and the city’s attempt to shield local interests
16 from the burden of obstacles it places in the path of interstate commerce is one
17 of the fatal flaws of the FFT amendments. *Raymond Motor Transportation,*
18 *Inc. v. Rice*, 434 US 429, 445-47, 98 S Ct 787 (1978) (exceptions in favor of
19 local interests “weaken the presumption in favor of the validity of [a
20 regulation], because they undermine the assumption that the State’s own
21 political processes will act as a check on local regulations that unduly burden
22 interstate commerce.”)

1 In the FFT amendments, the city attempts to limit its participation in the
2 traffic of fossil fuels, which the city clearly deems to be an undesirable
3 commodity. The city is indifferent to the *sources* of that commodity (none of
4 which are local), but is concerned with the ultimate *destinations* for fossil fuels
5 that enter the city for storage or transloading. As Policy 6.48 indicates, the
6 city’s policy goal is to limit fossil fuel storage and transloading to the
7 quantities needed to meet local and regional demands. The concomitant (and
8 expressly-stated) goal is to preclude establishment or expansion of FFTs that
9 would store or transload fossil fuel for destinations outside the state. Because
10 the status quo at present is that the city’s FFTs adequately serve current local
11 and regional demands, the city chose to advance both these policy goals
12 together by simply prohibiting new and expanded FFTs. To shield local users
13 from the consequences of a more comprehensive ban on new or expanded
14 FFTs, the city adopted a number of exceptions and exclusions, listed in the
15 margin.³⁰ The net effect is that the city has done all it can, short of an express

³⁰ PCC 33.920.300.D. lists exceptions to the definition of “bulk fossil fuel terminal,” (FFTs) many of which appear calculated to shield local fossil fuel storage facilities and end users from harm that could otherwise be inflicted by the FFT amendments. The exceptions include:

- “2. Truck or marine freight terminals that do not have transloading facilities and have storage capacity of 2 million gallons or less are classified as Warehouse and Freight Movement uses. However, multiple fossil fuel facilities, each with 2 million gallons of fossil fuel storage capacity or

1 prohibition on export terminals, to effectively restrict interstate or international
2 commerce in fossil fuels, while at the same time shielding its citizens and local

less but cumulatively having a fossil fuel storage capacity in excess of 2 million gallons, located on separate parcels or land will be classified as a Bulk Fossil Fuel Terminal when two or more of the following factors are present:

- “a. The facilities are located or will be located on one or more adjacent parcels of land. Adjacent includes separated by a shared right-of-way;
 - “b. The facilities share or will share operating facilities such as driveways, parking, piping, or storage facilities; or
 - “c. The facilities are owned or operated by a single parent partnership or corporation.
- “3. Gasoline stations and other retail sales of fossil fuels are not Bulk Fossil Fuel Terminals.
- “4. Distributors and wholesalers that receive and deliver fossil fuels exclusively by truck are not Bulk Fossil Fuel Terminals.
- “5. Industrial, commercial, institutional, and agricultural firms that exclusively store fossil fuel for use as an input are not Bulk Fossil Fuel Terminals.

“* * * * *

- “7. The storage of fossil fuels for exclusive use at an airport, surface passenger terminal, marine, truck or air freight terminal, drydock, ship or barge servicing facility, rail yard, or as part of a fleet vehicle servicing facility are not Bulk Fossil Fuel Terminals.
- “8. Uses that recover or reprocess used petroleum products are not Bulk Fossil Fuel Terminals.”

1 end-users to some extent from the adverse consequences of the restrictions on
2 new or expanded terminals.³¹ While not a classic form of economic
3 protectionism vis-a-vis out-of-state competitors, in our view a law that
4 embodies the above goals represents a species of protectionism and burden-
5 shifting that infringes on Congress’s latent authority under the Commerce
6 Clause. *Pac. Merch. Shipping v. Goldstene*, 639 F3d 1154, 1177 (9th Cir 2011)
7 (“[T]he whole objective of the dormant Commerce Clause doctrine is to protect
8 Congress’s latent authority from state encroachment.”)

9 With those observations, we turn to the cases cited by the parties.
10 Dormant Commerce Clause jurisprudence is highly fact-specific, and the
11 analysis often turns on identifying the most analogous fact patterns. In general,
12 the cases cited by the city are distinguishable. The city relies heavily on
13 *Chinatown Neighborhood Ass’n v. Harris*, 794 F3d 1136 (9th Cir 2015), in
14 which the United States Court of Appeals for the Ninth Circuit upheld the State
15 of California’s “Shark Fin Law,” which made it unlawful for any person to

³¹ The city’s ability to significantly impact interstate and international commerce in fossil fuels is, of course, limited. Export terminals can still be located in other cities throughout the region. Indeed, as the findings note, at least eight export terminals have been proposed in the region in places other than Portland. Record 317. Nonetheless, as Ordinance No. 188142 recognizes, the city enjoys several geographical and logistical advantages, including a location at the western end of a low-gradient railroad and barge route for heavy cargo through the Cascades, a corridor that is an economical conduit for fossil fuels from interior states for transshipment to overseas destinations. Record 48. Few other cities in the region are as well-placed as Portland to disturb the flow of fossil fuels in interstate commerce.

