IN THE COURT OF APPEALS OF THE STATE OF OREGON

COLUMBIA PACIFIC BUILDING TRADES COUNCIL, PORTLAND BUSINESS ALLIANCE, WESTERN STATES PETROLEUM ASSOCIATION, and WORKING WATERFRONT COALITION,
Petitioners-Respondents,

v.

CITY OF PORTLAND,
Respondent-below,

and

COLUMBIA RIVERKEEPER, OREGON PHYSICIANS FOR SOCIAL RESPONSIBILITY, PORTLAND AUDUBON SOCIETY, and CENTER FOR SUSTAINABLE ECONOMY,
Intervenor-Respondents-Petitioners.

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COLUMBIA RIVERKEEPER, OREGON PHYSICIANS FOR SOCIAL RESPONSIBILITY, PORTLAND AUDUBON SOCIETY, and CENTER FOR SUSTAINABLE ECONOMY,
Intervenors-Respondents below.

Land Use Board of Appeals
2017001

A165618

August 2017

INTERVENOR-RESPONDENTS-PETITIONERS COLUMBIA RIVERKEEPER ET AL.'S OPENING BRIEF[1]

Appeal from the Land Use Board of Appeals' Final Opinion and Order dated July 19, 2017, Bassham, Board Member

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[1] Pursuant to ORAP 5.50(1), Columbia Riverkeeper et al. incorporate by reference the Excerpt of Record filed with the Opening Brief of the City of Portland.

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I. STATEMENT OF THE CASE

A. Nature of Action and Relief Sought

This appeal seeks review of the Land Use Board of Appeals' ("LUBA") opinion and final order in *Columbia Pacific Building Trades Council, et al. v. City of Portland, et al.*, ___ Or LUBA ___ (LUBA No. 2017-001, July 19, 2017). ER 1-95.[1] LUBA's order reversed the City of Portland's ("City") adoption of Ordinance No. 188142, as amended, which adopted the Fossil Fuel Terminal Zoning Amendments ("the Amendments"). *See* ER 135-79. The Amendments revise Portland's zoning code to restrict expansion of existing bulk fossil fuel terminals and to limit the size of new terminals. Columbia Pacific Building Trades Council, Portland Business Alliance, Western States Petroleum Association and Working Waterfront Coalition (collectively "petitioners") challenged the Amendments before LUBA on numerous grounds. LR 631-769.

Columbia Riverkeeper, Center for Sustainable Economy, Oregon Physicians for Social Responsibility, and Portland Audubon Society (collectively "Riverkeeper") intervened as respondents before LUBA to defend the Amendments against petitioners' challenges and to defend the City's authority to take local action to address climate change. Riverkeeper seeks

[1] Riverkeeper uses "ER" to refer to the Excerpt of Record, "LR" to refer to the record of the LUBA proceedings and "Rec" when referring to the record of proceedings before the City.

review of LUBA's decision regarding the dormant Commerce Clause of the U.S. Constitution and Statewide Planning Goals 2 and 12. Riverkeeper respectfully requests that the Court reverse or remand LUBA's order that found the Amendments violate the dormant Commerce Clause and were adopted in violation of Statewide Planning Goals 2 and 12.

If the Court affirms LUBA's order under the dormant Commerce Clause, Riverkeeper requests that the Court determine whether any part of the Amendments may be severable from the whole.

B. Nature of the Final Order

LUBA's Final Order reversed the City's adoption of the Amendments, which created a new use category, "Bulk Fossil Fuel Terminals," reclassifying existing terminals as limited uses. *See* ER 166-67. The Amendments restricted expansion of existing terminals, limited the size of new fossil fuel terminals, and created exceptions to the use category. *Id.*; ER 175. LUBA sustained petitioners' assignments of error relating to compliance with the City's Comprehensive Plan, Statewide Planning Goals 2 and 12, and the dormant Commerce Clause. LUBA noted, ordinarily, sustaining challenges under local and state standards "would result in remand to the city for additional evidence or consideration." ER 14. However, because LUBA concluded the Amendments violate the dormant Commerce Clause, and OAR 661-010-0071

provides that LUBA "shall reverse" a land use decision found to be unconstitutional, LUBA reversed the City's decision. ER 13.

C. Appellate Jurisdiction and Timeliness of Appeal

LUBA issued its final opinion and order on July 19, 2017. ER 1-2. Riverkeeper filed its Petition for Review on August 9, 2017. The appeal is timely and this Court has jurisdiction under ORS 197.850.

D. LUBA Jurisdiction

LUBA has exclusive jurisdiction to review land use decisions, including decisions concerning the amendment of land use regulations. ORS 197.825(1); ORS 197.015(10)(a)(A)(iii). The challenged decision amended the City's zoning ordinance, which consists of land use regulations. Therefore, LUBA had jurisdiction over the appeal.

E. Questions Presented

1. Did LUBA exceed its scope of review by assuming facts outside the record to conclude the Amendments discriminate against interstate commerce?

2. Did LUBA err by shifting the burden to the City to demonstrate the Amendments do not discriminate against interstate commerce?

3. Did LUBA err in concluding the Amendments violate the dormant Commerce Clause of the U.S. Constitution based on discriminatory purpose and effect?

4. Did LUBA err in concluding the City's decision was not supported by an adequate factual base in violation of Goal 2?

5. Did LUBA err in concluding the City was required to consider whether its Transportation System Plan continues to comply with Goal 12?

F. Summary of Argument

Acting under its authority to regulate land use and zoning within its boundaries, the City took action to limit the number and scale of bulk fossil fuel terminals to protect public health and safety, and further the City's efforts to be a global leader on local climate change action. The City found the Amendments "promote major benefits to human health and safety, environmental health and resilience, with minor impacts to economic prosperity and equity." ER 136. The U.S. Supreme Court recognizes local government authority to exercise police powers to regulate activities and articles "which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people." *Guy v. Baltimore*, 100 US 434, 443 (1879).

Before LUBA, petitioners challenged the Amendments on numerous grounds arguing, among other things, that the Amendments impede the flow of fossil fuels in interstate and international commerce, impact transportation systems, and fail to account for local, regional, and interstate demand for fossil fuels. In sustaining petitioners' assignments of error and reversing the decision, LUBA committed the following errors:

1. LUBA exceeded the scope of its review under ORS 197.835(2)(a) by assuming facts outside the record to find that the Amendments discriminate against interstate commerce.

2. LUBA misapplied the law by shifting the burden to the City to demonstrate that the Amendments do not discriminate against interstate commerce where petitioners failed to meet their initial burden to demonstrate discrimination.

3. LUBA erred in concluding the Amendments violate the dormant Commerce Clause based solely on the City's alleged discriminatory intent where there is no demonstrated discriminatory effect. The Amendments' putative local benefits outweigh any incidental burdens on interstate commerce.

4. LUBA erred in concluding that the City's findings regarding regional demand for fossil fuels was not supported by an adequate factual base in violation of Goal 2. LUBA's finding of error under Goal 2 is entirely derivative of other assignments of error and thus was not a sufficient basis for reversal or remand.

5. LUBA erred in concluding that Goal 12 requires the City to consider whether the Amendments render the City's Transportation System Plan non-compliant with Goal 12 because petitioners did not raise that argument and Goal 12 does not directly apply to the Amendments.

