IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHELLE BARNES,	)	
	)	**Land Use Board of Appeals**
Respondent,	)	**Case No. 2010-011**
	)	
v.	)	**CA Case No. A146145**
	)	
CITY OF HILLSBORO and	)	**EXPEDITED PROCEEDING**
PORT OF PORTLAND,	)	**UNDER ORS 197.850, 197.855**
	)	
Petitioners.	)	

BRIEF AND EXCERPT OF RECORD OF PETITIONERS CITY OF HILLSBORO and PORT OF PORTLAND

Appeal of the Land Use Board of Appeals Case No. 2010-011
Final Opinion and Order Dated June 30, 2010
The Honorables Tod A. Bassham, Board Member; Melissa M. Ryan, Board Member, Participating; and Michael A. Holstun, Board Chair, Concurring

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August, 2010

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STATEMENT OF THE CASE

I. Nature of the Action and Relief Sought

This is an appeal from a final opinion and order of the Land Use Board of Appeals ("LUBA"). LUBA reviewed the City of Hillsboro's decision of January 19, 2010 adopting Ordinance 5935, which amends the City's Zoning Map to apply the "Airport Use" (AU) zones to the Hillsboro Airport and the "Airport Safety and Compatibility Overlay" (ASCO) zone to certain lands in the vicinity of the Hillsboro Airport. The City of Hillsboro's adoption of Ordinance 5935 was appealed to LUBA by Respondent, who raised three assignments of error. LUBA sustained all three assignments of error, reversing the City's adoption of Ordinance 5935 with respect to the first two assignments of error.

The first two assignments of error presented to LUBA challenged the facial constitutionality of certain provisions of the ASCO and AU zones, which were created by a separate City ordinance adopted by the City Council in 2009. The 2009 ordinance was not appealed by Respondent. LUBA held under the First Assignment of Error that provisions of the ASCO zone requiring dedication of an "avigation easement" to the Port of Portland, the owner and operator of the Hillsboro Airport, constitute an unconstitutional taking of private property without just compensation. LUBA held under the Second Assignment of Error that provisions of the AU zone constitute an unlawful delegation of legislative authority in violation of Article I, Section 21 of the Oregon Constitution.

Petitioners seek reversal of LUBA's decision on the First and Second Assignments of Error.

II. Statutory Basis of Appellate Jurisdiction

This court has jurisdiction pursuant to ORS 197.850. As explained in the Petition for Judicial Review, Petitioners have standing before this Court because they are adversely affected and aggrieved by LUBA's decision.

III. Effective Date for Appeal

The LUBA Final Opinion and Order was issued on June 30, 2010. The Petition for Judicial Review was filed and served on July 21, 2010, within the 21-day period provided in ORS 197.850(3)(a).

IV. Jurisdictional Basis for Agency Action.

The City of Hillsboro's decision to amend its Zoning Map through Ordinance 5935 is a land use decision subject to LUBA's jurisdiction. ORS 197.015(10); ORS 197.825.

V. Questions Presented on Appeal

Does the Land Use Board of Appeals have jurisdiction to consider assignments of error that allege error only in a local government's prior adoption of two new zones as part of its Zoning Ordinance, when the only land use decision before LUBA is the local government's subsequent legislative rezoning decision applying the two previously approved and acknowledged zones?

Does LUBA err when it reverses a legislative land use decision based on a conclusion that an earlier, unappealed legislative land use decision is constitutionally defective?

VI. Summary of Arguments

On appeal of the City of Hillsboro's legislative land use decision amending its zoning maps, LUBA did not have jurisdiction to consider assignments of error raising constitutional challenges to the City's prior

legislative land use decision amending the text of its Zoning Ordinance. LUBA's jurisdiction is statutorily prescribed, and extends only to review of the land use decision that has been appealed. The only land use decision appealed to LUBA was the City's adoption of zoning map amendments in 2010. Respondent's First and Second Assignments of Error to LUBA, however, asserted constitutional defects only in a zoning code text amendment adopted by the City in 2009. The 2009 ordinance was beyond LUBA's jurisdiction in this appeal.

LUBA also lacked a legal basis for reversing the City's decision to adopt the 2010 zoning map amendments. LUBA has authority to reverse a land use decision if the land use decision under review is unconstitutional. In this case, Respondent did not argue that the land use decision appealed – the 2010 rezoning – was unconstitutional. The only constitutional infirmities alleged by Respondent or identified by LUBA were solely in zoning code text amendments separately adopted by the City in 2009 and not appealed.

VII. Statement of Facts

Petitioners accept the facts as set forth in LUBA's order:

> "In 2005, the city commissioned a study that recommended adoption of new zones for the Hillsboro Airport, which is owned and operated by intervenor Port of Portland. Accordingly, in 2009, the city adopted ordinances 5925 and 5926, which amended the Hillsboro Comprehensive Plan and the Hillsboro Zoning Ordinance (HZO), respectively, to create two new zones, the AU and ASCO zones. The new AU zone allows a variety of airport related uses. The ASCO zone is intended to be applied to property within 6,000 feet of the airport, and imposes various limitations on uses and new development within six subzones, depending on proximity to the airport

runways.

"Under Ordinance 5926, development in ASCO subzones 2, 3, 4, and 5 and 6 is subject to the obligation to provide an "avigation easement" to the Port prior to recording land division plats or issuing certificates of occupancy. Ordinance 5926, Section 135B(C) defines 'avigation easement' as:

"A type of easement which conveys the following rights:

"[1] A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude above a surface specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).

"[2] A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.

"[3] A right to prohibit the erection of any structure, tree or other object that would penetrate the imaginary surfaces as defined in this ordinance.

"[4] A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surfaces as defined in this ordinance.

"[5] A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance from being created on the property."

"Ordinances 5925 and 5926 did not, however, apply the AU or ASCO zones to any property in the city when those ordinances were adopted in 2009. Following adoption and acknowledgment of Ordinances 5925 and 5926, the city initiated a legislative zoning map amendment process to apply to [sic] the AU and ASCO zones to approximately 7,000 properties located in or near the Hillsboro Airport. The city proposed to rezone the Airport from the current M-2 Industrial and MP Industrial Park zoning, in which the Airport is a non-conforming use, to the AU zone. The city proposed applying the ASCO zone to a number of properties within 6,000

> feet of the Airport. On January 19, 2010, the city council adopted Ordinance 5935, which amends the city zoning map to apply the AU and ASCO zones as proposed. This appeal of Ordinance 5935 followed." Rec. 40-41; ER-3 to ER-4 (footnote omitted).

VIII. Assignments of Error

1. First Assignment of Error

LUBA lacked jurisdiction to decide Respondents' First and Second Assignments of Error, which assigned error to a land use decision that was not the subject of the appeal.

(a) Preservation of Error

Petitioners preserved this error in their joint brief before LUBA. Rec. 97-99, 103B; ER-85 to ER-89, ER-91.[1] LUBA rejected the argument in its Final Opinion and Order. Rec. 44-46; ER-7 to ER-9.

(b) Standard of Review

On judicial review of a final opinion and order of the Land Use Board of Appeals, this Court must reverse or remand the order if it finds the order "to be unlawful in substance or procedure, but error in procedure is not cause for reversal or remand unless the court finds that substantial rights the petitioner were prejudiced thereby." ORS 197.850(9)(a). Petitioners contend that LUBA's order was unlawful in substance because LUBA lacked jurisdiction to address the first two assignments of error where the only error assigned was in an ordinance that was not the "land use decision" appealed to LUBA.

[1] LUBA's Record Transmittal is incorrectly paginated: it fails to place stamped numbers on the reverse side of two-sided pages. Petitioners will refer to unstamped pages by the number on the front side, with the addition of "B" to indicate the reverse side.

(c) Argument

(i) LUBA's jurisdiction is statutorily limited to land use decisions and limited land use decisions appealed through the timely filing of a Notice of Intent to Appeal.

LUBA's jurisdiction is statutorily limited under ORS 197.825(1) to the review of "land use decisions" and "limited land use decisions" "in the manner provided in ORS 197.830 to 197.845." Pursuant to ORS 197.830(1), review by LUBA of a land use decision can be commenced only by filing a Notice of Intent to Appeal that decision within the 21-day window allowed by statute. LUBA's scope of review is similarly constrained. ORS 197.835(1) provides:

> The Land Use Board of Appeals shall review the land use decision or limited land use decision and prepare a final order affirming, reversing or remanding the land use decision or limited land use decision. The board shall adopt rules defining the circumstances in which it will reverse rather than remand a land use decision or limited land use decision that is not affirmed. (Emphasis added).

The heart of this appeal is the simple fact that the legislature created LUBA as a land use appellate body, but not a review body that can hear appeals of any land use matter at any time. Rather, when one "land use decision" is appealed to LUBA, only that one land use decision is within LUBA's jurisdiction. This case involves two "land use decisions": one that was not appealed, and a subsequent one that was. LUBA erred by reviewing the land use decision that was not appealed.

This appears to Petitioners to be a case of first impression. Although the scope of LUBA's jurisdiction is well-defined by statute, neither LUBA nor this Court has previously addressed whether the appeal of a rezoning gives LUBA jurisdiction to review previously adopted, acknowledged provisions of the

underlying zones for statutory or constitutional infirmity if those provisions were not interpreted, amended or applied in the appealed land use decision.

(ii) LUBA had jurisdiction in this case only to review the City of Hillsboro's "Land Use Decision" to Adopt the 2010 Rezoning, Ordinance 5935.

In October, 2009, the City of Hillsboro adopted Ordinance 5926, which amended the Hillsboro Zoning Code to create two new zones: the Airport Use Zone (AU) as Section 135A of the Hillsboro Zoning Ordinance, and the Airport Safety and Compatibility Overlay Zone (ASCO) as Section 135B of the Hillsboro Zoning Ordinance. Rec. 211-223; ER-32 to ER-55. Ordinance 5926 was approved by the City Council and signed by the Mayor on October 6, 2009. (Ordinance 5926 will also be referred to herein as the "2009 Code Amendment").

In January, 2010, the City Council adopted Ordinance 5935, which mapped the AU and ASCO zones on certain lands within the City of Hillsboro. Rec. 206-210; ER-56 to ER-64. (Ordinance 5935 will also be referred to herein as the "2010 Rezoning"). The 2010 Rezoning did not in any manner alter the provisions of the 2009 Code Amendment, nor did it interpret or apply any of the specific provisions of those two zones.

On February 8, 2010, Respondent filed a Notice of Intent to Appeal with the Land Use Board of Appeals. The Notice of Intent to Appeal plainly identifies Ordinance 5935 – the 2010 Rezoning – as the only "land use decision" being appealed:

> "Notice is hereby given that petitioner intends to appeal that land use decision of respondent entitled Ordinance No. 5935; ZC7-09AU Airport Use Zone in ASCO Airport Safety and Compatibility Overlay Zone, which involves amending the official Zoning Map, a portion of Hillsboro Ordinance No. 1945 (as amended), changing the zoning of effected properties at and surrounding the Hillsboro Airport by applying

> the AU Airport Use Zone and the ASCO Airport Safety and Compatibility Overlay Zone. The decision was adopted by the Hillsboro City Council on January 19, 2010." Rec. 249; ER-65.

Similarly, the Petition for Review filed with LUBA by Respondent identifies the "Nature of the Decision and Relief Sought" as including only the 2010 Rezoning:

> "The challenged decision, the City of Hillsboro's . . . adoption of Ordinance No. 5935, amends the official Zoning Map of the City of Hillsboro changing the zoning of multiple properties at and surrounding the Hillsboro Airport by applying the Airport Use ("AU") Zone and the Airport Safety and Compatibility Overlay ("ASCO") Zone. Petitioner seeks reversal or remand of the adoption of the City's Ordinance No. 5935." Rec. 181; ER-66.

Neither the Notice of Intent to Appeal nor the Petition for Review identified the City's adoption of Ordinance 5926, the 2009 Code Amendment creating the AU and ASCO Zones, as a "land use decision" being challenged. Indeed, given the 21-day deadline for filing a Notice of Intent to Appeal under ORS 197.830, the Notice of Intent to Appeal in this case would have been more than 3 months too late to challenge the City of Hillsboro's October, 2009 adoption of Ordinance 5926.

In summary, the only land use decision over which LUBA had jurisdiction in this case was the City of Hillsboro's decision to adopt the 2010 Rezoning, Ordinance 5935. For her first two assignments of error, however, Respondent argued to LUBA not that the 2010 Rezoning was unlawful, but that the provisions of the two zones – the AU zone and the ASCO zone -- adopted as part of the 2009 Code Amendment were facially unconstitutional.

(iii) The First Assignment of Error did not challenge any aspect of the City's decision to adopt the 2010 Rezoning.

The First Assignment of Error presented to LUBA solely addressed the "avigation easement" requirement adopted as part of the ASCO zone in the 2009 Code Amendment:

> **"FIRST ASSIGNMENT OF ERROR – The City Erred in Adopting a Requirement for Property Owners to Provide an Avigation Easement to a Separate Entity as a Requirement of Developing Property."** Rec. 184; ER-67.