1 possess, sell, trade, or otherwise distribute shark fins anywhere in the state.
2 The plaintiffs argued that the law violated the dormant Commerce Clause by
3 curbing commerce in the flow of shark fins through the state to out-of-state
4 markets. *Id.* at 1145. The Ninth Circuit rejected that argument, concluding that
5 the law simply regulates conduct within the state, and any extraterritorial
6 impacts of the law are incidental. *Id.* at 1146. The city argues for the same
7 conclusion here: the FFT amendments simply regulate conduct within the
8 state, and any extraterritorial impacts are incidental.

9 However, a critical difference between the present case and *Chinatown*
10 *Neighborhood Ass'n*, is that in the latter case the state law did not purport to
11 shield state residents from the impacts of an otherwise comprehensive
12 prohibition. We believe it doubtful that the Ninth Circuit would have affirmed
13 a statute that allowed state residents to possess, sell, or trade shark fins, and
14 thus protected the existing domestic market in shark fins, but had the intent and
15 effect of restricting the storage or transport of shark fins for interstate or
16 international markets.³² Similarly, in the present case, we think the Ninth

³² Another significant difference is that in *Chinatown Neighborhood Ass'n*, the Ninth Circuit noted that Congress had adopted legislation prohibiting “finning” or the taking of shark fins in all U.S. waters. *Id.* at 1140. Thus, the state law prohibiting the possession, etc., of shark fins of any origin within the state was entirely consistent with federal legislation. *Id.* at 1144. Indeed, the Ninth Circuit first had to determine whether congressional legislation had already preempted or occupied the field of shark finning. *Id.* In the present case, as far as we are informed Congress has passed no law restricting interstate or international commerce in fossil fuels. If anything, it is more probable that

1 Circuit would not affirm regulations that are intended and have the practical
2 effect of prohibiting the storage or transloading of fossil fuel for interstate and
3 international markets, but which largely protect the local fossil fuel economy
4 and local end-users from the impacts of those regulations.

5 Another Ninth Circuit case cited by the city, *Rocky Mt. Farmers Union v.*
6 *Corey*, 730 F3d 1070, is also distinguishable. In *Rocky Mt. Farmers Union*, the
7 California Air Resources Board adopted a low carbon fuel standard regulation
8 for ethanol, an additive in fossil fuel. *Id.* at 1079-83. To comply with the fuel
9 standard, a fuel blender had to keep the average carbon intensity of its total
10 volume of fuel below the fuel standard’s annual limit, taking into account
11 various credits available under a cap-and-trade scheme. *Id.* Out-of-state
12 suppliers filed suit, arguing that the fuel standard violated the dormant
13 Commerce Clause. *Id.* at 1086. The district court concluded that the fuel
14 standard facially discriminated against out-of-state energy firms, because it

federal statutes foster the free flow of fossil fuels in interstate (and international) commerce. *See Raymond Motor Transp., Inc.*, 434 US at 440 (“[I]t never has been doubted that much state legislation, designed to serve legitimate state interests and applied without discrimination against interstate commerce, does not violate the Commerce Clause even though it affects commerce. In areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make delicate adjustment of the conflicting state and federal claims.” (Internal citations and quotation marks omitted.)); *see also Pac. Merch. Shipping Ass’n*, 639 F 3d at 1178 (“The foreign commerce context places further constraints on state power because of ‘the special need for federal uniformity.’”).

1 took into account the origin of the fuel and the distance fuel travels to reach
2 California. *Id.*

3 The Ninth Circuit disagreed, concluding that the fuel standard did not
4 facially discriminate against interstate commerce, because the state based its
5 standards on the carbon intensity of fuel sold in the state, not on the fuel's
6 origin. 730 F3d at 1078. The Ninth Circuit remanded to the district court for a
7 determination of whether the regulation's ethanol provisions discriminated in
8 purpose or practical effect. *Id.* If not, it was to apply the *Pike* balancing test.
9 *Id.*

10 The city argues that, like the state fuel standard at issue in *Rocky Mt.*
11 *Farmers Union*, the FFT amendments are facially neutral regarding the origin
12 of fossil fuels, with no motive to protect local economic actors from out-of-
13 state competition. However, we have already concluded that the FFT
14 amendments are not facially discriminatory, or designed to protect in-state
15 economic actors from direct out-of-state competition. The question is whether
16 the FFT amendments discriminate against interstate commerce in purpose or
17 practical effect. We fail to see how the holding or facts in *Rocky Mt. Farmers*
18 *Union* assists the city. The facts in *Rocky Mt. Farmers Union* would be closer
19 to all fours with the present case if the fuel standard had limited fuel terminals
20 in the state in a manner that effectively prohibited storage or transloading of
21 high-carbon fuels intended for other states or to international markets, but
22 allowed high-carbon fuels to continue to be stored, transloaded and sold at