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G. Statement of Facts

Portland's Northwest Industrial District is the site of eleven "gateway distribution facilities" that supply petroleum fuels and natural gas throughout Portland and Southern Washington, or more broadly to the multi-state West Coast PADD 5 region. ER 181, Rec 339-40. The rapid development of fossil fuel resources in the Western U.S. and Canada has resulted in many recent proposals for new bulk fossil fuel terminals and infrastructure in the Pacific Northwest. ER 180. Over 90 percent of Portland's industrial land supply, including the location of the existing terminals, is in areas with moderate-to-high susceptibility for soil liquefaction in an earthquake. ER 200. Some of Portland's fossil fuel infrastructure is over 100 years old and was built to little or no code standards. Rec. 1838.

Portland is at risk of damaging earthquakes from several fault lines; the greatest risk is from the Cascadia Subduction Zone, which has a 15-20 percent chance of rupture in the next 50 years and could be similar to the 2011 Magnitude 9 earthquake in Japan. Rec. 1443. Liquefied natural gas and petroleum gas terminals pose potentially catastrophic safety risks from explosions and fire. ER 200-02. Oil trains associated with bulk fossil fuel storage have an estimated risk of derailment as high as one every 30 months. ER 202. A recent oil train derailment in the Columbia River Gorge in Mosier resulted in a 1,000-barrel spill and affected local drinking water and wastewater

facilities. *Id*. "Fossil fuels pose risks to safety, health, and livability, including mobility of people, other freight, and other commercial vehicles." ER 135. In November 2015, the City adopted Resolution 37168, where it resolved to "actively oppose expansion of infrastructure whose primary purpose is transporting or storing fossil fuels in or through Portland or adjacent waterways[.]" ER 209-12.

Greenhouse gas emissions from burning fossil fuels are a major contributor to climate change and pollution. ER 189. As climate change accelerates, Portland will experience greater incidence of drought, high temperatures and increased risk of wildfire, damaging floods and landslides. Rec. 1396. Portland's 2015 Climate Action Plan sets a goal to reduce local carbon emissions by 80 percent from 1990 levels by 2050. ER 190.

Prior to the Amendments, Portland's zoning code allowed bulk fossil fuel terminals as a Warehouse and Freight Movement use with no limitations on size. ER 136. The Amendments create a new use category for "bulk fossil fuel terminals" and restrict expansion at existing terminals and prohibit new terminal development. ER 167; *see* ER 149 (Amendment #6). "Fossil fuels" are defined based on chemical composition and use as an energy source. ER 171. The Amendments do not regulate fossil fuel retail sales or distribution to end users—uses that are not "primarily engaged in the transport and bulk storage of fossil fuels." ER 175.

The Amendments do not regulate existing terminals beyond restricting expansion of fossil fuel storage capacity. *See* ER 167. The Amendments do not regulate or impede pipelines or other modes of transportation that supply and distribute fossil fuels to or from existing terminals. *Id*. The Amendments allow new fossil fuel terminals with storage capacity of 2 million gallons or less. ER 175. The Amendments do not "regulate the quantity of products handled (throughput) on developed sites or their destination (such as exports)." ER 186.

The City adopted general findings in support of the Amendments and findings of compliance with Statewide Planning Goals, the Metro Urban Growth Management Functional Plan and the City's Comprehensive Plan. ER 135-45. The City also adopted the 68-page Recommended Draft report, including commentary, "as legislative intent and further findings." ER 144; *see* Rec 311-82. To further its stated intent of safety, the City directed the Bureaus of Development Services, Emergency Management, and Fire to "work with the State of Oregon to develop policy options to require seismic upgrades of storage tanks within a firm deadline for replacement of older, unsafe tanks." ER 144. The City Council unanimously passed the Amendments on December 14, 2016. Rec 14, 109.

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II. ASSIGNMENTS OF ERROR

A. Analysis Under the Dormant Commerce Clause of the U.S. Constitution

The Commerce Clause grants Congress the power "[t]o regulate Commerce … among the several States[.]" US Const, Art I, § 8, cl 3. The negative implication of the Commerce Clause is a doctrine known as the dormant Commerce Clause, which "limits the power of States to erect barriers against interstate trade." *Maine v. Taylor*, 477 US 131, 137 (1986). However, the limitation on state or local governments is not absolute. *Id.* at 138. The U.S. Supreme Court has established a two-tiered approach to evaluating state or local regulations under the dormant Commerce Clause. First, courts look to whether the law "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce[.]" *Hughes v. Oklahoma*, 441 US 322, 336 (1979). If the law is found to be nondiscriminatory, it is valid unless any incidental burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 US 137, 142 (1970).

B. LUBA Erred in Assuming Facts Not in the Record to Determine the Amendments Violate the Dormant Commerce Clause.

i. Preservation of Error

Rivekeeper argued in its brief to LUBA that the record did not support petitioners' argument that the Amendments are discriminatory. LR 511-12. Riverkeeper raised LUBA's proper scope of review on several occasions. LR

461-2, 477 (brief); 610 (mot. to strike). LUBA exceeded its scope of review and went outside the record to conclude that the Amendments are discriminatory. ER 66 n 29.

ii. Standard of Review

The Court shall reverse or remand LUBA's order if it finds "[t]he order to be unlawful in substance[.]" ORS 197.850(9)(a).

iii. Argument

ORS 197.835(2)(a) sets out LUBA's scope of review and provides, "[r]eview of a decision under ORS 197.830 to 197.845 shall be confined to the record." In evaluating whether the Amendments discriminate against interstate commerce, LUBA correctly noted, "[t]he [Amendments] are silent regarding the origin or final destination of fossil fuels stored or transloaded in the affected [terminals]." ER 64. Nonetheless, LUBA concluded that the Amendments "have the practical effect of prohibiting the storage or transloading of fossil fuels for interstate and international markets[.]" ER 73; *see also* ER 77, ln 8-13. LUBA's conclusion appears to be based entirely on speculation and assumption of facts not in the record.

Riverkeeper argued below that the Amendments do not restrict the amount of fuel transported or distributed through Portland and that petitioners had not demonstrated the Amendments had any impact on the flow of fossil fuels to interstate or international markets through the existing terminals. LR

516. LUBA rejected these arguments on the basis that there was no evidence in the record that the existing terminals could serve interstate or international markets. ER 66-67 n 29. LUBA found that changes to existing facilities would be needed to serve external markets:

> "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 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."

Id. (emphasis added). However, the record contains no evidence that existing terminals would be required to shift modalities or types of fuels in order to reach interstate or international markets. Based on these assumptions, LUBA found the effect of the Amendments was to "freeze the status quo, in which the city's existing [terminals] serve only local, regional and intrastate markets for fossil fuels." ER 66.

LUBA erred by assuming extra-record facts in order to conclude the Amendments violate the dormant Commerce Clause. As discussed below, petitioners bore the burden of demonstrating discrimination against interstate commerce and they failed to identify any facts in the record or produce any evidence to support their claims. ORS 197.835(2)(b) provides that "[i]n the case of disputed allegations of … unconstitutionality of the decision … the board may take evidence and make findings of fact on those allegations." LUBA's

administrative rules provide that the Board "may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision[.]" OAR 661-010-0045(1). Petitioners had the opportunity to request that LUBA take additional evidence to determine whether the Amendments unconstitutionally discriminate against commerce. Petitioners failed to exercise that opportunity and therefore, LUBA's review was "confined to the record." ORS 197.835(2)(a).