The Petition for Review then cites five sections of the Hillsboro Zoning Ordinance requiring an avigation easement:

> "HZO Sections 135B(G)(2)(e), 135B(G)(3)(e), 135(B)G)(4)(e), 135B(G)(5)(e) and 135(B)(G)(6)(c) . . .." Rec. 184; ER-67.

Those provisions, as well as the required contents of an avigation easement prescribed by HZO Section 135(B)(C)(6), were not created or amended by the 2010 Rezoning, the only land use decision that was appealed to LUBA; rather, they were all products of the 2009 Code Amendment, Ordinance 5926. In fact, the First Assignment of Error addresses only the constitutionality of zoning provisions adopted in the 2009 Code Amendment and does not even cite the ordinance actually appealed – the 2010 Rezoning. The First Assignment of Error does not attempt to identify any constitutional or other legal infirmity in the City of Hillsboro's decision to adopt that 2010 Rezoning, the only land use decision LUBA had jurisdiction to review.

(iv) The Second Assignment of Error, while mentioning the 2010 Rezoning, raised constitutional objections only to provisions adopted as part of the AU zone in the 2009 Code Amendment.

The Second Assignment of Error presented to LUBA arguably attempted to assign error to the land use decision actually being appealed, but quickly settled on a provision of the 2009 Code Amendment as the source of the alleged constitutional infirmity. The assignment reads:

> **"SECOND ASSIGNMENT OF ERROR – The City's Application of the AU Zone to Particular Properties through Adoption of Ordinance 5935 Unlawfully Delegates Legislative Authority to the Port of Portland."** Rec. 197; ER-80.

The Petition for Review then briefly mentioned that Ordinance 5935 applied the AU zone and the ASCO zone to individual properties. That is the sole mention of Ordinance 5935 – the only land use decision on appeal -- in the Second Assignment of Error.

The argument transitioned immediately from the 2010 Rezoning to provisions of the AU zone adopted as part of the 2009 Code Amendment: "However, the AU zone has a problem in that certain provisions unconstitutionally delegate authority to other bodies." Rec. 197; ER-80. Respondent's argument to LUBA was entirely about Section 135A (Airport Use Zone) of the Hillsboro Zoning Ordinance. Rec. 197-201; ER-80 to ER-84. Those provisions were adopted as part of the 2009 Code Amendment, Ordinance 5926. Rec. 211B-215; ER-33 to ER-39.

(v) LUBA ignored the legislative limits on its jurisdiction.

LUBA's analysis went seriously astray and ignored the statutory framework under which LUBA reviews "land use decisions" when LUBA focused on the notion that the adoption of a rezoning ordinance may present the

"first reasonable opportunity" for affected or concerned persons to present statutory or constitutional challenges to the provisions of the underlying zone. LUBA held:[2]

> We disagree with respondents that petitioner are [sic] precluded from advancing a facial constitutional challenge to the HZO 135B avigation easement requirement in the present appeal, as an impermissible "collateral attack" on Ordinance 5926. The only support that respondents cite for that proposition is *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, aff'd 195 Or App 763,100 P3d 218 (2004), in which we held that in an appeal of a final subdivision plat decision the petitioner could not challenge the correctness of an earlier, final decision that modified the tentative subdivision plat approval. However, *Butte Conservancy* did not involve separate legislative decisions that adopt and then apply zoning regulations, nor constitutional challenges to such regulations. Respondents are correct that, because the ASCO zone is deemed acknowledged to comply with the statewide planning goals, if petitioner attempted in this appeal to argue that the ASCO zone is inconsistent with one or more statewide planning goals, such a challenge would be precluded by acknowledgment. However, acknowledgment of the ASCO zone does nothing to insulate that zone from challenge on statutory or constitutional grounds. We see no principled reason why such statutory or constitutional challenges cannot be advanced in an appeal of a subsequent legislative ordinance that, for the first time, applies the ASCO zone to specific properties in the city.
>
> Further, adoption of new zones and associated zoning regulations can, as in the present case, be effected in two separate ordinances, one that adopts the new zone but does not apply it to any property, and a second that actually applies the new zone to specific properties. In that circumstance, the second decision is almost certainly the first time that the city notifies property owners that their property is now subject to the new zone and its requirements. ORS 215.503, also known as "Ballot Measure 56," requires counties to

[2] LUBA's ruling was presented in LUBA's analysis of Respondent's First Assignment of Error. Petitioners raised the same objection with respect to the Respondent's Second Assignment of Error, Rec. 103B, ER-91, but LUBA did not address it separately under that assignment.

> provide notice to affected property owners when "rezoning" their property. ORS 215.503 did not require the city to provide its citizens Ballot Measure 56 notice of Ordinance 5926, and the city presumably did not provide such notice. As a practical matter, then, an appeal of the ordinance that applies the new zone to specific properties is the first reasonable opportunity many affected or concerned persons affected would have to raise a facial constitutional challenge to the zone. Accordingly, we decline respondents' invitation to extend the reasoning in *Butte Conservancy*, because in many cases the consequences of that extension would be that affected persons would essentially be precluded from advancing a facial challenge to the new zone, and would be limited to as-applied challenges when the city ultimately applied the new zoning requirements to deny or condition proposed development. Rec. 45-46; ER-8 to ER-9.

LUBA misses the "principled reason" why LUBA could not reach issues regarding the 2009 Code Amendments: the limit of LUBA's jurisdiction in this case was the one "land use decision" appealed, specifically the 2010 Rezoning. Nothing in that land use decision involved the City of Hillsboro interpreting or applying the specific terms of the AU or ASCO zones that were adopted months earlier in the 2009 Code Amendment. The First and Second Assignments of Error do not address "error" in the one and only "land use decision" over which LUBA had jurisdiction. LUBA, in other words, ignored the limits the legislature placed on LUBA's jurisdiction.

Nothing in the statutory scheme establishing LUBA and its jurisdiction to review "land use decisions" and "limited land use decisions" ensures that "affected or concerned persons" will be able to challenge a local zoning ordinance at "the first reasonable opportunity." As LUBA notes, local governments often adopt the text of new land use zones in one ordinance, and map land with those zones in subsequent ordinances, just as the City of Hillsboro did. Nothing in Oregon law prohibits that procedure. Nothing in the

statutes creating and governing LUBA authorizes LUBA to review a "land use decision" that was not timely appealed simply because "affected or concerned persons" might not have been sufficiently affected or concerned to appeal the land use decision in the manner provided by statute.

LUBA injects policy concerns into what is fundamentally a legal issue. LUBA seems to assume that if the Board cannot review the statutory or constitutional validity of existing and acknowledged zoning code provisions in the context of reviewing a local government's rezoning of land, "affected or concerned persons" including property owners will be left without a remedy, at least until those zoning code provisions are applied in the context of a site-specific land use application. Even if correct, LUBA's assumption cannot expand the Board's jurisdiction beyond its current statutory limits – only the legislature can do that.

Even as a policy matter, there is ample reason to believe that persons who are adversely affected may have other avenues of redress than the appeal of a zoning map amendment. First, "affected or concerned persons" can participate in the local proceedings through which the zoning code is amended, as many citizens do. The City's proceedings leading to adoption of the 2009 Code Amendment were public, and involved the recommendations of a citizen advisory group, three public hearings before the Hillsboro Planning Commission, and public consideration by the City Council. Rec. 211-211B; ER-82 to ER-83. There is no apparent reason Respondent could not have appealed <u>that</u> land use decision if she wanted to participate and raise constitutional concerns.

Second, participants in a local government's review of a site-specific land division or development request, including the applicant, can challenge

applicable provisions of the local zoning code on an "as applied" basis. For example, the requirement to provide an avigation easement in the ASCO zone is implemented through conditions of approval for "land use or limited land use approvals":

> "Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable." Rec. 220; ER-49.[3]

In the context of a quasi-judicial land use application, the applicant would have the opportunity to raise any constitutional "takings" issues regarding the avigation easement at the local level and on appeal to LUBA.

Finally, relief may be available in other forums, such as the federal courts, with jurisdiction that is not limited to timely appeals of land use decisions and limited land use decisions. Indeed, one need look no farther than the seminal U.S. Supreme Court zoning case, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Village of Euclid* was not an "as applied" challenge. Rather, it began with a property owner seeking an injunction in federal court against the enforcement of zoning laws, based on the contention that the laws were facially unconstitutional.

Respondent's First and Second Assignments of Error are challenges to the facial constitutionality of provisions in the 2009 Code Amendment. They do not assert any constitutional defect in the 2010 Rezoning. LUBA did not have jurisdiction to entertain or decide Assignments of Error directed entirely at an ordinance that was not appealed and was not the subject of the appeal.

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[3] Identical or similar language is found in HZO Sections 135B(G)(2)(e), 135B(G)(3)(e), 135(B)G)(4)(e), 135B(G)(5)(e) and 135(B)(G)(6)(c).

LUBA erred in ruling on the First and Second Assignments of Error raised by Respondent.

2. Second Assignment of Error

LUBA lacked a legal basis for reversing the 2010 Rezoning on constitutional grounds where Respondent did not identify, and LUBA did not address, any constitutional defect in the land use decision that was appealed.

(a) Preservation of Error

Petitioners preserved this error in their joint brief before LUBA. Record 97-99, 103B; ER-85 to ER-89, ER-91. LUBA rejected the argument in its final opinion and order. Record 44-46; ER-7 to ER-9.

(b) Standard of Review

On judicial review of a final opinion and order of the Land Use Board of Appeals, this Court must reverse or remand the order if it finds the order "to be unlawful in substance or procedure, but error in procedure is not cause for reversal or remand unless the court finds that substantial rights the petitioner were prejudiced thereby." ORS 197.850(9)(a). Petitioners contend that LUBA's order was unlawful in substance because LUBA reversed a land use decision – the City of Hillsboro's adoption of the 2010 Rezoning -- based on a finding of constitutional defects in a different land use decision – the 2009 Code Amendment.

(c) Argument

(i) LUBA can reverse a land use decision on grounds of unconstitutionality only if the land use decision itself is unconstitutional.

ORS 197.835 describes circumstances under which LUBA may reverse or remand a land use decision. ORS 197.835(9) provides:

> In addition to the review under sections (1) to (8) of this section, the board shall reverse or remand the land

> use decision under review if the board finds:
> (a) The local government or special district:
> * * *
> (E) Made an unconstitutional decision.

To the extent there is any ambiguity regarding whether the "unconstitutional decision" that provides the basis for reversal or remand must be the "land use decision under review," that ambiguity is eliminated by LUBA's rules. ORS 197.835(1) gives LUBA the authority to "adopt rules defining the circumstances in which it will reverse rather than remand a land use decision or limited land use decision that is not affirmed." The rules, set forth at OAR 661-010-0071,[4] provide that the Board shall reverse a "land use decision" when "[t]he decision is unconstitutional." (Emphasis added). It is hardly surprising that the grounds for reversal or remand are, in all cases, limited to errors in "the decision" that has been appealed to LUBA.

[4] OAR 661-010-0071 provides, in full:

> (1) The Board shall reverse a land use decision when:
> (a) The governing body exceeded its jurisdiction;
> (b) The decision is unconstitutional; or
> (c) The decision violates a provision of applicable law and is prohibited as a matter of law.
> (2) The Board shall remand a land use decision for further proceedings when:
> (a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);
> (b) The decision is not supported by substantial evidence in the whole record;
> (c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
> (d) The decision improperly construes the applicable law, but is not prohibited as a matter of law.

(ii) LUBA did not find any constitutional error in the land use decision that was appealed.

It may be possible to construct an argument that the adoption of an ordinance rezoning land is *per se* unlawful, and therefore reversible error, to the extent any provision of an existing, acknowledged zone being mapped onto the land is statutorily or constitutionally infirm. This case does not present that issue because Respondent never raised it and LUBA's Final Opinion and Order does not address it.

Rather, LUBA decided to reverse the City of Hillsboro's 2010 Rezoning Decision based solely on holding that certain provisions of the AU and ASCO zones, adopted in the 2009 Code Amendment, are unconstitutional. As already noted, the First Assignment of Error did not even assign error to the City's decision to adopt Ordinance 5935, the 2010 Rezoning. The Second Assignment of Error mentions the 2010 Rezoning in its caption, but argues exclusively against the City's action in adopting the 2009 Code Amendment.

LUBA's decision to reverse the City's adoption of the 2010 Rezoning represents a complete disjuncture between error and relief. Even purported constitutional error in one land use decision does not automatically justify reversal of a subsequent land use decision. The constitutional flaw must be in the land use decision being appealed. Respondent pointed to no such error, and LUBA identified no such error in its Final Opinion and Order. LUBA had no legal basis for reversing the City of Hillsboro's Ordinance 5935, the 2010 Rezoning.