1 current levels to California residents, with numerous exemptions to protect
2 local economic actors from the impacts of the restriction on commerce in high-
3 carbon fuels effectively imposed on fuel that passes through to other states.³³
4 One of the signal characteristics of a law that discriminates in purpose or
5 practical effect in violation of the dormant Commerce Clause, and is thus
6 subject to elevated scrutiny, is unequal treatment between in-state and out-of-
7 state economic actors or markets. *Or. Waste Sys.*, 511 US at 99 (discrimination
8 “means differential treatment of in-state and out-of-state economic interests
9 that benefits the former and burdens the latter); *see also Philadelphia v. New*
10 *Jersey*, 437 US 617, 628, 98 S Ct 2531 (1978) (“It does not matter that the
11 State has shut the article of commerce inside the State in one case and outside
12 the State in the other. What is crucial is the attempt by one State to isolate itself
13 from a problem common to many by erecting a barrier against the movement of
14 interstate trade.”). Despite the facial neutrality of the FFT amendments, the
15 city has done all it can to effectively eliminate any city role in the export of
16 fossil fuels, while continuing to provide for existing and projected local
17 consumption of fossil fuels. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 US

³³ In addition, the Ninth Circuit recognized that the federal Clean Air Act expressly authorizes California to adopt its own fuel standards. 730 F 3d at 1078. Again, in the present case, no party cites us to any act of Congress authorizing a city or state to regulate the size or number of fossil fuel transportation facilities in a manner that has the practical effect of prohibiting export terminals.

1 333, 350, (referring to “the Commerce Clause’s overriding requirement of a
2 national ‘common market’” (internal citations omitted)). Nothing cited to us in
3 *Rocky Mt. Farmers Union*, or any other case, suggests that a law with that
4 purpose and that practical effect can avoid elevated levels of scrutiny under the
5 dormant Commerce Clause analysis.

6 Among the dormant Commerce Clause cases cited to us are two cases
7 involving zoning or land use regulations. The city relies on *Wal-Mart Stores,*
8 *Inc. v. City of Turlock*, 483 F Supp 2d 987, 991-92 (E D Cal 2006), which
9 involved a city zoning text amendment that created three new categories of
10 commercial retail land uses: discount stores, discount clubs, and discount
11 superstores. Under the amendments, the first two categories were allowed as
12 conditional uses in commercial zones, but the last category, discount
13 superstore, was not allowed in any city zone. *Id.* Wal-Mart, which operated a
14 discount store in the city but sought to establish a discount superstore, argued
15 that the prohibition on establishing a discount superstore in any zone
16 discriminates against interstate commerce in practical effect, because it
17 prevents Wal-Mart, an out-of-state retailer, from operating within the city in
18 Wal-Mart’s preferred superstore format. *Id.* at 1009-14. However, the district
19 court rejected those arguments, concluding that the facially neutral ordinance
20 did not discriminate against interstate commerce because any retailer, in-state
21 or out-of-state, can locate retail operations in the city, and offer any products,
22 except in the discount superstore format. *Id.* The court held that the Commerce

1 Clause does not protect the preferred structure or methods of a retail operation,
2 or the right to conduct business in the most efficient manner. *Id.* In the present
3 case, the city argues likewise that FFT owners are not entitled to establish
4 terminals in any preferred format or conduct terminal operations in the most
5 efficient manner.

6 Like the present case, *Wal-Mart Stores, Inc.*, involved creation of a new
7 land use category, which the ordinance then prohibits within the city.
8 However, the resemblance mostly ends there. In the present case, the city
9 deems a particular commodity in interstate commerce (fossil fuels) to be
10 undesirable and therefore adopts steps to freeze the number and size of
11 facilities that meet local demands for that undesirable commodity, and to
12 preclude facilities that would store and transload the undesirable commodity
13 for further shipment to interstate and international markets. In *Wal-Mart*
14 *Stores, Inc.*, the commodities at issue were desirable, it was only the size and
15 format of the building in which the goods would be sold to which the city
16 objected. 483 F Supp 2d at 1012. Before and after the zoning amendments in
17 *Wal-Mart Stores, Inc.*, the same type and quantity of goods flowed from the
18 stream of interstate commerce to enter the city and be sold. *Id.* The only
19 difference was that after the amendments those goods would have to be sold in
20 smaller retail outlets, not in the larger superstore format that Wal-Mart
21 preferred. *Id.* at 1016. By contrast, in the present case, if the FFT amendments
22 achieve the city's several goals, the amendments strongly affect the type and