LUBA's decision is unlawful in substance because LUBA exceeded its scope of review under ORS 197.835(2)(a). Ordinarily, the proper remedy for LUBA's error would be to remand to LUBA to conduct its analysis based on the record. However, because the record does not support a finding of unconstitutionality and petitioners waived their opportunity to submit additional evidence on disputed issues of fact, the Court should reverse LUBA's order. *See infra* Parts II.C & D.

C. LUBA Erred in Shifting the Burden to the City to Demonstrate the Amendments Do Not Discriminate Against Interstate Commerce.

i. Preservation of Error

Riverkeeper's LUBA brief raised petitioners' burden to demonstrate the Amendments violate the dormant Commerce Clause. LR 512-14. LUBA disregarded petitioners' burden and instead shifted the burden to the City. ER 66, 83, 87.

ii. Standard of Review

The Court shall reverse or remand LUBA's order if it finds "[t]he order to be unlawful in substance[.]" ORS 197.850(9)(a).

iii. Argument

The burden of demonstrating that a regulation discriminates against interstate commerce in violation of the dormant Commerce Clause "rests on the party challenging the validity" of the law. *Hughes*, 441 US at 336. The burden shifts to the City only once "discrimination against commerce … is demonstrated." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 US 333, 353 (1977). If the law does not discriminate against interstate commerce, the burden remains on the challenging party to establish, at the *Pike* balancing stage, that any burden on interstate commerce is clearly excessive in relation to the putative local benefits. *Kleenwell Biohazard Waste & Gen. Ecology Consultants v. Nelson*, 48 F3d 391, 399 (9th Cir 1995). At both stages of analysis, LUBA neither acknowledged nor enforced the burden imposed on petitioners as the challenging parties. Instead, LUBA improperly shifted the burden to the City to demonstrate that the Amendments are non-discriminatory.

First, in evaluating whether the Amendments have a discriminatory effect, LUBA concluded that the Amendments "effectively restrict interstate or international commerce in fossil fuels, while at the same time shielding [Portland's] citizens and local end-users to some extent from the adverse

consequences of the restriction on new or expanded terminals." ER 75. Riverkeeper and the City argued that petitioners failed to demonstrate that the Amendments create any barrier to interstate trade in fossil fuels, while protecting local fuel distribution. LR 292; 516. In response to these arguments, LUBA acknowledged "that nothing in the [Amendments] expressly prohibits … 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." ER 66-67 n 29. "However," LUBA stated, "the city cites no evidence that such redevelopment would be a practical or economic reality." *Id.* Yet, petitioners cited no evidence that such redevelopment of the existing terminals is *not* a practical or economic reality. The parties challenging the constitutionality of the Amendments bore the burden of demonstrating a discriminatory effect. In the absence of such a showing, LUBA erred in shifting the burden to the City.

Second, in its analysis under the *Pike* balancing test, LUBA struggled to identify any incidental burdens on interstate commerce and appeared to blame the City for this difficulty:

> "It is difficult to evaluate how much of a burden the city's prohibition on new or expanded [terminals] would have on the establishment of new export terminals, or on the flow of fossil fuels into and through any future export terminals in the city or region, because the record includes no attempt to conduct that evaluation."

ER 87. However, neither petitioners nor LUBA identified any approval criteria or applicable law that required the City to evaluate the Amendments' potential burden on yet-unplanned future export terminals or the flow of fossil fuels through those terminals. Petitioners had every opportunity to present evidence of the alleged burdens on interstate commerce and it was petitioners' burden to demonstrate that any burdens on commerce outweigh local benefits.

LUBA erred in shifting the burden to the City to evaluate and disprove alleged burdens on interstate commerce where petitioners had not satisfied their initial burden to demonstrate the Amendments had a discriminatory effect or incidental burden on interstate commerce. The Court should reverse or remand LUBA's order.

D. LUBA Erred in Concluding the Amendments Violate the Dormant Commerce Clause of the U.S. Constitution.

i. Preservation of Error

Riverkeeper argued in its LUBA brief that the Amendments do not violate the dormant Commerce Clause because they are not discriminatory and the putative local benefits outweigh any incidental burdens on interstate commerce. LR 509-17. LUBA concluded the Amendments have a discriminatory effect on interstate commerce that outweighs any local benefits and were adopted for a discriminatory purpose. ER 61-92.

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ii. Standard of Review

The Court shall reverse or remand LUBA's order if it finds "[t]he order to be unlawful in substance[.]" ORS 197.850(9)(a). This Court gives "no deference to LUBA's rulings on legal questions." *Grabhorn v. Washington County*, 279 Or App 197, 203, 379 P3d 796 (2016).

iii. Argument

1. LUBA erred in concluding the Amendments are discriminatory.

At the first stage of dormant Commerce Clause analysis courts apply strict scrutiny to laws that "discriminate against interstate commerce 'either on its face or in practical effect.'" *Hughes*, 441 US at 336. "Discriminatory" under the dormant Commerce Clause means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 US 93, 99 (1994). When comparing in-state interests to out-of-state interests allegedly burdened by the regulation, courts must compare similarly situated entities. *See GMC v. Tracy*, 519 US 278, 298 (1997) ("[A]ny notion of discrimination assumes a comparison of substantially similar entities."); *see also Exxon Corp. v. Governor of Md.*, 437 US 117, 125-26 (1978) (distinguishing out-of-state petroleum refiners operating retail stations from in-state independent retailers and instead comparing out-of-state retail dealers to in-state dealers). LUBA

misconstrued the law governing the discriminatory effect analysis and misconstrued the scope of the Amendments.

At the outset, LUBA acknowledged that the Amendments are not discriminatory, at least in the most traditional sense. First, LUBA noted that the Amendments are facially neutral because they "are silent regarding the origin or final destination of fossil fuels stored or transloaded in the affected [terminals]." ER 64. Second, LUBA found the Amendments do not represent "economic protectionism in the classic sense of a state or municipality trying to favor local economic interests by restricting or burdening competition from out-of-state actors." ER 68. That is because neither Portland nor Oregon has any "local refineries or sources of fossil fuel to promote or protect against competitors." *Id.*; LR 702; ER 194. "Nonetheless," LUBA concluded,

> "we believe that the [Amendments] embody elements of economic protection for local interests—protection from the burdens that the city is willing to impose on interstate commerce—and the city's attempt to shield local interests from the burden of obstacles it places in the path of interstate commerce is one of the fatal flaws of the [Amendments]."

ER 68.

Throughout the opinion, LUBA varies its analysis of discrimination, focusing at some points on burdens to the fossil fuel distribution path (*i.e.* exports) and at other points on obstacles based on the type, origin or quantity of goods (*i.e.* bulk fossil fuels). Under either frame, LUBA erred in finding the Amendments are discriminatory because LUBA failed to identify any

differential treatment of similarly situated in-state and out-of-state economic interests.