CONCLUSION

For the reasons set forth above, the Final Opinion and Order of the Land Use Board of Appeals should be reversed as to LUBA's determination of the First and Second Assignments of Error.

DATED this 11 day of August, 2010.

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EXCERPT OF RECORD

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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHELLE BARNES,
Petitioner,

vs.

CITY OF HILLSBORO,
Respondent,

and

THE PORT OF PORTLAND,
Intervenors-Respondent.

LUBA No. 2010-011

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

William K. Kabeiseman filed the petition for review and argued on behalf of petitioner. With him on the brief was Jennifer M. Bragar and Garvey Schubert Barer.

David F. Doughman, Portland, filed the joint response brief and argued on behalf of respondent. With him on the brief was Dana Krawczuk and Beery Elsner and Hammond, LLP.

Dana Krawczuk, Portland, filed the joint response brief on behalf of intervenor-respondent. With her on the brief was David F. Doughman and Beery Elsner and Hammond, LLP. Misti K. Johnson, Portland, argued on behalf of intervenor-respondent.

BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

HOLSTUN, Board Chair, concurring.

REVERSED 06/30/2010

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city ordinance that amends the city zoning map to apply the city's Airport Use (AU) zone to the Hillsboro Airport and the city's Airport Safety and Compatibility Overlay (ASCO) zone to surrounding properties.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to five alleged "new matters" raised in the response brief, pursuant to OAR 661-010-0039. The city and intervenor-respondent Port of Portland (intervenor or Port) object that the last two alleged new matters are not "new matters" within the meaning of OAR 661-010-0039.

Both disputes involve the third assignment of error, in which petitioner alleges that the city "failed to comply" with Statewide Planning Goal 12 (Transportation) and the Transportation Planning Rule (TPR). Petition for Review 21. In the response brief, respondents argue that the third assignment of error is limited to a challenge to the adequacy of the city's findings regarding Goal 12 and the TPR, and point out that there is no generally applicable obligation to adopt findings supporting a legislative land use decision. The response brief then argues that even without specific findings addressing the TPR, the challenged decision is consistent with the rule, for the reasons set out in the response brief. The reply brief disputes that the third assignment of error is limited to a findings challenge, and contends that even in the absence of a general findings obligation the city must at least cite to evidence in the record demonstrating compliance with applicable criteria.

We agree with petitioner that the dispute raised in the response brief over the nature of an assignment of error and hence LUBA's scope of review is an appropriate subject for a reply brief. The reply brief is allowed.

FACTS

In 2005, the city commissioned a study that recommended adoption of new zones for the Hillsboro Airport, which is owned and operated by intervenor Port of Portland. Accordingly, in 2009, the city adopted ordinances 5925 and 5926, which amended the Hillsboro Comprehensive Plan and the Hillsboro Zoning Ordinance (HZO), respectively, to create two new zones, the AU and ASCO zones. The new AU zone allows a variety of airport related uses. The ASCO zone is intended to be applied to property within 6,000 feet of the airport, and imposes various limitations on uses and new development within six subzones, depending on proximity to the airport and its runways.

Under Ordinance 5926, development in ASCO subzones 2, 3, 4, and 5 and 6 is subject to the obligation to provide an "avigation easement" to the Port prior to recording land division plats or issuing certificates of occupancy.[1] Ordinance 5926, Section 135B(C)(6) defines "avigation easement" as:

> "A type of easement which conveys the following rights:
>
> "[1] A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude above a surface specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).
>
> "[2] A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.
>
> "[3] A right to prohibit the erection or growth of any structure, tree, or other object that would penetrate the imaginary surfaces as defined in this ordinance.

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[1] For example, under Ordinance 5926, Section 135B(G)(2)(e), governing subzone 2, states:

> "Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable."

Similar provisions govern subzones 3, 4, 5 and 6.

"[4] A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surfaces as defined in this ordinance.

"[5] A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance from being created on the property."

Ordinances 5925 and 5926 did not, however, apply the AU or ASCO zones to any property in the city when those ordinances were adopted in 2009. Following adoption and acknowledgment of Ordinances 5925 and 5926, the city initiated a legislative zoning map amendment process to apply the AU and ASCO zones to approximately 7,000 properties located in or near the Hillsboro Airport. The city proposed to rezone the Airport from the current M-2 Industrial and MP Industrial Park zoning, in which the Airport is a non-conforming use, to the AU zone. The city proposed applying the ASCO zone to a number of properties within 6,000 feet of the Airport. On January 19, 2010, the city council adopted Ordinance 5935, which amends the city zoning map to apply the AU and ASCO zones as proposed. This appeal of Ordinance 5935 followed.

MOTION TO STRIKE

Petitioner moves to strike Exhibit 2 and Appendix G to the joint response brief. Exhibit 2 consists of two notices from the Department of Land Conservation and Development that the city had adopted Ordinances 5925 and 5926. Appendix G consists of two tables created by respondents' counsel that compares the uses allowed in the M-2 and MP zones with the uses that are allowed in the AU zone, with commentary and explanations. Petitioner argues that the documents in Exhibit 2 and Appendix G are not part of the record in this appeal, and that respondents have not offered any basis for LUBA to consider those extra-record documents.

The city and intervenor respond that Exhibit 2 simply demonstrates that Ordinance 5926 was acknowledged in October 2009 to comply with the statewide planning goals. However, that response does not explain why it is permissible for LUBA to consider

materials outside the record. With exceptions not invoked here, ORS 197.835(2)(a) confines our review to the documents and evidence in the record.[2]

With respect to Appendix G, respondents argue that the tables comparing uses under the M-2, MP and AU zones are simply extensions of respondents' arguments in their brief that the uses in the new AU zone are not substantively different or more intense than the uses allowed in the old M-2 and MP zones, in response to petitioner's arguments under the third assignment of error that the city has not demonstrated that rezoning the airport to AU complies with Goal 12 and the TPR. As explained below, the TPR is concerned in part with plan and zoning amendments allowing uses that generate more traffic than uses allowed under unamended plan and zoning designations.

The comparisons in Appendix G can be understood to constitute legal arguments: the views of respondents' legal counsel regarding the legal effect of rezoning the airport. However, even if so understood, OAR 661-010-0030(4)(d) and OAR 661-010-0035(3) require, in effect, that argument in support of or in opposition to an assignment of error be set forth in the body of the brief, and does not provide for the attachment of *additional* argument in an appendix to the brief. One reason for that requirement is that OAR 661-010-0030(2)(b) restricts the body of the brief to 50 pages, while there is no restriction on the number of pages that can be attached in appendices. Here, however, the body of the response brief is 38 pages, while the two tables total 10 pages, which is seemingly consistent with the 50-page limit. Therefore, we treat respondents' violation of OAR 661-010-0030(4)(d) and OAR 661-010-0035(3) as a "technical violation" of our rules under OAR 661-010-0005 that will not affect

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[2] Respondents do not argue that the DLCD notices of adoption are subject to official notice under ORS 40.090(2) and Oregon Evidence Code 202(2). We have previously expressed uncertainty whether a DLCD notice of adoption is subject to official notice. *Media Art v. City of Tigard*, 46 Or LUBA 61, 63 (2003), *aff'd* 192 Or App 602, 89 P3d 95 (2004). However, even assuming the DLCD notice is not subject to official notice, petitioners do not dispute that Ordinance 5926 is acknowledged to comply with the statewide planning goals, which is the proposition that respondents rely on Exhibit 2 to establish in this appeal. Therefore, for what it is worth, for purposes of this opinion we will assume that Ordinance 5926 is acknowledged.

our review unless that violation prejudices the substantial rights of the parties. Petitioners do not argue that treating the legal arguments in Appendix G as part of a 48-page response brief otherwise consistent with our rules prejudices their substantial rights, and we do not see that it does. Accordingly, we shall consider the arguments in Appendix G.

The motion to strike is sustained in part. The Board shall not consider Exhibit 2.

FIRST ASSIGNMENT OF ERROR

Ordinance 5926, creating the AU zone and ASCO zone, is codified at HZO chapters 135A and 135B. Petitioner argues that Ordinance 5935, the decision challenged in this appeal, rezones over 7,000 properties to make new development on those properties subject to HZO 135B and, in particular, subject to the obligation for the landowner to provide the Port of Portland with an avigation easement as a condition of development. According to petitioner, the HZO 135B easement requirement is facially inconsistent with the Fifth Amendment to the United States Constitution, which prohibits taking private property for public use, without just compensation, and with the similar provisions of Article I, section 18 of the Oregon Constitution.[3] Petitioner contends that in all circumstances in which the avigation easement is applied the city will violate the Takings Clauses.[4]

In advancing a facial constitutional claim to an ordinance, petitioner must demonstrate that the ordinance is incapable of any constitutionally permissible application. *Lincoln City Chamber of Comm. v. City of Lincoln City*, 164 Or App 272, 276, 991 P2d 1080

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[3] The Fifth Amendment of the United States Constitution provides in relevant part that "private property [shall not] be taken for public use, without just compensation." Similarly, Article I, section 18 of the Oregon Constitution provides as relevant here that "Private property shall not be taken for public use, * * * without just compensation."

[4] Petitioner also argues under the first assignment of error that the HZO 135B easement requirement is inconsistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution, the doctrine of "unconstitutional conditions," and Article I, section 20 of the Oregon Constitution. Because we agree with petitioners that the HZO 135B easement requirement is facially inconsistent with the federal and state Takings Clauses, we see no point in addressing petitioners' alternative theories of constitutional infirmity. *See West Coast Media, LLC v. City of Gladstone*, 192 Or App 102, 108, 84 P3d 213 (2004) (affirming LUBA's holding that the city's sign ordinance is inconsistent with Article 1, section 8 of the Oregon Constitution and, for that reason, declining to address challenges to LUBA's holdings with respect to Article 1, section 20).

(1999). If the disputed ordinance provision is capable of being applied in a constitutionally permissible manner, then that provision can be challenged only on an "as-applied" basis, and the ordinance cannot be declared invalid on its face. *Id.* (citing *Cope v. City of Cannon Beach*, 317 Or 339, 855 P2d 1083 (1993)).

HZO 135B requires a property owner in the ASCO zone to transfer a property interest, an avigation easement, as a condition of development approval. Petitioner argues that the city can avoid the obligation to pay just compensation for exacting that property interest only if the city demonstrates that (1) there is an "essential nexus" between the exaction and a substantial government purpose, under *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), and (2) the exaction is "roughly proportional" to the impacts of the proposed development, under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). According to petitioner, because in all circumstances in which the avigation easement is applied the exaction will have nothing to do with the impacts of proposed development of property in the ASCO zone, the HZO 135B avigation easement requirement fails both *Nollan* and *Dolan* and is unconstitutional on its face.

A. Collateral Attack

The city and intervenor respond, initially, that petitioner's constitutional challenge to the HZO 135B avigation easement requirement is in essence an impermissible "collateral attack" on Ordinance 5926, which is not before LUBA in this appeal. According to respondents, the decision that is before LUBA in this appeal, Ordinance 5935, simply amends the city's zoning map to apply the AU zone and ASCO zone to various properties within the city. Respondents argue that Ordinance 5935 did not amend HZO 135B in any way, and that petitioner cannot advance a facial constitutional challenge to HZO 135B in an appeal of Ordinance 5935. We understand respondents to argue that the HZO 135B avigation easement requirement could be challenged only by filing a timely appeal of Ordinance 5926,

or by appealing a quasi-judicial land use decision that actually applies HZO 135B to approve or deny an application to develop property within the ASCO zone.

We disagree with respondents that petitioner are precluded from advancing a facial constitutional challenge to the HZO 135B avigation easement requirement in the present appeal, as an impermissible "collateral attack" on Ordinance 5926. The only support that respondents cite for that proposition is *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, *aff'd* 195 Or App 763, 100 P3d 218 (2004), in which we held that in an appeal of a final subdivision plat decision the petitioner could not challenge the correctness of an earlier, final decision that modified the tentative subdivision plat approval. However, *Butte Conservancy* did not involve separate legislative decisions that adopt and then apply zoning regulations, nor constitutional challenges to such regulations. Respondents are correct that, because the ASCO zone is deemed acknowledged to comply with the statewide planning goals, if petitioner attempted in this appeal to argue that the ASCO zone is inconsistent with one or more statewide planning goals, such a challenge would be precluded by acknowledgment. However, acknowledgment of the ASCO zone does nothing to insulate that zone from challenge on statutory or constitutional grounds. We see no principled reason why such statutory or constitutional challenges cannot be advanced in an appeal of a subsequent legislative ordinance that, for the first time, applies the ASCO zone to specific properties in the city.