1 quantity of fossil fuels that could potentially flow into and out of the city from
2 the stream of interstate commerce. Prior to the FFT amendments, a new
3 propane or coal export terminal could be sited within the city, to transload
4 those types of fossil fuels from North Dakota or Montana for shipment to
5 overseas markets. Under the FFT amendments, such facilities are effectively
6 prohibited, and the types and quantities of fossil fuels that are stored and
7 transloaded in the city are, as a practical matter, limited to those needed to
8 satisfy the current and projected future local or regional demand.³⁴

³⁴ The city's findings recognize that the establishment of fossil fuel terminals in the region would significantly increase the quantity of fossil fuels flowing into, and out of, the state. As the findings note:

“[T]here is a wide margin between the size of recently proposed crude oil, coal, and (LNG) terminals in the Pacific Northwest and the scale of expected growth of existing Portland fuel terminals that generally serve the regional market area * * *.” Record 330.

In other words, due to the large volumes of fossil fuel that could be transported via fossil fuel export terminals (like the Pembina project), if established in the city or elsewhere in the region or state, these export terminals would significantly increase the amount of fossil fuel that enters the state, compared to any increase attributed to local or regional consumption. Record 46 (Figure 7). Conversely, if the city succeeds in discouraging the establishment of fossil fuel export terminals in the city, that could effectively reduce the quantity of fossil fuels that would otherwise cross state lines, and which is intended to again cross state lines on its way to interstate or international markets. Generally, a law with the intent and the effect of reducing the free flow of commerce across state lines is viewed with suspicion under the dormant Commerce Clause. *See Hughes v. Oklahoma*, 441 US 322, 337-38, 99 S Ct 1727 (1979) (statute prohibiting the transport of minnows out of the state violates the dormant Commerce Clause, because it “overtly blocks”

1 To put the circumstances in *Wal-Mart Stores, Inc.* on a closer footing
2 with the present case, imagine that the City of Turlock objects to the import of
3 goods manufactured overseas, and adopts amendments that prohibit new
4 distribution centers that receive and transfer foreign-made goods to stores
5 across the United States, but nonetheless the amendments allow local retailers
6 to continue to sell foreign-made goods in city stores to meet the local demand.
7 While a comprehensive and even-handed embargo on importation of foreign
8 goods to local markets *might* survive scrutiny under a dormant Commerce
9 Clause analysis, if the ban did not unduly impact interstate commerce, the
10 above-described selective approach would not, because it does not
11 evenhandedly distribute benefits and burdens, but instead concentrates the bulk
12 of its impacts on interstate commerce, while attempting to shield local interests
13 from those impacts.³⁵ The FFT amendments suffer the same flaw.

14 Petitioners argue, and we agree, that the circumstances in *Island Silver*
15 *Spice, Inc. v. Islamadora*, 542 F3d 844 (11th Cir 2008), bear a closer

the flow of interstate commerce at the state's borders); *but see Maine v. Taylor*, 477 US 131 (state law prohibiting import of baitfish in order to protect health of unique and fragile state fisheries survives Commerce Clause challenge because the prohibition serves a legitimate local purpose that cannot be adequately served by available nondiscriminatory alternatives).

³⁵ Indeed, the Eastern District of California rejected a similar argument made by Wal-Mart. As the court stated: “[The ordinance] leaves the market open to all local or foreign retailers of all local or foreign products, except in the discount superstore format. The Commerce Clause does not protect the particular structure or methods of operation of a retail market.”) *Wal-Mart Stores Inc.*, 483 F Supp 2d at 1012.

1 resemblance to the present circumstances. In *Island Silver Spice, Inc.*, a
2 municipality adopted zoning amendments that effectively prohibited
3 establishment of new “formula” restaurants and retail establishments, defined
4 as a retail sale establishment required by contract to provide a standardized
5 array of services or merchandise, décor, architecture, layout or similar
6 standardized features, by limiting street level frontage and total square footage
7 only for “formula” establishments, but not for similar retail uses. *Id.* at 845.
8 The apparent target of the zoning prohibition was nationally and regionally
9 branded formula retail stores, such as chain pharmacies. *Id.* The zoning
10 amendment did not facially discriminate against out-of-state stores;
11 nonetheless, the Eleventh Circuit concluded that by limiting the square footage
12 and street frontage for “formula” establishments, the amendment had the
13 practical effect of discriminating against interstate commerce, because it
14 effectively eliminated the establishment of new regionally and nationally
15 branded retailers, a quintessential type of interstate commerce. The Eleventh
16 Circuit therefore applied the elevated scrutiny test and ultimately concluded
17 that the amendment failed that test. *Id.* at 847.³⁶

18 The present circumstances are similar to those in *Island Silver Spice,*
19 *Inc.*, in that in both cases the city objects to a particular article or aspect of
20 commerce that is intrinsically interstate in nature (nationally branded retail

³⁶ The Eleventh Circuit also affirmed findings that the zoning amendment failed under the *Pike* balancing test. *Id.* at 847 n 2.