LUBA's finding of discrimination is based on the misperception that the Amendments have the effect of preserving the status quo where "the city's [terminals] adequately serve current local and regional demands" and shield local end-users from "the adverse consequences of the restrictions on new or expanded terminals." ER 69-71. However, LUBA identified no provision of the Amendments that requires or ensures continuation of the status quo or otherwise regulates in-state or local interests differently than out-of-state interests. The Amendments do not impose different burdens, obstacles or advantages on similarly situated in-state and out-of-state interests.

a. In-state vs. out-of-state entities

The Amendments do not prohibit any out-of-state company's operations while allowing an in-state company's operations. No company, whether in-state or out-of-state, can establish or expand a bulk fossil fuel terminal in Portland.[2] The Amendments do not prohibit any local or foreign entity from storing, distributing, or selling fossil fuels through any format other than a "bulk fossil fuel terminal" as defined by the Amendments. *See* ER 175 (characteristics of "bulk fossil fuel terminal"). The Commerce Clause does not protect "the

[2] Petitioners never asserted that Portland's existing terminals are owned solely by in-state companies. The existing terminals include those operated by multi-national corporations Chevron, Kinder Morgan, Conoco Phillips, BP West Coast, and Shell. *See* ER 196.

particular structure or methods of operation in a retail market." *Exxon Corp*, 437 US at 127. "There is no constitutional right to do business in a retailer's optimally profitable configuration, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality." *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F Supp 2d 987, 1012 (ED Cal 2006).

The facts of this case are almost directly on point with the facts in *Wal-Mart*. There, the city adopted an ordinance amending its zoning code to create new land use categories for "discount stores," "discount clubs," and "discount superstores." *Id.* at 991-92. "Discount superstores" were defined by square footage and the types of services provided and were prohibited in all zones. *Id.* "Discount stores" and "discount clubs" were allowed as conditional uses in commercial zones. *Id.* at 992. The court found the ordinance to be nondiscriminatory "because any retailer can locate and do business in Turlock, with any employees or managers, offering any products, except in the legislatively defined discount superstore format." *Id*. at 1012.

Here, the City of Portland adopted a new land use category for "bulk fossil fuel terminals" defined by the particular size and format of development, while allowing smaller formats of that type of use to continue in certain zones. ER 175. Just as in *Wal-Mart*, "[t]here is no suggestion any out-of-state [fossil fuel interest] cannot successfully do business marketing [fossil fuels] in

[Portland] if it is not permitted to do so as a [bulk fossil fuel terminal]." 483 F Supp 2d at 1012. Petitioners provided no evidence that the cost of storing, transporting, or distributing fossil fuels in and through Portland will be more costly or burdensome for out-of-state businesses than for in-state businesses under the Amendments.

b. In-state vs. out-of-state goods

LUBA explicitly acknowledged that the Amendments are not concerned with the origin of fossil fuels. ER 64, 69. The Amendments contain no distinction between local or foreign-made goods. Nor do the Amendments discriminate against any out-of-state product or create an economic barrier against out-of-state goods. The Amendments regulate fossil fuels on the basis of their chemical composition and intended use as a source of energy. ER 171. (definition of "fossil fuel").

c. In-state vs. out-of-state markets

LUBA attempted to distinguish this case from *Wal-Mart* by inserting words into the text of the Amendments:

> "To put the circumstances in *Wal-Mart Stores, Inc.* on a closer footing with the present case, imagine that the City of Turlock objects to the import of goods manufactured overseas, and adopts amendments that prohibit new distribution centers that receive and transfer foreign-made goods to stores across the United States, but nonetheless the amendments allow local retailers to continue to sell foreign-made goods in city stores to meet the local demand."

ER 79 (emphases added). This analogy is flawed. While the commentary to the Amendments includes discussion of the "regional market," it also states "the use classification is intended to be clearly identifiable by physical characteristics and not rely on a definition of region." ER 174. Elsewhere, the City pointed out, "[z]oning does not regulate the quantity of products handled (throughput) on developed sites or their destination (such as exports)." ER 186. Accordingly, the Amendments do not regulate the distribution of fossil fuels either from the existing bulk fossil fuel terminals or from new facilities that are not bulk terminals. ER 175.

LUBA correctly noted it was not "bound by the stated purpose when determining the practical effect of [a] law." ER 67 (quoting *Rocky Mt. Farmers Union v. Corey*, 730 F3d 1070, 1098 (9th Cir 2013)). Nonetheless, LUBA's practical effect analysis appears to be entirely dependent upon the City's 2035 Comprehensive Plan Policy 6.48 to "limit fossil fuel distribution and storage facilities to those necessary to serve the regional market." ER 65-73. However, the Amendments do not mandate a minimum quantity of in-state or local supply of fossil fuels. Nor do the Amendments dictate the distribution chain of fossil fuels from the existing facilities so as to permit only local and regional distribution or prohibit interstate and international exports.[3] In fact, the existing

[3] Petitioners proposed to the City that the Amendments restrict only "extra-regional" fossil fuel terminals but allow new facilities that are necessary to serve the regional market. Rec. 269-91. The City clearly rejected this

terminals already serve interstate markets spanning from Oregon to Southwest Washington and further to the 7-state West Coast PADD 5 region, including Alaska and Hawaii. Rec. 276, 339-40. The Amendments do not "affect the type and quantity of fuels" that flow in interstate commerce across state lines. ER 77-78.

d. "Local Exceptions"

LUBA's practical effect analysis places particular emphasis on the "exceptions" to the prohibition on bulk fossil fuel terminals, concluding that they impermissibly "shield local interests." ER 68-71; *see* ER 175.[4] LUBA cites *Raymond Motor Transportation, Inc. v. Rice* for the principle that "exceptions in favor of local interests 'weaken the presumption in favor of the validity of [a regulation], because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce.'" ER 68 (quoting 434 US 429, 447 (1978)). However, the

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proposal as the Amendments do not distinguish between the markets served by bulk fossil fuel terminals.

[4] While designated as "exceptions," most of the items listed in PCC 33.920.330(D) are merely examples of uses that do not fit within the bulk fossil fuel terminal use category. For example, Exception (1)—"truck or marine freight terminals that do not store, transport or distribute fossil fuels"—does not fit the characteristics of a bulk fossil fuel terminal "primarily engaged in the transport and bulk storage of fossil fuels." ER 175. The same is true for Exceptions (3) (retail gasoline sales), (5) (industrial, commercial, institutional, and agricultural firms), (6) (solid and liquid waste facilities), (7) (airports, surface passenger terminals, freight terminals, rail yards, fleet vehicle servicing facility), and (8) (petroleum recycling). *See* Rec. 339 (listing "Exceptions that are not Bulk Fossil Fuel Terminals").

local exceptions at issue in *Raymond* were quite different than those in the Amendments. There, the State of Wisconsin prohibited operation of vehicles over 55 feet in length on highways within the state, but created exceptions allowing certain intrastate businesses to operate vehicles up to 100 feet long. 434 US at 432-34. In other words, the exceptions allowed in-state interests to operate the very type of vehicles the statute prohibited such that similarly situated out-of-state interests were burdened in a way in-state interests were not.

In contrast, the exceptions in the Amendments do not permit local businesses to develop new bulk fossil fuel terminals; nor do they prohibit out-of-state retail sales or end uses of fossil fuels. ER 175. The Amendments prohibit bulk fossil fuel terminals regardless of whether they distribute fuels locally or internationally. In finding that the "exceptions" were protectionist, LUBA erred in failing to compare similarly situated interests.