Further, adoption of new zones and associated zoning regulations can, as in the present case, be effected in two separate ordinances, one that adopts the new zone but does not apply it to any property, and a second that actually applies the new zone to specific properties. In that circumstance, the second decision is almost certainly the first time that the city notifies property owners that their property is now subject to the new zone and its requirements. ORS 215.503, also known as "Ballot Measure 56," requires counties to provide notice to affected property owners when "rezoning" their property. ORS 215.503 did

not require the city to provide its citizens Ballot Measure 56 notice of Ordinance 5926, and the city presumably did not provide such notice. As a practical matter, then, an appeal of the ordinance that applies the new zone to specific properties is the first reasonable opportunity many affected or concerned persons affected would have to raise a facial constitutional challenge to the zone. Accordingly, we decline respondents' invitation to extend the reasoning in *Butte Conservancy*, because in many cases the consequences of that extension would be that affected persons would essentially be precluded from advancing a facial challenge to the new zone, and would be limited to as-applied challenges when the city ultimately applied the new zoning requirements to deny or condition proposed development.

B. The Applicability of *Dolan* to a Facial Takings Challenge

Respondents next argue that the "rough proportionality" test in *Dolan* cannot, by its nature, be applied in a facial takings claim. *See Garneau v. City of Seattle*, 147 F3d 802, 811 (9th Cir 1998) (the *Dolan* analysis cannot be applied in facial takings claims). According to respondents, much of petitioner's facial challenge to HZO 135B rests on the premise that the avigation easement required under that provision will not be "roughly proportional" to the impacts of proposed development of land allowed in the base zone, and thus the exaction of the easement will violate the requirements of *Dolan*.

We generally agree with respondents that because the *Dolan* "rough proportionality" analysis requires evaluation of the specific impacts of specific proposed development, the rough proportionality analysis will play little or no direct role in a facial takings challenge. That does not mean, however, that *Dolan* is completely inapposite to a facial takings challenge of the kind advanced here. *Dolan* is a refinement of the reasoning in *Nollan*, and is part of a closely related two-prong test for determining under what circumstances a local government can take private property for public use without paying the just compensation otherwise required by the federal Takings Clause. While petitioner relies on *Dolan* in part to argue that the HZO 135B avigation easement requirement facially violates the Takings

Clauses, because petitioner believes that in all cases in which it is exacted the easement will have no relationship to the impacts of any proposed development, that argument is based as much on *Nollan* as *Dolan*. To the extent the reasoning in *Dolan* illuminates the requirements of *Nollan* or otherwise has some bearing on a facial takings challenge in the posture of the case before us, we see no error in considering that reasoning.

C. Petitioner's Standing to Present a Facial Challenge

Although respondents do not dispute petitioner's standing to bring this appeal under ORS 197.620(1) and 197.830(2), respondents note that at no place in the record or in their brief does petitioner assert that Ordinance 5935 applies the ASCO zone to property she owns. Respondents argue that if petitioner does not own property subject to the ASCO zone, then petitioner's arguments based on *Dolan* are particularly inappropriate, since petitioner will never be subject to the requirement to provide an avigation easement and could never advance an as-applied challenge under *Dolan*. Further, we understand respondents to argue that, in order to advance a *facial* challenge to the HZO 135B avigation easement requirement, petitioner must demonstrate that she owns property subject to the ASCO zone and therefore is potentially subject to HZO 135B.

As explained above, the reasoning in *Dolan* may have some bearing in evaluating a facial challenge based on *Nollan*, even if the *Dolan* rough proportionality test is not itself applicable. We are not sure what to make of respondents' suggestion that petitioner's failure to allege that she owns property that is subject to the ASCO zone precludes her from advancing a facial takings challenge to HZO 135B. Respondents cite to *Carson Harbor Village, Ltd. v. City of Carson*, 37 F3d 468, 476 (9th Cir 1994), for the proposition that persons bringing a facial takings challenge must demonstrate that they owned property subject to the challenged regulations at the time the regulations were enacted. Subsequent cases have recognized standing even for later purchasers. *Guggenheim v. City of Goleta*, 582 F3d 996, 1005-06 (9th Cir 2009). However, respondents are generally correct that, in order to

invoke an Article III Court's jurisdiction over a facial challenge under the federal Takings Clause, the challenger must usually show that a justiciable controversy exists, *i.e.*, that the disputed legislation causes the challenger to suffer an injury, the invasion of a legally protected interest. *Id.* at 1004.

LUBA is not a court and is not necessarily subject to the same standing requirements that may limit judicial review. *See Just v. City of Lebanon*, 193 Or App 132, 147, 88 P3d 312 (2004) (LUBA's review and standing to invoke review is governed by statute, and those statutes do not require LUBA to apply justiciability doctrines applicable to courts, such as the requirement that the person invoking review demonstrate that review will have a practical effect on that person). Standing to appeal a post-acknowledgment plan amendment to LUBA is governed by statute, specifically, ORS 197.620(1), which requires only that the petitioner participate in the proceedings below. Respondents cite to no statute or other authority imposing standing requirements on a petitioner advancing a claim that a land use decision is unconstitutional, or that limits LUBA's review of such claims. Absent a more developed argument, respondents have not demonstrated that petitioner's failure to allege that she owns property subject to the ASCO zone means that she has not established standing before LUBA to advance a facial takings challenge to HZO 135B.

D. HZO 135B Avigation Easement

Turning to the merits, respondents argue first that petitioner has not demonstrated either that adoption of Ordinance 5935 resulted in the taking of any property interest or that, as applied in all future circumstances, HZO 135B will take property without just compensation, contrary to the Takings Clauses. Therefore, respondents argue, petitioners have not demonstrated that the HZO 135B avigation easement requirement is invalid on its face.

Respondents cite *Carson Harbor Village, Ltd.*, again, for the proposition that a facial takings claim can succeed only if the challenger demonstrates that the mere *enactment* of the

legislation itself results in a taking of private property for public use. 37 F3d at 476. Because neither the initial adoption of the ASCO zone nor the zoning map amendment that applied the zone to private property in themselves exacted an avigation easement from any property owner or otherwise effected any taking of property, respondents argue that petitioner's facial challenge must fail.

Carson Harbor Village, Ltd. is a regulatory takings case in which the plaintiffs argued that ordinances limiting mobile home park rents and imposing other restrictions constituted a facial taking of property from park owners. In analyzing the park owners' standing to bring a facial takings claim, the Ninth Circuit concluded that because the park owners acquired the property after the enactment of the ordinances, they could not demonstrate injury to themselves, and therefore did not have standing to challenge the ordinances. *Id.* As explained above, standing requirements that govern the jurisdiction of an Article III court do not apply to LUBA's review. In addition, it is not clear to us that the proposition cited in *Carson Harbor Village, Ltd.* applies outside the context of a regulatory takings challenge, where the landowner argues that the challenged law constructively "takes" property by *regulating* the landowner's use of the property to such a degree that little or no economically beneficial use remains. In the present case, petitioners argue that the HZO 135B avigation easement requirement will, in every case in which it is applied, result in an actual "taking" of property, the legal acquisition of property interests, in a manner inconsistent with the state and federal Takings Clauses. We are cited to no cases suggesting that, where a law is challenged on such grounds, the petitioner must demonstrate that the mere enactment of the law itself results in a taking of property.

On the contrary, at least where Article I, section 18 of the Oregon Constitution is concerned, the Court of Appeals has allowed a facial challenge to an ordinance in circumstances where the mere adoption of the ordinance itself clearly did not immediately result in a taking of private property. *Ferguson v. City of Mill City*, 120 Or App 210, 852

P2d 205 (1993), involved a declaratory judgment action against a city ordinance that required property owners to (1) obtain a city permit and connect to city sewers, by installing an interceptor tank on their property, and (2) grant the city an easement to accommodate and maintain the city-owned interceptor tank and related sewer lines. The Court held that the ordinance mandated a "physical occupation" of private property for public use, without provision for just compensation, and therefore facially violated Article I, section 18. *Id.* at 214-15 (citing *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 US 419, 102 S Ct 3164, 73 L Ed 2d 868 (1982). While the present case does not involve a "physical occupation," that is, exclusive occupation of private property by or at the behest of government as in *Loretto* and *Ferguson*, petitioner alleges that the avigation easement requires a similar "physical invasion" of private property, and the actual acquisition of private property. We agree that a facial challenge to a law that allegedly requires physical invasion of private property and acquisition of property is similar to the "physical occupation" challenge advanced in *Ferguson*. In such circumstances, we do not believe a facial challenge to such a law fails unless the challenger demonstrates that the mere enactment of the law itself effects a physical invasion or acquisition of property.

Finally, respondents argue that petitioners have not demonstrated that, in every circumstance in which the HZO 135B avigation easement is required as a condition of development, that exaction of property will violate the state or federal Takings Clauses. Respondents argue:

> "To the extent the City must demonstrate rough proportionality if an avigation easement is required in a future development proposal, the City will have a range of options available to it. First, it may find based upon the facts in a given case that the requirement would be roughly proportional. Second, an applicant could seek a variance to the standard. Third, the City could elect not to apply the standard. *See Columbia Riverkeepers v. Clatsop County*, 58 Or LUBA 235 (2009) (When *Dolan* applies, it can function as a variance, and a local government may choose not to exact property as a condition of development approval that it would otherwise be entitled to exact under its land use regulations, as an alternative to compensating the landowner for the

taking). Finally, the City and/or the Port could compensate the landowner." Response Brief 13.

As we understand it, petitioner's arguments are based as much or more on the *Nollan* essential nexus requirement as they are on the *Dolan* rough proportionality requirement. Petitioner contends that there is no "nexus between the impacts of the developing property owner and the easement requirements." Petition for Review 11. Under *Nollan*, it is insufficient that an exaction of property serve some governmental objective. The exaction must in some way mitigate the impacts of proposed development *on* the identified governmental objective. In *Nollan*, the Coastal Commission required a lateral public easement along a private property's ocean frontage between mean high tide and a seawall, allegedly to mitigate the impacts of the proposed dwelling on the public's ability to view the ocean from vantage points landward of the dwelling. The Court held that, while the Commission might have constitutionally required some easement or exaction of property right that in fact mitigated such visual impacts, such as providing a public viewing point on the property, the lateral beach easement required in that case had nothing to do with mitigating such visual impacts, or the governmental interest in preserving public views of the beach from upland viewing spots, and therefore the Commission could not take the beach easement without providing just compensation.

In the present case, petitioners argue that in all conceivable applications of the HZO 135B avigation easement, there will be a similar disconnect between the easement, the impacts of development and the governmental objective, because the easement is not intended to mitigate, and does nothing to mitigate, the impacts of any development on the city's presumed governmental interest in protecting airport operations.

On appeal, respondents argue that the avigation easement requirement is intended to address airport compatibility issues and avoid land use conflicts in areas surrounding

airports.[5] Reducing land use conflicts with the airport is certainly a legitimate governmental objective. The avigation easement requirement presumably attempts to further that objective by requiring as a condition of development that surrounding property owners convey a property interest to the Port, allowing, among other things, the Port "free and unobstructed passage of aircraft through the airspace over the property" above a certain height, and the "right to subject the property to noise, vibrations, fumes, dust and fuel particle emissions associated with normal airport activity."[6] However, as in *Nollan*, the exaction of property does not advance the purported governmental interest, because granting the Port an easement to physically invade private property would do nothing to actually reduce conflicts between the Airport and surrounding land uses. The same conflicts (noise, etc.) would exist to the exact same degree, with or without the easement. The only arguable effect of requiring property owners to grant such an easement as a condition of land use approval is to make it more difficult for property owners to advance a successful inverse condemnation or other legal action against the Port, based on trespass or the externalized impacts of the airport

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[5] The purpose of the ASCO zone is to "establish compatibility and safety standards to promote air navigational safety and reduce potential safety hazards for persons living, working or recreating near the Hillsboro Airport, thereby encouraging and supporting its continued operation and vitality." HZO 135B(A).

[6] We repeat the definition of "avigation easement" at HZO 135B(C)(6):

> "[1] A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude above a surface specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).
>
> "[2] A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.
>
> "[3] A right to prohibit the erection or growth of any structure, tree, or other object that would penetrate the imaginary surfaces as defined in this ordinance.
>
> "[4] A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surfaces as defined in this ordinance.
>
> "[5] A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance from being created on the property."

operations on surrounding uses. We think it highly doubtful that taking private property for that purpose constitutes a legitimate government objective.[7]

Moreover, requiring an easement to allow for passage of aircraft over the property and the right to subject the property to airplane noise, etc., appears to have no connection whatsoever to the development of property surrounding the airport or the impacts of development. It is difficult to understand how allowing the Port to externalize adverse impacts onto property surrounding the airport could be "roughly proportional," or related at all, to the impacts of any kind of development on that property. Respondents offer no scenario or argument under which such an exaction could possibly be proportional to the impacts of *any* potential development allowed in the base zone and ASCO zone.