1 stores on the one hand, fossil fuels on the other hand), and adopts a zoning
2 amendment that prohibits establishment of such uses, or the expansion of
3 existing uses above a certain size, but allows existing undesirable uses to
4 continue in the city essentially as nonconforming uses. 542 F3d at 846-47
5 (noting the municipality’s existing zoning allowed the use of the subject
6 property as a retail use comprising over 12,000 square feet of floor area, greatly
7 exceeding the ordinance’s dimensional limitations for “formula retail”
8 businesses). In *Island Silver Spice, Inc.*, the Eleventh Circuit had no trouble
9 concluding that a municipality’s efforts to prohibit new and expanded
10 nationally branded formula retail uses (by limiting square footage and street
11 frontage) had a discriminatory practical effect on interstate commerce. *Id.*

12 The Eleventh Circuit then considered whether the zoning amendment
13 was supported by a legitimate local purpose that could not be adequately served
14 by reasonable nondiscriminatory alternatives. 542 F3d at 847. In *Island Silver*
15 *Spice, Inc.*, the stated purposes of the zoning ordinance prohibiting “formula”
16 retail included the protection of the municipality’s small town character. *Id.*
17 The Eleventh Circuit concluded that while preserving small town character is a
18 legitimate purpose, the municipality had no small town character to preserve,
19 because the town already included a number of pre-existing formula retail
20 businesses, and had no historic district or affected historic buildings. *Id.*
21 Further, the Eleventh Circuit noted that the zoning ordinance included
22 exceptions that would allow smaller formula retail stores, as well as large non-

1 formula retail establishments, none of which furthered preservation of a small
2 town character. *Id.* at 847-48. Because the municipality failed to identify a
3 legitimate local purpose to justify the amendment’s discriminatory practical
4 effects, the Eleventh Circuit invalidated the amendments without considering
5 whether the municipality could show that adequate, nondiscriminatory methods
6 were available to achieve the legitimate local purpose. *Id.*

7 In the present case, the city argues that its stated interests in reducing
8 vulnerability to seismic damage and reducing the city’s contribution to climate
9 change caused by fossil fuel consumption are both legitimate local interests,
10 and we agree. However, as explained below, the FFT amendments do not, in
11 fact, appear to further those interests. Moreover, the city makes no effort to
12 demonstrate that adequate, nondiscriminatory methods are unavailable to meet
13 those interests.

14 With respect to vulnerability of *existing* FFTs to seismic events, the FFT
15 amendments appear to do nothing to reduce that vulnerability.³⁷ With respect to
16 new or expanded FFTs, such facilities would presumably comply with modern
17 seismic codes, and it is not clear how a blanket ban on new or expanded FFTs
18 serves the purpose of reducing vulnerability of FFTs to seismic events. It is
19 also not clear why the city could not continue to allow new or expanded FFTs

³⁷ The PSC recommended draft offered existing FFTs an incentive to upgrade to current seismic standards, in exchange for a 10 percent expansion. However, the city council eliminated that incentive.

1 in industrial areas of the city that are not located on soils subject to
2 liquefaction, instead of broadly prohibiting new and expanded FFTs
3 everywhere in the city. Further, the FFT amendments allow without restriction
4 (1) small fossil fuel terminals below two million gallons in size, (2) unlimited
5 size mono-modal fossil fuel terminals served only by trucks, as well as (3)
6 terminals of any size that handle non-fossil fuels such as bio-diesel and ethanol,
7 in the same industrial areas that are vulnerable to seismic shocks. We are cited
8 to no evidence that seismic damage to a bio-diesel tank farm would be any less
9 catastrophic than seismic damage to a tank farm of petro-diesel, or that an
10 intermodal petroleum terminal is any more susceptible than a similarly sized
11 mono-modal petroleum terminal served only by trucks. There is no evidence
12 presented to us that the express target of the FFT amendments, intermodal
13 terminals, is uniquely vulnerable to seismic damage compared to mono-modal
14 facilities.

15 In short, although reducing vulnerability to seismic damage is a
16 legitimate local interest, the FFTs amendments appear to do very little, if
17 anything, to reduce that vulnerability, and are riddled with exceptions that
18 appear to undermine any steps toward reducing vulnerability to seismic damage
19 that the amendments might achieve. Further, and most importantly for our
20 analysis here, the amendments appear to favor local interests, to the detriment
21 of interstate and international market interests. Finally, as noted, the city
22 makes no attempt to demonstrate that there are no adequate, nondiscriminatory

1 alternatives to serve the local interest in reducing vulnerability to seismic
2 damage to FFTs. Based upon the record before us, it is not clear that such a
3 showing can be made.