For instance, while the Amendments allow facilities engaged in fossil fuel retail sales and service to end users to continue unrestricted, they do not impose any burdens or restrictions on similarly situated out-of-state fossil fuel retailers or end users. As discussed above, there is no indication in the record that Portland's existing terminals are incapable of serving interstate or international fossil fuel export markets. Those regional "gateway distribution facilities * * * have direct access to pipeline, deep-water port, railroad and truck route infrastructure." ER 181. Petitioners cited no evidence before LUBA to

demonstrate that interstate or international distribution through the existing terminals, or through new facilities that are not "bulk fossil fuel terminals," would not be economically feasible or profitable. The Amendments do not discriminate against the movement of goods in interstate commerce or impose disproportionate burdens on similarly situated out-of-state interests. LUBA erred in concluding the Amendments have a discriminatory effect in violation of the dormant Commerce Clause.

2. LUBA erred in determining the City had a discriminatory purpose rendering the Amendments invalid.

LUBA cited *Rocky Mt. Farmers*, for the principle that "a law may violate the dormant Commerce Clause if it 'discriminates against out-of-state entities on its face, in its purpose, or in its practical effect[.]'" ER 62-63 (quoting 730 F3d at 1087). Having established that LUBA erred in concluding the Amendments have a discriminatory effect, all that remains is LUBA's conclusion the City had a discriminatory purpose in adopting the Amendments. U.S. Supreme Court case law indicates consideration of whether a local government had a discriminatory purpose comes only "once a [] law is shown to discriminate against interstate commerce[.]" *Taylor*, 477 US at 138. LUBA erred in reviewing the City's purposes for the Amendments under "an elevated level of scrutiny." ER 62-63.

As LUBA noted, when evaluating the City's purpose in adopting the Amendments LUBA was to "assume that the objectives articulated by the

legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." ER 71 (quoting *Rocky Mt. Farmers*, 730 F3d at 1097-98). The government enacting laws affecting interstate commerce is "not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 US 456, 464 (1981). Instead, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id*. The rule of "per se invalidity" for economic protectionism "applies only when *no* legislative objectives other than protectionist ones are 'credibly advanced[.]'" *Spoklie v. Montana*, 411 F3d 1051, 1060 (9th Cir 2005) (emphasis in original).

LUBA misconstrued the law in concluding that the Amendments were unconstitutional due to a discriminatory purpose. LUBA improperly based its finding of discrimination solely on the City's alleged discriminatory intent and erred in disregarding the City's stated objectives to protect public health and safety.

a. Purpose alone is not sufficient for discrimination.

While courts routinely refer to the "discriminatory purpose" test, "there is some reason to question whether a showing of discriminatory purpose alone

will invariably suffice to support a finding of constitutional invalidity under the dormant Commerce Clause." *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F3d 30, 36 n 3 (1st Cir 2005) (citing Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 275 (15th ed 2004) (recognizing the analytical difficulty that arises because "a law motivated wholly by protectionist intent might fail to produce significant discriminatory effects")). The Ninth Circuit has held that "the legislature's stated purpose in enacting a statute is not dispositive of a dormant Commerce Clause challenge. The Commerce Clause seeks to prevent extraterritorial economic 'effects,' not purposes." *Gerling Global Reinsurance Corp. v. Low*, 240 F3d 739, 745-46 (9th Cir 2001) (citing *Healy v. Beer Inst.*, 491 US 324, 336 (1989)), *rev'd on other grounds sub nom*, *Am. Ins. Ass'n v. Garemendi*, 539 US 396 (2003). The court in *Wal-Mart* noted that there are no known cases where "a statute or regulation [has] been invalidated solely because of the legislators' alleged discriminatory motives." 483 F Supp 2d at 1013. The U.S. Supreme Court has itself stated, "we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands. On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect[.]'" *Associated Indus. v. Lohman*, 511 US 641, 654 (1994). "The dormant Commerce Clause is aimed at deflecting *acts* of

economic protectionism, not mere intent." *Puppies 'N Love v. City of Phoenix*, 116 F Supp 3d 971, 993 (D Ariz 2015) (emphasis in original).

LUBA's discriminatory purpose analysis turns entirely on the City's Resolution 37168 and 2035 Comprehensive Plan Policy 6.48, two of several policies that formed the basis for the Amendments. ER 64-66; *see* ER 186-90. Resolution 37168 states, in part, "the City Council will actively oppose expansion of infrastructure whose primary purpose is transporting or storing fossil fuels in or through Portland or adjacent waterways[.]" ER 209-12. This policy appears to target both existing and new fossil fuel terminals. Policy 6.48 is to "[l]imit fossil fuel distribution and storage facilities to those necessary to serve the regional market." ER 189. While Policy 6.48 appears to have a potentially discriminatory motive, as discussed above, the Amendments do not fulfill that motive because no part of the Amendments directs or compels the existing facilities to serve only the regional market. *See supra* Part II.D.iii.1. LUBA erred in basing its dormant Commerce Clause analysis solely on an alleged discriminatory purpose where the Amendments do not have any discriminatory effect.

b. LUBA ignored the City's health and safety purposes.

Even if discriminatory purpose alone was a sufficient basis to invalidate the Amendments, LUBA erred in its analysis of the City's purposes for adopting the Amendments. LUBA all but ignored the City's stated purposes

related to public health and safety. In the report for the Recommended Draft of the Amendments the City outlined the guiding principles of its 2035 Comprehensive Plan. ER 187-88. For the principles of human and environmental health, the report states:

> "The recommended code changes would reduce the scale of low, but potentially catastrophic, safety risks associated with the growth of fossil fuel infrastructure, including oil train derailments, explosive accidents at liquefied natural gas (LNG) and liquefied petroleum gas (LPG) facilities, and seismic risks of tank farms. Fossil fuel emissions and coal dust are also significant sources of air pollution associated with respiratory disorders."

ER 188. The report notes that restricting development of fossil fuel terminals furthers the City's 2015 Climate Action Plan goal to reduce local carbon emission 80 percent by 2050. ER 190. The City made numerous findings regarding the health, safety, and climate change impacts of bulk fossil fuel transport and infrastructure. ER 135-37.

At the outset of its dormant Commerce Clause analysis, LUBA brushed aside the City's stated purposes and reviewed the Amendments only through the lens of the purported discriminatory intent of Policy 6.48. ER 67-69. It wasn't until 19 pages into the Commerce Clause analysis that LUBA turned to the City's non-discriminatory health and safety purposes. In comparison to the City's alleged discriminatory intent, where LUBA presumed the Amendments would have their intended effect, when it came to the City's health and safety purposes LUBA made the effort to demonstrate that the Amendments would not

achieve the City's intent. ER 82-86. After ignoring record evidence and the City's unchallenged findings in support of the Amendments, LUBA concluded the Amendments do not actually achieve the City's health and safety goals. ER 83-84.

For example, LUBA found that the Amendments "appear to do nothing to reduce [] vulnerability" of the existing terminals to seismic events. ER 82. Throughout the process leading up to the adoption of the Amendments, City officials discussed the seismic stability of existing fossil fuel terminals. The City's Bureau of Emergency Management reported that a study of Portland's Critical Energy Infrastructure (CEI) Hub, which includes all of Oregon's bulk fossil fuel terminals, "found that the majority of the facilities in the CEI hub are constructed to no or low seismic standards and they're mostly located on soft liquefiable soils that are typically associated with increased seismic vulnerability." Rec 211; *see* Rec 1838, 1842 (CEI Hub Study). The CEI Hub Study noted that current regulations do not require seismic upgrades for existing terminals and associated tanks, pipes and piers. Rec 1849. The Portland Planning Commission discussed the inability of the City to go beyond state building codes to require seismic upgrades to existing terminals. Rec 3302-03.