In sum, we conclude that at least the first two elements of an avigation easement required under HZO 135B are facially inconsistent with the state and federal Takings Clauses, under the reasoning in *Nollan* and *Dolan*, and are incapable of any constitutionally permissible application. Whether the three remaining elements of an avigation easement are also unconstitutional for the reasons set out above is less clear, since those elements arguably function to actually reduce airport/land use conflicts, have some bearing on the city's presumed objective in reducing land use conflicts, and could have, at least in some cases, some relationship to the impacts of developing property. If the avigation easement requirement included only those three elements, we might well conclude that it would survive a facial challenge, and could be challenged only on an as-applied basis. However, the avigation easement requires all five elements, and therefore even if an easement that included only the three remaining elements would pass facial scrutiny, the avigation easement required under HZO 135B is still unconstitutional.

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[7] *See McCarran Int'l Airport v. Sisolak*, 122 Nev 645, 661, 137 P3d 1110 (2006) (requiring an uncompensated avigation easement as a condition of development was improper and therefore no defense to an inverse condemnation action).

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that several provisions of HZO 135A governing the AU zone violate Article I, section 21 of the Oregon Constitution, which prohibits the delegation of legislative authority.

In relevant part, Article I, section 21 prohibits passing any law "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Article I, section 21 has been construed to prohibit laws that delegate the power of amending legislation to another governmental entity, so-called "prospective" delegation. *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 981 P2d 368 (1999). In *Advocates*, the Court of Appeals addressed a citizen initiative that characterized "hazardous substance" as any substance that was included on several lists of federally-regulated hazardous materials, as well as "any substances added, subsequent to the effective date of this Act, to the lists described." *Id.* at 295-96. The plaintiffs argued that the initiative violated Article I, section 21 because it prospectively delegated authority to amend city legislation to the federal government. The Court agreed, holding that municipal legislation cannot incorporate into its definitions federal regulations not promulgated at the time the legislation is adopted.

Respondents argue, initially, that the Article I, section 21 delegation doctrine does not apply to legislative decisions amending comprehensive plans and zoning ordinances, but should be limited to the context addressed in *Advocates*, that of initiative amendments to city charters. Respondents cite to *Allison v. Washington County*, 24 Or App 571, 548 P2d 188 (1976), which addressed whether legislative actions related to comprehensive plans and zoning ordinances are subject to initiative and referendum, to argue that zoning ordinance amendments are different from initiatives and referenda, and therefore not subject to Article I, section 21. However, in *Advocates* the Court of Appeals addressed the inverse of that argument, holding that Article I, section 21 applied to an initiative that amended a city

charter, because a city charter is a "law" and thus subject to Article I, section 21. The Court rejected the argument that Article I, section 21 applies only to legislative acts such as statutes adopted by the legislature or "an ordinance adopted by a city council." 160 Or App at 312. Respondents have not cited any authority suggesting that zoning ordinance amendments are not "laws" for purposes of Article I, section 21.

A. HZO 135A(D)(7) "Environmental Laws"

HZO 135A(D)(7) identifies "Hazardous Substance" in part as "[a]ny and all substances *** in or under any Environmental Laws." In turn, HZO 135A(D)(6) defines "Environmental Laws" to include "[a]ny and all federal, state and local statutes, regulations, rules, permit terms and ordinances now *or hereafter in effect, as the same may be amended from time to time*, which in any way govern materials, substances, regulated substances and wastes, emissions, pollutants, animals or plants, noise, or products and/or relate to the protection of health, safety or the environment." (Emphasis added.) Petitioner contends that in requiring compliance with environmental laws as they "may be amended from time to time," HZO 135A(D)(6) clearly violates the prohibition on prospective delegation, as explained in *Advocates*.

Respondents argue that HZO 135A(D)(7) should be narrowly construed to avoid any constitutional violation, by understanding the provision to require compliance only to environmental laws that are in effect on the date the ordinance was enacted, and not to require compliance with laws that may be adopted by other governmental bodies in the future. According to respondents, the Court of Appeals recently took that approach in *Olson v. State Mortuary and Cemetery Board*, 230 Or App 376, 388, 216 P3d 325 (2009). *Olson* concerned a statute providing a cause for disciplinary action against funeral services providers that fail to comply with "regulations adopted by the Federal Trade Commission regulating funeral industry practices." The Court held that that language did not violate

Article I, section 21 because it could be construed to refer only to the federal rule "as it was then written" and not to future regulations that may be adopted. *Id.* at 388.

Petitioner argues, and we agree, that the present circumstance are much closer to those in *Advocates* than to those in *Olson*. The statute at issue in *Olson* included no references to prospective amendments to another entity's regulations, while the legislation at issue in both *Advocates* and in the present case explicitly and unambiguously require compliance with other entity's regulations as they may subsequently be amended. It is impossible to construe the language of HZO 135A(D)(6) to require compliance only with environmental regulations in effect when the ordinance was adopted. HZO 135A(D)(6) expressly requires compliance with future regulations not promulgated at the time of adoption, and therefore violates the Article I, section 21 prohibition on delegation of the power to amend the city's legislation.

B. HZO Section 135A(K) – "Currently Applicable" Standards

HZO Section 135A(K) provides:

> "All uses and activities permitted outright within the AU Airport Use Zone shall be reviewed for compliance with, *and shall comply with currently applicable Port of Portland standards* as follows:
>
> "1. Hillsboro Airport Standards for Development;
>
> "2. General Aviation Minimum Standards for the Hillsboro Airport; and
>
> "3. Wildlife Hazard Management Plan for the Hillsboro Airport" (Emphasis added.)

Petitioner argues that HZO Section 135A(K) also violates Article I, section 21, by requiring that the city evaluate land use applications for uses and activities permitted within the AU Airport Zone for compliance with the "currently applicable Port of Portland standards," as they exist at the time approval is being sought.

The city and intervenor respond that the phrase "currently applicable" should be understood to refer only to the three listed sets of Port of Portland standards and plans as they

"currently" existed on the date HZO 135A(K) was adopted, not as they may exist at the time development approval is sought. Respondents argue that, because HZO 135A(K) can be interpreted in a manner that does not run afoul of Article I, section 21, under *Olson* LUBA should so interpret the code provision and thus avoid any problem with prospective delegation.

HZO 135A(K) is less explicit than HZO 135A(D)(6), and can be read to refer only to Port standards as they existed on the date the code provision was adopted. The clause "shall comply with currently applicable Port of Portland standards" is part of a compound sentence the first element of which provides that "[a]ll uses and activities permitted outright within the AU Airport Use Zone shall be reviewed for compliance with" Port standards. Because that first element of the sentence is clearly referring to a post-adoption time frame when land use applications are filed, an inference arises that the second element of the sentence is also referring to the same time frame, the standards that are applicable when land use applications are filed. On the other hand, when the city intends to refer to standards as they may be amended from time to time, as it explicitly did in HZO 135A(D)(6), it knows how to express that intent unambiguously. Because the city chose to use different language in HZO 135A(K), that suggests a different intent. Although it is a close call, we agree with respondents that the narrowing construction applied in *Olson* should be extended to circumstances where, as here, the text of the code language can be interpreted to refer to legislation as it exists on the date the code language is adopted. This subassignment of error is denied.

C. HZO Section 135A(E)(2) – Uses and Activities Permitted Outright within the Master Plan for the Hillsboro Airport

HZO 135A(E) sets out the uses permitted outright in the AU zone. HZO 135A(E)(2) provides for "[a]ir passenger and air freight services and facilities that are consistent with levels identified in the most current, adopted Master Plan for the Hillsboro Airport." Petitioner notes that at the present time no air passenger or air freight services are present at

the Hillsboro Airport and those services are not identified in the existing airport master plan, which means that any future expansion of the airport to allow such uses will require an amendment to the airport master plan. According to petitioner, the airport master plan is not a city planning document, but a document that the Port has adopted for its own purposes and that the Port can amend at its discretion. Again, petitioner argues that the city has violated Article I, section 21 by simply delegating to the Port the ability to determine what uses are allowed at the airport, and at a what level of intensity.

Respondents offer no specific response to petitioner's arguments regarding HZO 135A(E)(2). As noted, Article I, section 21 prohibits passing any law "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." We agree with petitioner that HZO 135(E)(2) presents an even clearer violation of Article I, section 21 than the provisions discussed above. Under HZO 135(E)(2), the city has delegated to the Port not only the authority to effectively *amend* the city standards that govern land uses in the AU zone (prospective delegation), the city has actually delegated to the Port the authority to determine what uses are in fact allowed in the AU zone. Because the existing Port master plan apparently does not provide for air passenger or air freight services, under HZO 135A(E)(2) those uses are not allowed at all, unless and until the Port amends its plan to provide for them. In the words of Article I, section 21, the city has made the "taking effect" of HZO 135(E)(2) depend upon the authority of the Port. Respondents do not argue that that delegation of authority is provided for under the Oregon Constitution, or any other basis to conclude that HZO 135(A)(E)(2) does not violate Article I, section 21.

D. Severance

As a final general defense, respondents argue that if LUBA concludes that any provisions of HZO 135A violate Article I, section 21, LUBA should simply sever those provisions. Respondents note that in an appeal of the decision on remand in *Advocates*, the Court of Appeals held that even where there is no express severability clause included in an

ordinance, the law provides a presumption of severability, which may be overcome based on three considerations. *Advocates for Effective Regulation v. City of Eugene*, 176 Or App 370, 376, 32 P3d 228 (2001) (*Advocates II*).[8] Respondents argue that because the three considerations discussed in *Advocates II* are not present here, LUBA should apply the presumption of severability, sever any offending provisions from HZO 135A, and thus deny the second assignment of error.

The doctrine of severance does not work in the manner respondents argue, at least for purposes of LUBA's review. In *Advocates I*, the Court of Appeals remanded the decision to the circuit court to consider, among other things, whether the offending provisions could be severed. On remand, the circuit court applied the severance doctrine and severed the disputed provisions. In *Advocates II*, the Court of Appeals rejected challenges to the decision on remand and therefore ultimately affirmed the circuit court's decision. However, respondents do not cite to any case where the Court of Appeals or LUBA applied the severance doctrine to the decision on appeal, severed offending provisions, and thereby denied the assignment of error and affirmed the decision. On the contrary, in the only LUBA decision we find in which the Board has applied the severance doctrine, LUBA used the doctrine only to determine whether the Board must reverse as unconstitutional the challenged ordinance *in its entirety*, or whether LUBA could go on to address sub-constitutional

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[8] The Court in *Advocates II* explained:

> "If there is no express severability clause, the law provides a presumption of severability, which may be overcome only if (1) the enactment provides that the remaining parts shall not remain in effect; (2) the remaining parts are so dependent on the invalid part that the remaining parts would not have been enacted without the invalid part; or (3) the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with legislative intent. ORS 174.040." Id at 376.

The Court noted that the same severability principles embodied in ORS 174.040 also apply to municipal ordinances, citing *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 16, 994 P2d 1205 (2000).

challenges to the remaining portions of the ordinance that were not subject to severance. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466, 470 (1993).[9]

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioner argues under this assignment of error that Ordinance 5935, which applies the AU zone to the airport property, fails to comply with Goal 12 and the Transportation Planning Rule (TPR), at OAR 660-012-0060.[10] According to petitioner, in rezoning the airport property from industrial uses to AU, the city authorized new uses that must be analyzed under the TPR, because those new uses could have a "significant effect" on the

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[9] Our reasoning in *Riverbend Landfill Company* was likely unnecessary since ORS 197.835(11)(a) expressly authorizes LUBA to consider all issues "when reversing or remanding a land use decision." Identical statutory authority was codified at ORS 197.835(9)(a) (1993) when *Riverbend Landfill Company* was decided in 1993.

[10] OAR 660-012-0060(1) provides:

> "Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. 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; or
>
> "(c) As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
>
> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."

city's transportation system. However, petitioner argues, the city did not address or consider compliance with the TPR.

As a threshold issue, respondents assert that the third assignment of error fails, because it is limited to an argument that the city was required to adopt findings addressing the TPR and failed to do so, and fails to contend that adoption of Ordinance 5935 in fact "significantly affects" any transportation facility and thus triggers compliance with the TPR. Respondents note, correctly, that Ordinance 5935 is a legislative decision, and that there is no generally applicable requirement that legislative decisions be supported by findings demonstrating compliance with applicable approval standards. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435, 451, *aff'd* 185 Or App 408, 61 P3d 281 (2002); *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 563-64 (1994). *But see Home Builders Association v. City of Eugene*, 59 Or LUBA 116, 133 (2002) (citing *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16, n 6, 38 P3d 956 (2002) (even without a findings obligation for legislative decisions, to allow LUBA and the appellate courts to perform their review function, there must be enough in the way of findings or accessible material in the legislative record to show that applicable criteria were applied and that required considerations were indeed considered).

Petitioner replies, and we agree, that fairly read the third assignment of error includes a substantive challenge that Ordinance 5935 triggers the need to demonstrate compliance with TPR and the city failed to do so. The third assignment of error is that "The City's Decision Ignored Applicable Law and Failed to Comply with Goal 12 and the Transportation Planning Rule." Petition for Review 21. Petitioner argues in relevant part that rezoning the Airport property from the MP and M-2 zones, which do not allow an airport and under which the existing airport is a nonconforming use, to AU, which according to petitioner allows airports at greater levels of intensity than the existing airport, might allow uses with increased traffic impacts sufficient to "significantly affect" surrounding transportation facilities within

the meaning of OAR 660-012-0060(1). Although petitioner's argument understandably focuses on the complete absence of findings addressing the TPR, we decline to read the third assignment of error as challenging merely the absence of findings.