4 The city's other stated goal—reducing the city's contribution to global
5 warming and climate change—is an entirely laudable goal. However, the city
6 identifies nothing in the FFT amendments directed at actually accomplishing
7 that goal. The FFT amendments include no provisions designed to reduce the
8 *local* consumption of fossil fuels, and thus the *local* emission of greenhouse
9 gasses. In implementing Policy 6.48, the city attempted to limit local FFTs to
10 serve only the regional demand for fossil fuels, but the amendments do not
11 propose anything to *reduce* local or regional demand. As discussed with regard
12 to Goal 12, the city's working assumption is that local demand for fossil fuels
13 will plateau and even decline in the foreseeable future, making new or
14 expanded FFTs unnecessary. But the city does not identify anything in the FFT
15 amendments that would cause or contribute to any plateau or decline in local
16 fossil fuel demand and therefore reduce local greenhouse gas emissions. In
17 other words, although the amendments prohibit new or expanded FFTs, under
18 the city's assumptions—that local demand will plateau or decline—there is no
19 basis to assume that new or expanded FFTs would ever be necessary to meet
20 increased local demand. The prohibition on new or expanded FFTs appears to
21 do little or nothing to further the city's interest in reducing local consumption
22 or the carbon content of locally consumed fossil fuels.

1 The only scenario we can understand that could causally connect the
2 prohibition on new or expanded FFTs with a reduction in local demand for
3 fossil fuel (and a resulting reduction in local greenhouse gas emissions) would
4 require that the city's working assumptions be incorrect, and in fact local
5 demand for fossil fuel will increase in coming years beyond the capacity of the
6 existing FFTs and of new small or mono-modal FFTs to accommodate. In that
7 circumstance, the shortage of FFT capacity might cause a local shortage of
8 fossil fuel that could raise prices, thus discouraging consumption and
9 encouraging a transition to non-fossil fuel sources. However, that speculative
10 chain of causation, contrary to the city's working assumptions, is a thin basis
11 for meeting the city's burden of demonstrating the existence of a legitimate
12 local purpose that cannot be adequately served by reasonable
13 nondiscriminatory alternatives.

14 In any case, the most important impact of the FFT amendments for
15 purposes of the dormant Commerce Clause analysis is the fact that the
16 amendments are intended to and have the practical effect of precluding the
17 establishment of new fossil fuel *export* terminals. We question whether the
18 city's desire to preclude establishment of fossil fuel export terminals reflects a
19 legitimate *local* interest. As noted, the city may well take responsibility for *its*
20 *own* greenhouse gas emissions from local consumption of fossil fuels without
21 running afoul of the dormant Commerce Clause (if those efforts create only
22 incidental impacts on interstate commerce). However, we do not believe the

1 city can, consistent with the dormant Commerce Clause, deliberately attempt to
2 slow or obstruct the flow of fossil fuels from other states to consumers in other
3 states or countries with the apparent goal of reducing generation of greenhouse
4 gases elsewhere in the world, and justify that attempt as a legitimate *local*
5 interest.

6 Finally, even if reducing fossil fuel consumption and emissions
7 elsewhere in the world can be viewed as a legitimate local interest for purposes
8 of the discriminatory practical effect analysis, as noted the city makes no effort
9 to demonstrate that that purpose cannot be adequately served by reasonable
10 nondiscriminatory alternatives.

11 In sum, we conclude that the FFT amendments are discriminatory in
12 practical effect, and that the city has failed to demonstrate that the amendments
13 serve a legitimate local interest or purpose that cannot be adequately served by
14 reasonable nondiscriminatory alternatives. Accordingly, the FFT amendments
15 violate the dormant Commerce Clause.

16 **B. *Pike* Balancing Test**

17 In the event that the FFT amendments are deemed to be
18 nondiscriminatory and to have only indirect impacts on interstate commerce,
19 we consider whether the FFTs amendments survive under the so-called “*Pike*
20 balancing test.” Under *Pike*, “nondiscriminatory regulations that have only
21 incidental effects on interstate commerce are valid unless ‘the burden imposed

1 on interstate commerce is clearly excessive in relation to the putative local
2 benefits.” *Or. Waste Sys.*, 511 US 93, 99 (quoting *Pike*, 397 US 137, 142).

3 As explained above, the FFT amendments appear to provide little if any
4 local benefits with respect to reducing seismic vulnerability and reducing the
5 city’s local contributions to global warming. The city’s other express goal of
6 precluding export terminals is arguably the FFT amendments’ most potentially
7 significant burden on interstate commerce. It is difficult to evaluate how much
8 of a burden the city’s prohibition on new or expanded FFTs would have on the
9 establishment of new export terminals, or on the flow of fossil fuels into and
10 through any future export terminals in the city or region, because the record
11 includes no attempt to conduct that evaluation. Nonetheless, it is clearly the
12 city’s intent that the impact on the interstate and international market in fossil
13 fuels will be significant, and that few or no fossil fuel export terminals will
14 become established in the city or perhaps even in the region. *See* Record 206
15 (“As we all experienced with the [P]embina proposal last year, the [city’s]
16 zoning code actually allows fossil fuel terminals as a warehouse and freight
17 movement use in our zoning code today without any limit on the size of these
18 terminals. We, of course, passed [Resolution 37168] saying we’re going in a
19 different direction and today is the proposal to put that into city law, into our
20 code.”)