Early drafts of the Amendments included a ten percent expansion allowance for seismic upgrades to storage tanks. ER 167. However, after hearing from petitioners and representatives of existing terminals that a ten

percent expansion was not an adequate incentive for tank replacements, the City opted to remove the provision and instead seek changes to state building codes. *See* ER 149 (Amendment #6 – "Delete provision that allows for up to 10% expansion for seismic replacement of storage tanks."); Rec 124 (Mayor Hales explaining that seismic improvements won't happen through expansion incentive); Rec 173, 224 (statements from petitioners that 10% expansion is not adequate incentive). As an alternative to the expansion incentive, Ordinance 188142 directs City bureaus to "work with the State of Oregon to develop policy options to require seismic upgrades of storage tanks within a firm deadline for replacement of older, unsafe tanks." ER 144. Thus, the Amendments do what within the City's current authority to address the seismic vulnerability of existing terminals and to prevent risk from further development of large-scale fossil fuel infrastructure.

LUBA also discounted the City's interest in addressing seismic vulnerability because the Amendments allow development of smaller fossil fuel terminals and bulk terminals for non-fossil fuels such as bio-diesel and ethanol. ER 83. This frame ignores the City's other concerns and objectives in adopting the Amendments. The City's findings make clear that, in addition to seismic safety, the City is concerned with fossil-fuel-caused pollution, risks related to oil train derailments, explosion risks at large storage facilities, and transitioning to non-fossil fuel energy sources. ER 135-37. The Amendments seek to address

those concerns by focusing on the largest common denominator of those broader policy issues—bulk fossil fuel terminals. LUBA provides no support for the contention that the City's purpose of improving health and safety is legitimate only if the Amendments address the entire problem, rather than a significant part. Regulations aimed at protecting health and safety are among those that the Supreme Court "has been most reluctant to invalidate." *Kleenwell*, 48 F3d at 398.

With respect the City's stated purpose of reducing climate change impacts from fossil fuel consumption, LUBA concluded it was not a legitimate local purpose because the Amendments do nothing to reduce or constrain local consumption. ER 84-86. LUBA relied on the City's finding that regional demand for fossil fuels may plateau or decline to conclude that the Amendments will not achieve the City's purpose. ER 84; *see* ER 137 (Finding No. 21).[5] The Amendments may constrain local demand and consumption of fossil fuels. *See* Rec. 100 ("Restricting potential increases in regional supply of fossil fuels could have a negative economic impact by increasing fuel costs."); Rec 344 (Amendments "may be more restrictive than the exceptions in [Resolution 37168] that call for not restricting improvements at existing fuel

[5] Earlier in its opinion LUBA concluded that the City's finding on regional demand was not supported by substantial evidence, but was "pure speculation." ER 54-56.

terminals that improve safety, provide wholesale fuel supply to local or regional end users, add backup capacity, or add tanks for clean/renewable fuels[.]").

The City advanced several legitimate non-protectionist purposes for adopting the Amendments. LUBA misapplied the law in elevating one of the City's purposes above the other stated purposes without engaging in a complete "examination of the circumstances" for each purpose. *Rocky Mt. Farmers*, 730 F3d at 1097-98. LUBA erred in concluding that the City's stated nondiscriminatory health and safety purposes we not legitimate.

3. LUBA erred in concluding that any incidental burden on interstate commerce outweighs the City's legitimate local interests in adopting the Amendments.

Because petitioners failed to demonstrate that the Amendments are discriminatory in effect and LUBA erred in finding a discriminatory purpose, the proper inquiry was whether the Amendments violated the dormant Commerce Clause under the *Pike* balancing test. At this stage, petitioners had the obligation of demonstrating that any incidental burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike*, 397 US at 142

LUBA's conclusion at the *Pike* balancing stage was based on the same flawed analysis conducted at the first stage of Commerce Clause review discussed above. LUBA acknowledged there was little evidence of any actual burden on interstate commerce. ER 87. Nonetheless, LUBA concluded the

Amendments were excessively burdensome based on "the city's intent that the impact on the interstate and international market in fossil fuels will be significant, and that few or no fossil fuel export terminals will become established in the city or perhaps the region." *Id.* As with the practical effect determination, LUBA erred in concluding that the Amendments impose even incidental burdens on interstate commerce based solely on the City's alleged intentions where petitioners failed to provide any evidence of those burdens.

LUBA also erred in concluding the Amendments do not achieve any "local" benefits that could be balanced against the incidental burdens on interstate commerce. ER 88-89. As discussed above, the Amendments will improve seismic resilience by prohibiting new high-risk development in soil liquefaction zones and directing City bureaus to pursue changes to state building codes to require seismic upgrades at existing terminals. ER 200. The City found that the Amendments reduce potentially catastrophic public safety risks from explosions and fire at liquefied natural gas and petroleum gas facilities by restricting development to less than 2 million gallons of storage capacity. ER 202. Regarding risks from oil train derailments, the City found the Amendments "could incrementally reduce rail accident risks by restricting development and expansion of fossil fuel terminals in Portland as a West Coast rail hub location." *Id.*

Perhaps the most measureable local benefit achieved by the Amendments is the furtherance of the City's efforts to be a leader in local climate action. As then-Mayor Charlie Hales cast the final vote in favor of passing the Amendments, he said "I'm proud that we're a leader[;]" he continued:

> "I'm wearing my C40[6] pin because I was at the conference to accept an award for having the best climate action plan in the world. * * * I said to the group of worried cities around the world who are partners in this work that regardless of what you're reading or hearing about the [U]nited [S]tates that the cities of our country that are climate action cities are still in this work, and are still committed. * * * [T]his is how we're expressing our values about the place we live in. We live here together. We want this to be a sustainable, responsible community."

Rec 109 (transcript of Dec. 14, 2016 Hearing). The City has taken meaningful actions to reduce local greenhouse gas emissions for two decades. Rec 207-08. The City cut carbon emissions by 40 percent since 1990 and cut total emissions by 21 percent even as population increased by more than one-third and jobs grew by 25 percent. Rec 207. The City cut its government energy bill by $6 million in a single year and over $50 million over 10 years and now purchases 100 percent green power for all city facilities. *Id.*

LUBA questioned whether the City's interest in reducing greenhouse gas emissions and the impacts of climate change result in legitimate "local" benefits because such benefits "would literally apply to every person on the planet" and thus are too "attenuated." ER 88-89. However, LUBA cited no authority for the

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[6] C40 is a network of 83 global cities committed to addressing climate change. *See* Rec 132-33.

proposition that a local government has no legitimate interest in solving a global problem, regardless of whether "it stands to gain or lose more than any other city in the world from infinitesimal reductions or increases in global warming." ER 90-91; *see Massachusetts v. EPA*, 549 US 497, 522 (2007) ("That these climate change risks are 'widely-shared' does not minimize Massachusetts' interest" in reducing them). Such logic would require cities and states across the county to simply watch their resources and environment degrade, powerless to take any action to stop it. The "constitutional principles underlying the commerce clause cannot be read as requiring the [city] to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees . . . before it acts to avoid such consequences." *Taylor*, 477 US at 148.