On the merits, respondents argue that rezoning the airport property to AU in fact represents a "down-zone" in the intensity of uses allowed on the airport property compared to the previous MP and M-2 zones, and therefore the rezoning could not possibly allow land uses whose traffic impacts could "significantly affect" any transportation facility within the relevant planning period. However, respondents cite to nothing in the record supporting their view that the effect of rezoning the Airport from MP and M-2 to the new AU zone represents a "down-zone" with respect to potential for impacts on transportation facilities near the airport, and therefore the TPR is not triggered. As noted above, to allow meaningful review, there must be enough in the way of findings or accessible material in the legislative record to show that applicable criteria were applied and required considerations were indeed considered. Respondents' arguments rest entirely on Appendix G to the Response Brief. As far as the *record* reflects, the city apparently gave no consideration to the TPR during the legislative proceedings below. In that circumstance (*i.e.*, a legislative decision that does not consider the TPR and includes no findings addressing the TPR), we believe that the city can avoid remand on this issue only if it can demonstrate, essentially as a matter of law, that the TPR does not apply to the challenged rezoning, in other words, that the TPR is not a "required consideration." *Citizens Against Irresponsible Growth*, 179 Or App at 16, n 6.

The response brief falls short of making that demonstration. The AU zone is the only city zone that allows an airport and airport related facilities. The challenged decision applies the AU zone to property developed with a regional airport that is a nonconforming use under the preexisting zoning. Generally, restrictions apply to expansions or alterations of nonconforming uses. *See* HZO 99 (allowing expansion of a nonconforming use in cases of "practical difficulty or unnecessary hardship"). An airport is an outright permitted use in the

AU zone and, as discussed above, the city has largely delegated to the Port of Portland the ability to determine what intensity of airport uses is allowed. Under that view, rezoning the Airport property to AU certainly could allow new or expanded airport operations, with consequent traffic impacts that might well "significantly effect" nearby transportation facilities over the relevant planning period, within the meaning of OAR 660-012-0060(1).

The city's argument that the TPR does not apply as a matter of law is based on a comparison of the most-intensive uses potentially allowed in the MP and M-2 zones against the most-intensive uses allowed in the AU zone (an airport). The MP and M-2 zones allow a number of potentially traffic-intensive uses, including drive-in restaurants, stores, offices, etc. The city argues that if the airport property were redeveloped with such traffic-intensive commercial uses, the impacts on nearby transportation facilities would necessarily be greater than an airport allowed under AU zone. The city is correct that determining whether a zoning map amendment "significantly affects" a transportation facility can often be accomplished by comparing the most traffic-intensive uses allowed in the old zone against the most-traffic intensive uses allowed in the new zone. If the record supports a determination that a reasonable "worst-case" scenario based on the uses allowed under the new zone would result in fewer impacts on transportation facilities than the reasonable "worst-case" scenario based on uses allowed under the old zone, such a determination could support a conclusion that that the rezoning does not "significantly affect" a transportation facility under OAR 660-012-0060(1)(c).

The presumption underlying that comparison approach is that the local government's acknowledged transportation system plan (TSP) was originally developed with the goal of accommodating the transportation needs potentially generated by uses allowed under the old zone, within the relevant planning period. The TSP obviously would not take into account rezonings that allow new uses with potentially more significant traffic impacts. Hence, a hypothetical comparison of reasonable worst-case traffic scenarios between the uses allowed

under the old and new zones can be a reliable and appropriate method of making a threshold determination whether a rezoning decision triggers the TPR. In Appendix G and in supporting argument, respondents attempt to conduct just such a hypothetical comparison. However, it is not clear to us in the present circumstances that a hypothetical comparison of the relative traffic-intensity of uses allowed in the MP, M-2 and AU zones is necessarily an appropriate and reliable method of determining whether the TPR is triggered. That is because the airport property has long been developed with an important regional airport, and it seems highly unlikely that the city's TSP was developed with the understanding that the airport would be demolished during the planning period and the airport property redeveloped with various commercial uses nominally allowed on that property under the MP and M-2 zones. It seems far more likely that the surrounding transportation system is planned and designed to accommodate the existing airport, notwithstanding that it is a nonconforming use in the MP and M-2 zones. In other words, the hypothetical "worst-case" scenario posited by respondents under the prior industrial zoning may well not be a *reasonable* scenario under these circumstances, which casts into doubt whether a simple comparison of uses nominally allowed in the MP, M-2 and AU zones would yield a meaningful determination that the TPR is or is not triggered. The most meaningful approach in the present case, as petitioner suggests, may be a comparison of the airport use as planned under the city's TSP and comprehensive plan, with the airport as it may reasonably be expanded under the AU zone.

In sum, we cannot tell from the present record and pleadings whether the TPR is a "required consideration" in rezoning the airport to AU, and the present record does not include any indication that the city in fact considered whether the rezoning triggers the TPR.

The third assignment of error is sustained.

CONCLUSION

For the reasons set out under the first and second assignments of error, the adoption of Ordinance 5935 is unconstitutional, and the city cannot lawfully apply the AU zone and

ASCO zone to property within the city unless and until the city amends HZO 135A and 135B to remove the unconstitutional provisions identified in this opinion. Under that reasoning, the proper disposition is reversal of Ordinance 5935. OAR 661-010-0071.[11] If the county elects to readopt Ordinance 5935 after removing from HZO 135A and 135B the unconstitutional provisions identified in this opinion, it will also need to address our disposition of the third assignment of error.

The city's decision is reversed.

Holstun, Board Chair, concurring.

In relevant part, Article I, section 21 of the Oregon Constitution prohibits passing any law "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." In section C under the second assignment of error, the majority concludes that HZO 135A(E) runs afoul of Article I, section 21. Among the uses permitted outright in the AU zone are "[a]ir passenger and air freight services and facilities that are consistent with levels identified in the most current, adopted Master Plan for the

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[11] OAR 661-010-0071 provides:

"(1) The Board shall reverse a land use decision when:

"(a) The governing body exceeded its jurisdiction;

"(b) The decision is unconstitutional; or

"(c) The decision violates a provision of applicable law and is prohibited as a matter of law.

"(2) The Board shall remand a land use decision for further proceedings when:

"(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);

"(b) The decision is not supported by substantial evidence in the whole record;

"(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or

"(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law."

Hillsboro Airport." I do not believe that language in HZO 135A(E) runs afoul of the Article I, section 21 prohibition against the city delegating its lawmaking power.

City land use regulations commonly allow specified development but require that development first be served by sewer or water—services that are often provided by a special district or other governmental unit. That is not a delay or delegation of the "taking of effect" of the regulation. Rather, such regulations immediately take effect and authorize applications for approval of the specified development but require certain factual predicates (availability of water and sewer) before such development can be approved by the city. Such regulations do not delegate to the sewer or water district or other governmental unit the power to determine when the regulation will "take[] effect," within the meaning of Article I, section 21.

Similarly, a regulation like HZO 135A(E) that requires that any air freight services and facilities in the AU zone must be consistent with the "levels identified" in the airport master plan simply imposes a condition predicate to development of air freight services and facilities in the AU zone. The precise meaning of "levels identified' in the airport master plan is not clear to me, but presumably it requires that construction of air freight services and facilities in the AU zone must be consistent with the demand for such facilities identified in the airport master plan. While I will concede it may be possible to characterize that understanding of HZO 135A(E) as unlawfully delegating lawmaking authority to the port, it is also possible to characterize HZO 135A(E) as doing something different. The condition predicate in HZO 135A(E) (that air passenger and freight services be consistent with the "levels identified" in the airport master plan) is not unlike zoning standards that are commonly encountered and require a "public need" for development before the development authorized in a zoning district may be approved. Just as the city may have little or no control over the "levels" of air freight services and facilities identified in the airport master plan, a city may have little or no control over the level of public need for development. In neither

case is there an improper delegation of lawmaking power under Article I, section 21. I would reject petitioner's challenge to HZO 135A(E)(2) under the second assignment of error.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2010-011 on June 30, 2010, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 30th day of June, 2010.

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ATTACHMENT E

ER-52

ORDINANCE NO. 5926

ZOA 3-09: HILLSBORO AIRPORT COMPATIBILITY STUDY IMPLEMENTATION

AN ORDINANCE AMENDING ZONING ORDINANCE NO. 1945, AS AMENDED, SECTION 94 EXCEPTIONS TO BUILDING HEIGHT LIMITATIONS AND ADDING TWO NEW SECTIONS: SECTION 135A AU AIRPORT USE ZONE AND SECTION 135B ASCO AIRPORT SAFETY AND COMPATIBILITY OVERLAY ZONE TO REFLECT THE RECOMMENDATIONS OF THE HILLSBORO AIRPORT COMPATIBILITY STUDY AND THE RECOMMENDATIONS OF THE HILLSBORO AIRPORT ISSUES ROUNDTABLE.

WHEREAS, Oregon Administrative Rules (OAR) Section 660-13 requires local jurisdictions to adopt provisions to encourage and support the continued operation and vitality of airports," including both Airport Use zones and Airport Safety and Compatibility Overlay zones, and

WHEREAS, the 2005 Hillsboro Airport Compatibility Study recommended creation and adoption of both an Airport Use zone and Airport Safety and Compatibility Overlay zones for the Hillsboro Airport, and

WHEREAS, the citizen advisory group Hillsboro Airport Issues Roundtable (HAIR) worked with City of Hillsboro staff, Washington County staff, and Port of Portland staff for over 18 months to prepare draft language for a proposed AU Airport Zone and a proposed ASCO Airport Safety and Compatibility Overlay Zone to be added to the Hillsboro Zoning Ordinance and Zoning Map, finalizing its recommendation in January 2009, and

WHEREAS, the Hillsboro Planning Commission received and reviewed the proposed Zoning Ordinance amendments at a work session on February 25th, 2009, and found sufficient merit in the draft language to initiate Zoning Ordinance amendments as authorized under Section 112 Authorization to Initiate Amendments, and

WHEREAS, the Planning Commission subsequently adopted Order No. 8004 initiating the proposed Zoning Ordinance amendments and an additional amendment to Section 94 Exceptions to Building Height Limitations consistent with the amendments recommended by the HAIR, and

WHEREAS, the Planning Commission held a public hearing on the proposed Zoning Ordinance amendments on May 13, May 27, and June 24, 2009, and received testimony in support and in opposition to the amendments, and

WHEREAS, at the conclusion of the public hearing, the Planning Commission adopted Order No. 8103 on July 22, 2009, recommending City Council approval of the proposed amendments, and

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WHEREAS, the City Council considered the Planning Commission's recommendation at a work session on September 15, 2009 and at the regular meetings on September 15 and October 6, 2009, and

WHEREAS, the City Council adopts the findings attached hereto as Attachment A in support of their decision.

NOW, THEREFORE, THE CITY OF HILLSBORO ORDAINS AS FOLLOWS:

Section 1. Zoning Ordinance No. 1945, Section 94 Exceptions to Building Height Limitations is amended with the deletion of the existing reference to FAR Part 77 and the addition of an updated reference to Section 135B; with deleted text shown in overstrike typeface and added text shown in bold italic typeface as follows:

Section 94. Exceptions to Building Height Limitations.

(1) Except for the limitations set forth in Subsection (2) hereof, the following types of structures or structural parts are not subject to the building height limitations of this Ordinance: chimneys, tanks, church spires, belfries, domes, monuments, fire and hose towers, observation towers, masts, aerials, cooling towers, elevator shafts, transmission towers, smokestacks, flagpoles, radio and television towers and other similar projections.

(2) In order to assure safe airport operation, no structure or structural part shall exceed height standards established for the vicinity of the Portland-Hillsboro Airport ~~by the Federal Aviation Administration's Aviation Regulations (FAR) Part 77~~ ***in Section 135B***.