21 Weighed against that burden are the putative local benefits. We
22 understand the city and Riverkeeper to argue that precluding fossil fuel export

1 terminals will provide local benefits in the form of reducing harm to its citizens
2 caused by fossil fuel consumption in other countries, which are the final
3 destination for fossil fuels that would be transloaded onto ships at the export
4 terminals that the amendments effectively prohibit. The city argues that simply
5 because “climate-change risks are ‘widely-shared’ does not minimize” a
6 government’s interest in reducing contributions to global warming.
7 *Massachusetts v. EPA*, 549 US 497, 522, 127 S Ct 1438 (2007) (concluding
8 that Massachusetts has standing to file suit challenging denial of a petition for
9 EPA rulemaking to adopt rules to reduce U.S. emissions that contribute to
10 global warming and climate change). The city cites *Rocky Mt. Farmers Union*,
11 730 F3d at 1103, to argue that a state is free to regulate in-state commerce with
12 the goal of influencing out of-state choices of market participants. The city also
13 cites *Pac. Merch. Shipping Ass’n*, 639 F 3d 1154, for the proposition that a
14 state’s interest in protecting the health of its residents from air pollution far
15 outweighs the federal interest in the free flow of commerce.

16 However, none of the cited cases support the proposition that a city or
17 state can take steps to slow or block the flow of commerce to other states or
18 countries, in an effort to prevent the blocked commodities from being
19 consumed in those countries, causing air pollution in those countries that
20 contribute to global warming, which in turn will adversely impact the citizens
21 of the city or state (along with everyone else in the world). We do not believe
22 that such attenuated benefits, which would literally apply to every person on

1 the planet, can be reasonably described as “local” benefits, for purposes of the
2 *Pike* balancing test.

3 The *Massachusetts* case held that the impacts of global warming on the
4 state (*e.g.*, increased erosion to coastlines) gave the state standing to challenge
5 denial of a petition for the EPA to issue rulemaking directed at reducing
6 national carbon emissions, given the United States’ role as one of the world’s
7 biggest contributors to carbon emissions. 549 US 497, 521-526. However,
8 nothing in the case suggests that the state has a uniquely “local” interest or
9 benefit in preventing the flow of fossil fuels across the state to other countries,
10 in order to reduce the consumption of fossil fuels in those other countries, for
11 purposes of the *Pike* balancing test.

12 As noted, *Rocky Mt. Farmers Union* involved state rules imposing low
13 carbon fuel standards on fuel sold in the state. 730 F3d 1070. The standards
14 took into account the full carbon costs of producing and transporting ethanol
15 intended for the California market, and in so doing, also considered the origin
16 of the ethanol. 730 F3d at 1088-93. As Riverkeeper argues, the Ninth Circuit
17 observed that carbon emitted in manufacturing ethanol in Iowa or Brazil
18 impacts Californians as much as carbon emitted in Sacramento, given the
19 widespread impacts of global warming. *Id.* at 1081.³⁸ The Ninth Circuit

³⁸ However, the Ninth Circuit also found that California is “uniquely vulnerable to the perils of global warming,” due to its long coastline, and dry fragile forests and deserts. 730 F3d 1070, 1106.

1 concluded that the fuel standards did not facially discriminate or discriminate
2 in practical effect, but remanded to the District Court to determine if the
3 impacts on interstate commerce clearly exceeded the putative local benefits
4 under the *Pike* balancing test. *Id.* at 1100. The Ninth Circuit did not, of course,
5 reach the remanded issue, but there is certainly language in the opinion
6 suggesting that the “local benefits” to be balanced under *Pike* could include
7 reducing the state’s unique vulnerability to the impacts of global warming,
8 achieved in part using the state’s economic leverage to persuade out-of-state
9 ethanol producers to reduce the carbon used to produce and transport fuel for
10 the California market. *Id.*

11 However, the salient difference between *Rocky Mt. Farmers Union*, and
12 the facts presented to us here is that California’s regulatory efforts were
13 entirely directed at fuel intended for consumption *in California*. 730 F3d at
14 1079-80. In the present case, the city’s effective prohibition on fossil fuel
15 export terminals (like the proposed Pembina project) is intended to slow or
16 obstruct the flow of fossil fuel from other states to international markets,
17 presumably to discourage the consumption of fossil fuels in other countries. At
18 best, that effort, if successful, might slightly reduce consumption of fossil fuels
19 in other countries, but there is no evidence or argument that the city would
20 receive any *particular local* benefit in doing so. The city does not argue that it
21 is “uniquely vulnerable” to global warming, or that it stands to gain or lose

1 more than any other city in the world from infinitesimal reductions or increases
2 in global warming.