LUBA attempted to distinguish cases upholding state or local efforts to reduce pollution or climate change impacts by asserting that Portland is not "uniquely vulnerable" to climate change. ER 188-91 (discussing *Rocky Mt. Farmers*, 730 F3d 1070, and *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F3d 1154 (9th Cir 2011)). However, the City indentified multiple risks to Portland due to climate change, including increased temperatures, incidence of drought, and wildfire frequency and intensity as well as increased incidence and magnitude of damaging floods and landslides. Rec 1396. The City has a legitimate local interest in acting to prevent or lessen those risks. LUBA erred

in concluding the Amendments' legitimate local benefits are outweighed by unsubstantiated and hypothetical incidental burdens on interstate commerce.

iv. Conclusion

LUBA misconstrued the law governing dormant Commerce Clause analysis by elevating consideration of the City's purpose above the effect of the Amendments and failing to identify any discrimination against interstate commerce. The City's legitimate health and safety purposes and the local benefits of the Amendments outweigh any incidental burdens on interstate commerce. The Court should find that the Amendments do not violate the dormant Commerce Clause and reverse LUBA's decision.

If the Court affirms LUBA's determination, Riverkeeper respectfully requests the Court review the Amendments for severability and declare only the portions that discriminate against interstate commerce unconstitutional. *See City Univ. v. Office of Educ. Policy & Planning*, 320 Or 422, 425, 885 P2d 701 (1994) ("This court has held that, when part or parts of a statute are held unconstitutional, the whole statute need not be invalidated if the part or parts that are constitutionally impermissible are severable from the remainder of the statute").

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E. LUBA Erred in Concluding the City's Decision was Not Supported by an Adequate Factual Base in Violation of Statewide Planning Goal 2.

i. Preservation of Error

Riverkeeper and the City argued in their briefs to LUBA that the decision complied with Goal 2 and was supported with an adequate factual base. LR 253-58; 474-78. LUBA concluded that the City's decision violated Goal 2. ER 52-57.

ii. Standard of Review

The Court shall reverse or remand LUBA's order if it finds "[t]he order to be unlawful in substance[.]" ORS 197.850(9)(a).

iii. Argument

Goal 2 requires that legislative land use decisions be supported by an adequate factual base. "LUBA has interpreted the Goal 2 requirement to 'assure an adequate base' to mean that legislative decisions must be supported by substantial evidence, *i.e.* findings of fact supported by evidence in the record which, viewing the record as a whole, would permit a reasonable person to make that finding." ER 53 (citing *1000 Friends v. City of North Plains*, 27 Or LUBA 372, 377-78 (1994), *aff'd,* 130 Or App 406 (1994))). "[F]or a decision to be reasonable, it need not be the decision that LUBA would have made on the same evidence." *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 256 (1988).

The findings of fact supporting the Amendments are found at ER 135-37. Petitioners and LUBA took issue with Finding 21 regarding future demand:

> "The potential impact of the code amendments on constraining 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 in other modes of transportation, more fuel efficient vehicles, electric vehicles, and other carbon reduction strategies."

ER 137. LUBA erroneously concluded the finding was not supported by substantial evidence because it "essentially ignore[s] uncontradicted projections of moderate growth in demand for fossil fuels, and instead rel[ies] on what are no more than unsupported speculations that demand will actually plateau or decline." ER 57.

First, Finding 21 expressly acknowledges, "demand may increase moderately, as indicated by trend-based forecasts" but ultimately concludes that "[t]he potential impact of the code amendments on constraining fossil fuel supply to meet regional demand is uncertain." ER 137. LUBA itself acknowledged that "[p]rojecting future demand for fossil fuels is an uncertain enterprise." ER 56. The City noted it received contradictory comments regarding local growth projections and had difficulty obtaining reliable information on the ability of existing terminals to accommodate increased demand because terminal representatives "could not comment on facility size and anticipated growth because of anti-trust laws[.]" ER 195; Rec 382. The City

also pointed to the challenge of forecasting for liquid bulk cargo in light of recent changes in prospects for new fuel terminals. ER 198.

Second, the City's determination that demand *may* "plateau or decline" is not based on "pure speculation" but is supported by evidence in the record. *See* ER 56. As discussed above, the City has a 20-year record of reducing its carbon emissions and energy consumption. Rec 207-08. In addition to past accomplishments, the City noted other projects and policies that could further reduce demand, including an electric vehicle strategy and community solar. Rec 208. The Oregon Clean Fuels Program requires a 10 percent reduction in carbon intensity of fuels by 2025. ER 199. Both the City and Oregon have goals to dramatically reduce carbon emissions by 2050. ER 190. This is substantial evidence such that a reasonable person could conclude that regional demand for fossil fuels "may plateau and decline with a continued shift in other modes of transportation, more fuel efficient vehicles, electric vehicles, and other carbon reduction strategies." ER 137.

Moreover, LUBA overstates the importance of the finding. Contrary to LUBA's determination, the City's projection that demand for fossil fuels "may plateau or decline" was not the "key support for the prohibition on any expansion of existing terminals to meet even local or regional needs[.]" *See* ER 57. The City relied on the exact same projection in the report for the Recommended Draft of the Amendments, which included the ten percent

expansion allowance. ER 195-96.[7] In other words, the City contemplated allowing expansion of existing terminals despite the potential for regional fossil fuel demand to plateau or decline. The City's findings regarding regional demand did not turn on its decision to prohibit storage expansion at existing terminals.

While shrouded in the context of a substantial evidence challenge to Finding 21, LUBA's concern appears to lie in the fact the City did not make different or additional findings regarding demand for fossil fuels despite its "unique geographic and logistical position with respect to regional, statewide, interstate and international markets in fossil fuels." ER 56-57. However, there is no general requirement that legislative decisions be supported by findings. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). LUBA pointed to errors under Goal 12 and the dormant Commerce Clause to conclude "we do not believe the city can limit the scope of its evidentiary inquiry to evaluating only the local or even regional demand for fossil fuels." ER 57. Thus, LUBA's conclusion that the City's findings are not supported by an adequate factual base appear to be grounded in LUBA's resolution of other assignments of error. LUBA has held that Goal 2 arguments that are "entirely derivative of other arguments in other assignments of

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[7] As discussed above, the primary purpose of the ten percent expansion was to incentivize seismic upgrades. *See supra* Part II.D.ii.2.b. After hearing from terminal representatives that the expansion allowance was not a sufficient incentive, the City removed the provision. Rec 124.

error…do not provide an independent basis for reversal or remand." *Home Builders Assoc. of Lane Cnty. v. City of Eugene*, 41 Or LUBA 370, 450 (2002).

LUBA erred in sustaining petitioners' Goal 2 assignment of error because the findings are supported by an adequate factual base and any failure of the City to make additional findings regarding demand for fossil fuels is derivative of petitioners' other assignments of error. The Court should reverse LUBA's determination on Goal 2.