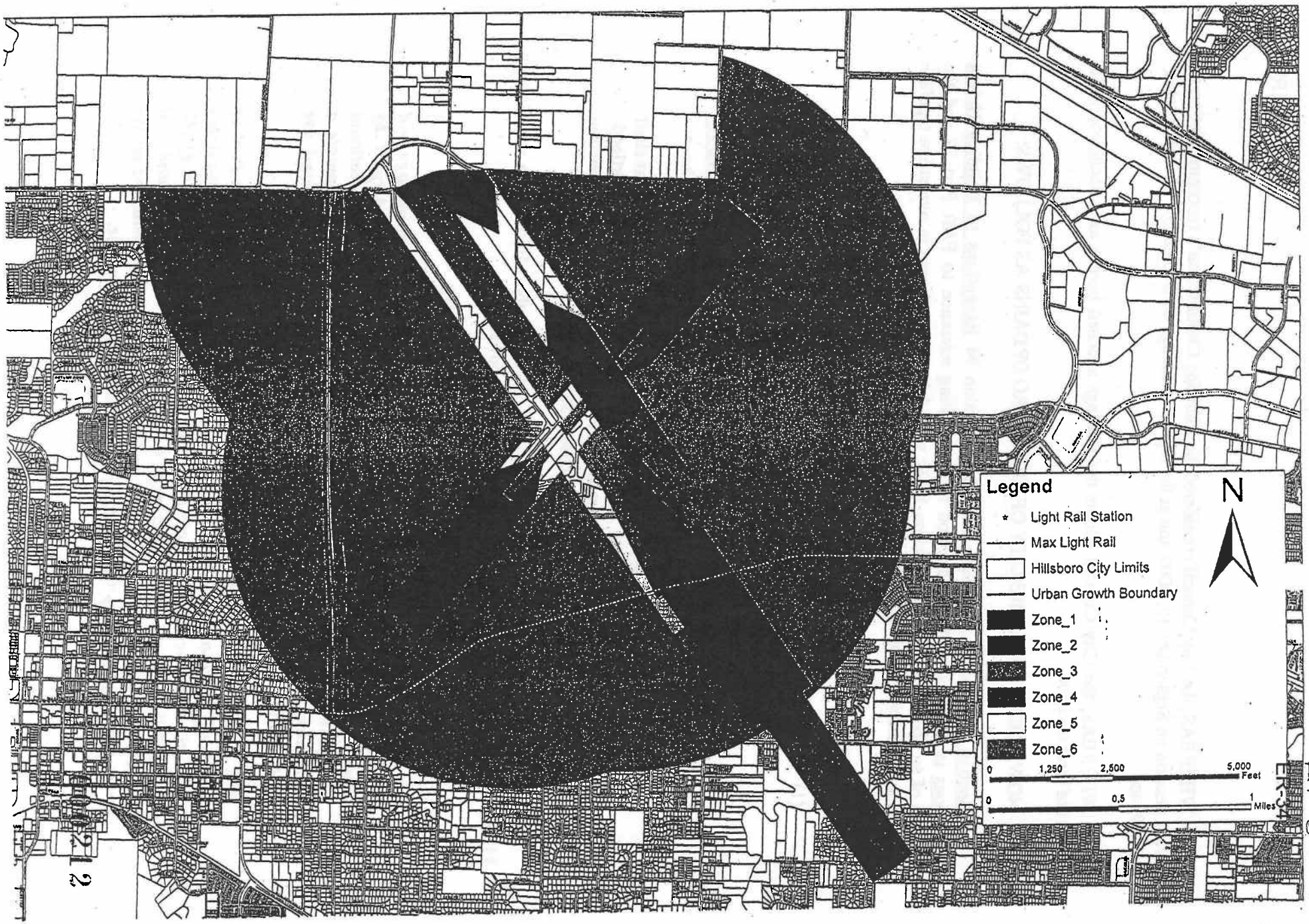
Section 2. Zoning Ordinance No. 1945, is amended with the addition of a new Section 135A Airport Zone AU; shown in bold italic typeface as follows:

Section 135 (A). Airport Use Zone (AU)

A. Purpose. The purpose of the AU Airport Use Zone is to encourage and support the continued operation and vitality of the Hillsboro Airport by allowing airport and aviation-related commercial, industrial and recreational uses in accordance with state laws. These laws are intended to promote a convenient and economic system of airports in the state and for land use planning to reduce the risks to airport operators and nearby land uses.

B. Application. The AU zone applies to properties owned by the Port of Portland, which are in use or proposed for use for airport or aviation-related operations and activities. These properties are generally located north of NE Cornell Road, south of NW Evergreen Road, east of NE 25th Avenue, and west of NW Brookwood Parkway. The boundary of the AU zone is identified on the "Airport Use Zone Map" adopted as part of the Zoning Ordinance.

Exhibit B: HZO Figure 135B ASCO Zone Boundaries



C. *Conformance with the Airport Safety and Compatibility Overlay (ASCO) Zone. All uses, activities, facilities and structures allowed in the AU Airport Use Zone shall comply with the requirements of the ASCO Airport Safety and Compatibility Overlay Zone, Hillsboro Zoning Ordinance Section 135B. In the event of a conflict between the requirements of the AU zone and the ASCO zone, the requirements of the ASCO zone shall control.*

D. *Definitions.*

1. *Aircraft: Includes airplanes and helicopters, but not sport aircraft, ultra lights or lighter than air aircraft.*

2. *Commercial Aviation Activity (CAA): Any activity that is conducted on the airport for profit.*

3. *Aircraft manufacturing: Includes one or more of the following*
   a. *Original Equipment Manufacturer – a CAA using materials to produce aircraft or aircraft parts for sale to the public.*
   b. *Commercial Assembly – a CAA that assists aircraft kit owners with assembly of their aircraft.*
   c. *Hobbyist Assembly – aircraft assembled from kit or raw materials on the Airport for the personal use and enjoyment of the person(s) assembling it, and not constructed for the purpose of profit or resale.*

4. *Aviation/aeronautical activity: Any activity on the airport that involves the operation of aircraft or aviation related equipment; or supports the operation of aircraft or aviation related equipment.*

5. *Fixed Base Operator (FBO): A person or entity who leases property at the Airport for the purpose of offering commercial aviation activities that typically include retail fuel sales, line services, aircraft maintenance and activities such as, but not limited to:*
   a) *Aircraft charter operation*
   b) *Aircraft rental*
   c) *Aircraft storage*
   d) *Flight training*
   e) *Aircraft sales/leasing*
   f) *Aircraft component maintenance*
   g) *Aircraft parts sales*

6. *Environmental Laws: Any and all federal, state and local statutes, regulations, rules, permit terms and ordinances now or hereafter in effect, as the same may be amended from time to time, which in any way govern materials, substances, regulated substances and wastes, emissions, pollutants,*

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animals or plants, noise, or products and/or relate to the protection of health, safety or the environment.

7. Hazardous Substance: Any and all substances, emissions, pollutants, materials, or products defined or designated as hazardous, toxic, radioactive, dangerous or regulated wastes or materials, or any similar term in or under any Environmental Laws. "Hazardous Substance" shall also include, but not be limited to, fuels, petroleum, and petroleum-derived products.

E. Uses and Activities Permitted Outright. The following uses and their associated facilities and accessory structures are permitted in the AU zone.

1. Customary and usual aviation-related activities, including but not limited to takeoffs and landings; aircraft hangars and tie-downs; construction and maintenance of airport facilities; fixed based operator facilities; a facility for an airport caretaker or security officer; and other activities incidental to the normal operation of an airport, including operation of fixed wing aircraft, helicopters and lighter than air aircraft. Except as provided in this ordinance, customary and usual aviation-related activities do not include residential, commercial, industrial, manufacturing and other uses.

2. Air passenger and air freight services and facilities that are consistent with levels identified in the most current, adopted Master Plan for the Hillsboro Airport.

3. Emergency medical flight services, including activities, aircraft, accessory structures, and other facilities necessary to support emergency transportation for medical purposes. Emergency medical flight services do not include hospitals, medical offices, medical labs, medical equipment sales, and other similar uses.

4. Law enforcement and firefighting activities, including aircraft and ground-based activities, facilities and accessory structures necessary to support federal, state or local law enforcement or land management agencies engaged in law enforcement or firefighting activities. Law enforcement and firefighting activities include transport of personnel, aerial observation and transport of equipment, water, fire retardant and supplies.

5. Search and rescue operations, including aircraft and ground based activities that promote the orderly and efficient conduct of search or rescue related activities.

6. Flight instruction, including activities, facilities, and accessory structures located at airport sites that provide education and training directly related to aeronautical activities. Flight instruction includes ground training

and aeronautic skills training, but does not include schools for flight attendants, ticket agents or similar personnel.

7. Aircraft service, maintenance and training, including activities, facilities and accessory structures provided to teach aircraft service and maintenance skills and to maintain, service, refuel or repair aircraft or aircraft components. "Aircraft service, maintenance and training" includes allowances for the construction and assembly of aircraft and aircraft components for personal use.

8. Aircraft rental, including activities, facilities and accessory structures that support the provision of aircraft for rent or lease to the public.

9. Aircraft sales and the sale of aeronautic equipment and supplies, including activities, facilities and accessory structures for the storage, display, demonstration and sale of aircraft and aeronautic equipment and supplies to the public.

10. Crop dusting activities, including activities, facilities and structures accessory to crop dusting operations. Crop dusting activities include, but are not limited to, aerial application of chemicals, seed, fertilizer, and other chemicals or products used in a commercial agricultural, forestry or rangeland management setting. Operators must provide the Port of Portland a current list of all Hazardous Substances used in crop dusting activities, listing the amounts stored, method of storage, the projected maximum storage period and providing a hazardous response spill plan.

11. Agricultural activities, including activities, facilities and accessory structures that qualify as a "farm use" as defined in ORS 215.203 or "farming practice" as defined in ORS 30.930.

12. Manufacturing, assembly, processing, packaging, testing, treatment, repair, or distribution of aircraft or aircraft related components or products for sale to the public and/or for personal use.

13. Other aeronautical uses and activities and supporting uses and activities associated with terminal buildings at high activity public use airports, including automobile rental and associated auto washing facilities, hotels and motels, eating and drinking establishments, banks, offices, public parking and auto storage, conference centers, aviation clubs and schools, barber shops, physical fitness centers, transit park and rides and commercial support services.

14. Aeronautic educational, recreational and sporting activities, including activities, facilities and accessory structures at airports that support aviation education, recreational usage of aircraft and sporting activities that require the use of aircraft or other devices used and intended for use in flight. Aeronautic education, recreation and sporting activities authorized under this paragraph

include, but are not limited to, air shows, fly-ins; glider flights; hot air ballooning; ultra light aircraft flights; displays of aircraft; ~~and~~ gyrocopter flights and aviation museums, but do not include flights carrying parachutists or parachute drops (including all forms of skydiving).

15. Flights carrying parachutists, and parachute drops (including all forms of skydiving) onto an airport, but only upon demonstration that the parachutist business has secured approval to use a drop zone that is at least 10 contiguous acres. The configuration of the drop zone shall roughly approximate a square or a circle and may contain structures, trees, or other obstacles only if the remainder of the drop zone provides adequate areas for parachutists to land safely.

F. Pre-Existing Non-Conforming Uses.

Any lawfully created structure or use existing at the time of adoption of the AU Airport Use Zone, which does not comply with the provisions of this Section, may be continued and maintained in reasonable repair, but shall not be enlarged or expanded except as specified in Zoning Ordinance Section 98 – 100. Pre-existing non-conforming structures or uses in the AU Airport Use zone shall also be subject to Zoning Ordinance Sections 101-105 regarding alterations, completion, change, discontinuance, or destruction.

G. Setback Requirements. In the AU zone, the yards shall be as follows:

1. The front yard and any side yard abutting a public street shall be a minimum of 25 feet.

2.. The side or rear yard abutting a leasehold line shall be a minimum of five feet.

H. Height of Buildings. In the AU zone, the maximum structural height shall be 45 feet. All structures in the AU zone must comply with the height standards specified in the Airport Imaginary Surfaces as defined in Zoning Ordinance Section 135B, and as illustrated on Figure 135B2.

I. Off-Street Parking and Loading. In the AU zone, in addition to the requirements of Section 84 to 86, parking or loading shall not be permitted within the front yard adjacent to a public street unless the building setback is increased to 45 feet and the first 15 feet from the front property line are landscaped.

J. General Development Standards.

1. Exterior lighting shall be directed away from adjacent properties.

2. Open storage of materials and equipment shall be surrounded by a sight-obscuring fence at least six feet high, but no more than 10 feet high.
3. Access points to public streets shall be located to minimize traffic congestion and consolidated wherever possible.
4. Yards adjacent to public streets shall be continuously maintained in lawn, trees and shrubs. Other yards and unused property shall be maintained in grass or other suitable ground cover.

K. Compliance with Port of Portland Requirements.

All uses and activities permitted outright within the AU Airport Use Zone shall be reviewed for compliance with, and shall comply with currently applicable Port of Portland standards as follows:

1. Hillsboro Airport Standards for Development;
2. General Aviation Minimum Standards for the Hillsboro Airport; and
3. Wildlife Hazard Management Plan for the Hillsboro Airport

L. Development Review Standards.

All development within the AU Airport Use Zone is subject to and shall comply with the standards and procedures set forth in Section 133, Development Review/Approval of Plans.