3 Finally, *Pac. Merch. Shipping Ass'n*, 639 F 3d 1154, also does not assist
4 the city. In *Pac. Merch. Shipping Ass'n*, the Ninth Circuit upheld under the
5 *Pike* balancing test state rules requiring vessel operators calling at a California
6 port to use low-sulfur marine fuels within the state's territorial waters—rules
7 intended to reduce coastal air pollution caused by burning high-sulfur marine
8 bunker fuel that the record showed directly affected the health of the state's
9 citizens. *Id.* at 1159. Notably, the rules included an express exemption for
10 vessels traveling through territorial waters toward non-state ports or markets
11 (known as the “innocent passage” provision). *Id.* at 1158. The Ninth Circuit
12 held that the impacts on interstate or international commerce did not clearly
13 exceed the well-documented local benefits of preserving the health of the
14 state's citizens against coastal air pollution. *Id.* at 1180-1182. The present case
15 differs, again, in that the FFT amendments do little or nothing to reduce or
16 change local consumption of fossil fuels or local contributions to global
17 warming, and the effective ban on fossil fuel export terminals would have, at
18 best, only the most attenuated connection to reduced global warming and
19 concomitant effects on the health of the city's citizens.

20 Reduced to essentials, the FFT amendments represent the city's attempt
21 to isolate itself to some extent from the national and international economy in
22 fossil fuels. See *Chemical Waste Management v. Hunt*, 503 US 334, 341-42,

1 112 S Ct 2009 (1992) (“The Court has consistently found parochial legislation
2 of this kind to be constitutionally invalid, whether the ultimate aim of the
3 legislation was to assure a steady supply of milk by erecting barriers to
4 allegedly ruinous outside competition,” or a tax discriminating against
5 interstate commerce even when such tax was “designed to encourage the use of
6 ethanol and thereby reduce harmful emissions,” for “in all of these cases, a
7 presumably legitimate goal was sought to be achieved by the illegitimate means
8 of isolating the State from the national economy.” (Internal citations omitted.)).
9 Given the city’s geographic and strategic position astride a major trade route,
10 its attempts to isolate itself from the national and international market in fossil
11 fuels have far greater potential impact on those markets than would the same
12 efforts by a more geographically isolated city. Weighed against those
13 potentially significant burdens on interstate commerce are local benefits from
14 the legislation that, based on this record, appear to be attenuated at best. We
15 conclude therefore that the burdens on interstate commerce are “clearly
16 excessive” in relation to the putative local benefits, and the FFT amendments
17 also fail under the *Pike* balancing test.

18 The ninth assignment of error is affirmed.

19 **DISPOSITION**

20 OAR 661-010-0071 provides that LUBA shall reverse a land use
21 decision when the Board finds that the decision is unconstitutional. We
22 concluded under the ninth assignment of error that the FFT amendments are

1 inconsistent with the dormant Commerce Clause. Accordingly, reversal is the
2 appropriate disposition.

3 The city's decision is reversed.

4

Index – Glossary

1		
2	BPS	Portland city Bureau of Planning and Sustainability
3	FFT	Fossil Fuel Terminal
4	FMP	City of Portland Freight Master Plan
5	GLISP	Guild’s Lake Industrial Sanctuary Plan
6	DLCD	Department of Land Conservation and Development
7	Metro	Metro Regional Government
8	ODOT	Oregon Department of Transportation
9	OFP	Oregon Freight Plan
10	OTC	Oregon Transportation Commission
11	OTP	Oregon Transportation Plan
12	PCC	Portland City Code
13	PCP	Portland 1980 Comprehensive Plan, as amended (2011)
14	2035 PCP	Portland 2035 Comprehensive Plan
15	PSC	City of Portland Planning and Sustainability Commission
16	TPR	Oregon Transportation Planning Rule
17	TSP	City of Portland Transportation System Plan
18	WWC	Intervenor-petitioner Working Waterfront Coalition

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-001 on July 19, 2017, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

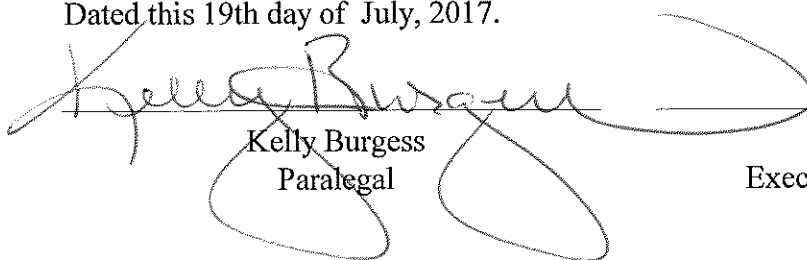
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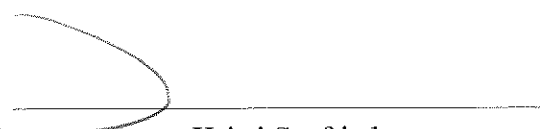
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