F. LUBA Erred in Concluding the City Failed to Demonstrate Compliance with Statewide Planning Goal 12.

i. Preservation of Error

Riverkeeper argued below that the Amendments do not violate Goal 12 because they do "not significantly affect an existing or planned transportation facility." LR 461, 484-86. Riverkeeper asserted that "petitioners' arguments for direct application of Goal 12 are not grounded in relevant goal language[,]" and that Goal 12 specifically regulates transportation plans, not zoning amendments generally. LR 485. LUBA ruled that Goal 12 requires the City to determine whether the Amendments affect the City's Transportation System Plan's compliance with Goal 12. ER 41-45.

ii. Standard of Review

The Court shall reverse or remand LUBA's order if it is "unlawful in substance or procedure, but error in procedure is not cause for reversal or

remand unless the court finds that substantial rights of the petitioner were prejudiced thereby[.]" ORS 197.850(9)(a).

iii. Argument

Goal 12 is "[t]o provide and encourage a safe, convenient and economic transportation system." OAR 660-012-0000(1). Goal 12 governs "transportation plans," typically referred to as transportation system plans (TSPs). *See* OAR 660-012-0000(2) (implementation of Goal 12 met with coordinated land use transportation plans). One directive of Goal 12 is that TSPs "shall * * * facilitate the flow of goods and services[.]" App. 1. Petitioners argued the Amendments violate Goal 12 because they "disrupt 'the flow of goods and services[.]'" LR 662-64. LUBA sustained petitioners' assignment of error, effectively creating a new requirement not grounded in the text of Goal 12:

> "we do not believe the city can adopt zoning amendments that restrict [terminals] to their existing number and capacity, without at least considering the impact of the amendments on the flow of fossil fuel to the region and the state. Specifically, the city must consider whether the city's TSP and zoning regulations, post-amendment, continue to comply with the Goal 12 requirement to facilitate the flow of goods and services."

ER 45.

1. Goal 12 does not directly regulate code amendments.

Goal 12 is implemented at OAR Chapter 660 Division 12; OAR 660-012-0060 governs "Plan and Land Use Regulation Amendments" and has specific provisions addressing zoning amendments. Petitioners raised error

under OAR 660-012-0060 and LUBA rejected those arguments on the basis that "the [Amendments] do not significantly affect any [transportation] facility[.]" ER 29-41. Absent a showing of significant effects to a transportation facility, Goal 12 does not directly apply to land use regulation amendments. LUBA ignored the plain language of Goal 12 applying only to "transportation plans" not zoning amendments. App. The city found the Amendments were consistent with Goal 12. ER 139-40. LUBA's conclusion otherwise was in error.

2. LUBA erred in sustaining error that was not adequately raised by petitioners.

LUBA cannot raise issues *sua sponte* that were not adequately developed in the petitioners' briefs. *See* ORS 197.835(11)(a) (LUBA "shall decide all issues presented to it"). As the parties assigning error to the City's decision, it was petitioners' burden to articulate how the Amendments were in violation of Goal 12. *Opus Dev. Corp. v. City of Eugene*, 141 Or App 249, 256, 918 P2d 116 (1996) ("A party challenging the decision must provide some particularized basis for showing it to be reversible."). However, no petitioner raised with specificity an argument that the Amendments caused the City's TSP to be noncompliant with Goal 12. *See* LR 672-77; 728-32; *see* LR 41-42 (summarizing petitioners' Goal 12 arguments).

Petitioners *did* assign error asserting the Amendments violate the City's TSP. LR 683-88. However, LUBA only noted the assignment of error, but did not address it in its order. *See* ER 14-24. Whether the Amendments violate the

City's TSP is relevant to whether the Amendments render the TSP noncompliant with Goal 12. By failing to address petitioners' TSP arguments while sustaining error under Goal 12 based on the TSP, LUBA's decision effectively provides petitioners a second chance to develop arguments on remand that they did not present or adequately support before LUBA. This error prejudices Riverkeeper's right to receive full analysis of all issues presented and the ability to respond to arguments that were not adequately raised.

Petitioners did not adequately develop an argument that the Amendments render the City's TSP noncompliant with Goal 12. The Court should reverse LUBA's finding that the Amendments violate Goal 12. If the Court remands to LUBA, Riverkeeper requests the Court direct LUBA to resolve petitioners' arguments that the Amendments are inconsistent with the City's TSP.

III. CONCLUSION

For the reasons stated above, Riverkeeper respectfully requests the Court reverse LUBA's Order finding the Amendments violate the dormant Commerce Clause of the U.S. Constitution and Statewide Planning Goals 2 and 12.

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DATED this 30th day of August, 2017.

Respectfully submitted,

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Oregon's Statewide Planning Goals & Guidelines

GOAL 12: TRANSPORTATION

OAR 660-015-0000(12)

To provide and encourage a safe, convenient and economic transportation system.

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 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.

Transportation -- refers to the movement of people and goods.

Transportation Facility -- refers to any physical facility that moves or assists in the movement of people and goods excluding electricity, sewage and water.

Transportation System -- refers to one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity of movement between modes, and within and between geographic and jurisdictional areas.

Mass Transit -- refers to any form of passenger transportation which carries members of the public on a regular and continuing basis.

Transportation Disadvantaged -- refers to those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.

GUIDELINES

A. PLANNING

1. All current area-wide transportation studies and plans should be revised in coordination with local and regional comprehensive plans and submitted to local and regional agencies for review and approval.

2. Transportation systems, to the fullest extent possible, should be planned to utilize existing facilities and rights-of-way within the state provided that such use is not inconsistent with the environmental, energy, land-use, economic or social policies of the state.

3. No major transportation facility should be planned or developed outside urban boundaries on Class 1 and II agricultural land, as defined by the U.S. Soil Conservation Service unless no feasible alternative exists.

4. Major transportation facilities should avoid dividing existing economic farm units and urban social units unless no feasible alternative exists.

5. Population densities and peak hour travel patterns of existing and planned developments should be considered in the choice of transportation modes for trips taken by persons. While high density developments with concentrated trip origins and destinations should be designed to be principally served by mass transit,

low-density developments with dispersed origins and destinations should be principally served by the auto.

6. Plans providing for a transportation system should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.

B. IMPLEMENTATION

1. The number and location of major transportation facilities should conform to applicable state or local land use plans and policies designed to direct urban expansion to areas identified as necessary and suitable for urban development. The planning and development of transportation facilities in rural areas should discourage urban growth while providing transportation service necessary to sustain rural and recreational uses in those areas so designated in the comprehensive plan.

2. Plans for new or for the improvement of major transportation facilities should identify the positive and negative impacts on: (1) local land use patterns, (2) environmental quality, (3) energy use and resources, (4) existing transportation systems and (5) fiscal resources in a manner sufficient to enable local governments to rationally consider the issues posed by the construction and operation of such facilities.

3. Lands adjacent to major mass transit stations, freeway interchanges, and other major air, land and water terminals should be managed and controlled so as to be consistent with and supportive of the land use and development patterns identified in the comprehensive plan of the jurisdiction within which the facilities are located.

4. Plans should provide for a detailed management program to assign respective implementation roles and responsibilities to those governmental bodies operating in the planning area and having interests in carrying out the goal.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.02(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 9,987 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING & SERVICE

I certify that on August 30, 2017, I filed the foregoing with the Court of Appeals using the e-Filing System and I served copies of this Petitioners' Opening Brief, through the e-Filing System, on:

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