Section 3. Zoning Ordinance No. 1945, is amended with the addition of a new Section 135B Airport Safety and Compatiblity Overlay Zone (ASCO); shown in bold italic typeface as follows:

Section 135B: Airport Safety and Compatibility Overlay Zone (ASCO)

A. Purpose. The Airport Safety and Compatibility Overlay (ASCO) Zone is an overlay zone that supplements the provisions of the underlying zones. The purpose of the ASCO zone is to establish compatibility and safety standards to promote air navigational safety and reduce potential safety hazards for persons living, working or recreating near the Hillsboro Airport, thereby encouraging and supporting its continued operation and vitality.

B. Boundary Delineations and Applicability. The location and dimensions of the Hillsboro Airport runways, civil airport imaginary surfaces, airport noise impact boundaries, and compatibility zones as defined and described in this Section, are delineated for the Hillsboro Airport on Figures 135B 1, 135B 2, 135B 3, and 135B 4. By their inclusion in this Section, these boundaries are made part of the Official Zoning Map.

1. All land, water and airspace, or portions thereof, located within the imaginary surfaces, airport noise impact boundaries, and compatibility

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zones are subject to the requirements of the ASCO zone. Where the boundary of an imaginary surface, airport noise impact contour, or compatibility zone divides an individual property, the location of that boundary on that property shall be determined by the Planning Director or the Director's designee upon request by an interested party.

2. Adjustments adopted by the Port of Portland to the airport noise impact boundaries delineated on Figure 135B 3 shall be made to that Figure following completion of a public hearing process as set forth in Section 116 Public Hearing on an Amendment. The public hearing shall be held before the Planning and Zoning Hearings Board, and notice of the hearing shall be provided to owners of properties to be wholly or partially included or excluded in any relocated noise contour boundary as required in Section 116 1 b. Publication of the notice in a general circulation newspaper shall not be required.

(C) Definitions.

1. Airport (also referred to as "Hillsboro Airport"). Those properties lying generally north of NE Cornell Road, east of NE 25th Avenue, west of NE Brookwood Parkway, and south of NW Evergreen Road, which are owned and administered by the Port of Portland for general aviation purposes including taking off and landing aircraft. Hillsboro Airport includes airside facilities (runways, taxiways, lighting, markings, signage and navigational aids) and landside facilities (terminals, aircraft storage/maintenance hangars, aircraft parking aprons, and support facilities such as fuel storage, automobile parking, roadway access, firefighting and aircraft rescue). The Hillsboro Airport Runways are illustrated on Figure 135B 1.

2. Airport Safety and Compatibility Overlay Zones: Areas on and near the Hillsboro Airport in which land use and development restrictions are established to protect the safety of the public. The dimensions of the Hillsboro Airport Safety and Compatibility Overlay Zones are based upon guidelines from the California Airport Land Use Handbook which are in turn based on patterns of aircraft accidents at and near general aviation airports. The Airport Safety and Compatibility Overlay Zones dimensions are illustrated and defined on Figure 135B 4 and are generally located as follows:

a. Zone 1 - Runway Protection Zone (RPZ): Trapezoidal areas extending from the runway ends, centered on the extended runway centerlines.

b. Zone 2 - Inner Approach/Departure Zone: A rectangular area extending beyond the RPZ. If the RPZ widths approximately equal the runway widths, the Inner Approach/Departure Zone area extends along the sides of the RPZs from the end of the runway.

c. Zone 3 – Inner Turning Zone: A triangular area over which aircraft are typically turning from the base to final approach legs of the standard traffic pattern. The Inner Turning Zone also includes the area where departing aircraft normally complete the transition from takeoff to climb mode and begin to turn to their en route heading.

d. Zone 4 – Outer Approach/Departure Zone: A rectangular area located along the extended runway centerline beyond the Inner Approach/Departure Zone.

e. Zone 5 – Sideline Zone: A rectangular area in close proximity and parallel to the runway.

f. Zone 6 – Traffic Pattern Zone: An elliptical area that includes the majority of other portions of regular air traffic patterns and pattern entry routes, and generally extends to the farthest points of 6,000 foot radius arcs from the centers of each of the primary surfaces and connecting lines tangent to those arcs.

3. Airport Elevation. The highest point of the Airport's usable runways, measured in feet above mean sea level.

4. Airport Imaginary Surfaces. The areas established in relation to the airport and to each runway consistent with FAR Part Section 77.25 Civil Airport Imaginary Surfaces in which any object extending above these imaginary surfaces, by definition, is an obstruction. The Hillsboro Airport Imaginary Surfaces area illustrated on Figure 135B 2, and are generally located as follows:

a. Primary Surfaces. A surface longitudinally centered on a runway. The primary surface extends 200 feet beyond the end of that runway. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline. The width of the primary surface for runway 12/30 is 1000 feet, 500 feet for runway 2/20 and 500 feet future runway 12L/30R.

b. Approach surfaces: An aerial surface longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. An approach surface is applied to each end of the runway based upon the type of approach available or planned for that runway end.

The inner edge of the approach surface is the same width as the primary surface and it expands uniformly to a length of 1,250 feet for runway

ends 12L/30R, 1,500 feet for runway ends 2/20, 3,500 feet for runway end 30 and 16,000 feet for runway end 12.

The approach surface extends for a horizontal distance of 5,000 feet at a slope of 20:1 for runway 2/20 and future runway 12L/30R. The approach surface extends for a horizontal distance of 10,000 feet at a slope of 34:1 for runway 30. The approach surface extends for a horizontal distance of 50,000 feet for runway 12 at a slope of 50:1 for 10,000 feet and then 40:1 for the remaining 40,000.

The outer width of the approach surface for future runway 12L/30R is 5,000 feet. The outer width of the approach surface for runway 2-20 is 5,000 feet. The outer width of the approach surface for runway 30 is 50,000 feet. The outer width of the approach surface for runway 12 is 10,000 feet.

c. Transitional Surfaces. Sloping aerial planes extending upward and outward at 90 degree angles to the runway centerlines and the extended runway centerlines. Transitional surfaces rise at a slope of seven (7) feet horizontally for each foot vertically from the sides of the primary and approach surfaces to the points of intersection with the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at a 90 degree angle to the extended runway centerline.

d. Horizontal Surface. A horizontal plane 150 feet above the established airport elevation. The horizontal surface perimeter of the Hillsboro Airport is located at the farthest points of 10,000 foot radius arcs from the centers of each of the primary surfaces and connecting lines tangent to those arcs.

e. Conical Surface. A sloping aerial plane extending outward and upward from the perimeter of the horizontal surface at a slope of 20:1 for a horizontal distance of 4,000 feet.

5. Airport Noise Impact Contour Boundaries. Areas located within 1,500 feet of an airport runway or within established noise contour boundaries exceeding 55 DnL, as defined and demarcated in the most recently adopted Hillsboro Airport Master Plan, and as illustrated on Figure 135B 3. The noise exposures contours on Figure 135B 3 are derived from projected long term noise exposure contours in the most current Hillsboro Airport Master Plan.

6. Avigation Easement. A type of easement which conveys the following rights:

- *A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude above a surface specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).*
- *A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.*
- *A right to prohibit the erection or growth of any structure, tree, or other object that would penetrate the imaginary surfaces as defined in this ordinance.*
- *A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surfaces as defined in this ordinance.*
- *A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance from being created on the property.*

7. Building permit. Within Section 135B, a permit issued by the Hillsboro Building Department for structural improvements on a property, excluding permits for electrical, mechanical, plumbing or grading improvements, non-residential tenant improvements, residential remodeling, or any other permit which does not increase the number of residential dwelling units or the square footage of non-residential structures on a property.

8. Commercial Child Care Facility. Any child care facility, other than certified or registered family child care homes or childcare centers used by and operated solely for employees of one or more businesses within the boundaries of the ASCO zone.

9. Commercial Senior or Convalescent Care Facility. Any senior or convalescent care facility, other than licensed residential homes or residential facilities, which provides overnight sleeping rooms for residents' use.

10. FAA. The Federal Aviation Administration.

11. Height. The highest point of a structure or tree, plant or other object of natural growth, measured in feet above the Airport Elevation.

12. Day-Night Average Sound Level (DNL or L_{dn}). The noise metric adopted by the U.S. Environmental Protection Agency for measurement of environmental noise. It represents the average daytime noise level during a 24-hour day, measured in decibels and adjusted to account for the lower tolerance of people to noise during nighttime periods. The mathematical symbol is L_{dn}

13. Noise Sensitive Uses. Real property normally used for sleeping or as a school, church, hospital, or public library.

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14. Obstruction. Any structure or other natural object penetrating an Airport Imaginary Surface.

15. Airport Activity Disclosure Statement. A disclosure statement that acknowledges that a subject property is located within the noise impact boundary and/or the 55 DNL and signifies an owner's awareness of the noise levels and activities associated with airport operations, such as over flights, vibration and odors.

16. Public Assembly Facility. A permanent or temporary structure, facility, place or activity where concentrations of people gather in reasonably close quarters. Public assembly facilities include, but are not limited to: schools, churches, conference or convention facilities, employment and shopping centers, arenas, athletic fields, stadiums, clubhouses, large museums, and similar facilities and places, but do not include parks, golf courses, fair grounds or similar facilities. Public assembly facilities also do not include air shows, structures or uses approved by the FAA in an adopted airport master plan, or places where people congregate for short periods of time such as parking lots or bus stops.

17. Runway. The defined areas at the Hillsboro Airport constructed and used for aircraft landing and takeoff. Runways at the Hillsboro Airport include existing Runway 12/30, existing 2/20, and future Runway 12L/30R.

18. Structure. For purposes of this Section, any constructed or erected object which requires location on the ground or is attached to something located on the ground. For purposes of this section, structures include but are not limited to buildings, decks, fences, signs, towers, cranes, flagpoles, antennas, smokestacks, earth formations and overhead transmission lines, but do not include concrete or asphalt surfaces exceeding the surrounding ground level by less than six inches.

19. Water Impoundment. A temporary or permanent, human-made body of water, excluding above-ground or in-ground swimming pools, hot tubs, or spas with surface areas less than 650 square feet. Water impoundments include wastewater treatment settling ponds, storm water swales, detention and retention ponds, artificial lakes and ponds, and similar water features. An expansion of an existing water impoundment is considered a new impoundment except where such expansion was authorized by the City prior to [effective date of this Section].

D. Compatibility and Safety Standards regarding Height. All structures permitted in the ASCO zone under the standards of the underlying zone shall comply with the height limitations of this Section. Where height limitations of the underlying zone are more restrictive than those of this Section, the

underlying zone limitations shall control. Pursuant to Section I, installation of obstruction markers or lighting, or alteration of the structure, may be required on any pre-existing legally constructed structures built or permitted prior to [effective date of this Ordinance] not conforming to these standards if the structure is determined to be a potential air navigation hazard.

1. Except as provided in subsections B and C of this Section, no structure, tree, plant, object of natural growth and temporary structures, such as construction equipment, shall penetrate the Imaginary Surfaces shown on Figure 135B 2.

2. Within the Imaginary Surfaces outside the approach and transition surfaces, where ground elevation exceeds the Airport Elevation to the degree that existing or permitted structures penetrate or would penetrate the primary, conical, or horizontal Surfaces, the City may issue permits for construction of structures up to 35 feet in height.

3. Variances or exceptions to allow structural heights exceeding the standard of the underlying zone may be permitted. Applications for height variances shall be processed as required under Zoning Ordinance Sections 106 through 111, or 136 (X).

4. Proposed structures, trees, plants, objects of natural growth and temporary structures that would penetrate the imaginary surfaces must be reviewed through the FAA's Obstruction Evaluation / Airport Airspace Analysis process and the applicant must file a Notice of Proposed Construction or Alteration (Form 7460-1) with the FAA. Approval of a variance for increased height within the ASCO may be subject to conditions recommended by the FAA.

(E) Compatibility and Safety Standards regarding Noise Applications for land use approvals, limited land use approvals, or building permits for properties within the boundaries of the ASCO zone received after [effective date of this Ordinance] shall demonstrate compliance with the noise disclosure and mitigation requirements of this Section. The requirements of Section E shall not be construed to require the compliance of any pre-existing legally established structure or land use approval not conforming to these requirements.

1. Within the Airport Noise Impact Boundaries shown on Figure 135B 3, recordation of any land division of residentially zoned property shall include recordation of a Airport Activity Disclosure Statement. Any Covenants, Conditions and Restrictions or similar documents shall include citation of the Airport Activity Disclosure Statement. Issuance of a Development Review approval, under Zoning Ordinance Section 133 Development Review / Approval of Plans, for a multi-family residential development not including a land

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division shall be conditioned to require documentation that an Airport Activity Disclosure Statement is included within any lease or rental contracts. Documentation demonstrating compliance with this standard shall be provided to the Planning Department prior to issuance of a Certificate of Occupancy.

2. Within the Airport Noise Impact Boundaries shown on Figure 135B 3, where airport noise levels are identified at or above 55 Ldn, construction plans submitted for building permit applications for noise sensitive land uses shall include noise abatement methods incorporated into building design and construction as necessary to achieve an indoor noise level not to exceed 45 dBA. Such noise abatement methods may include, but are not limited to: additional insulation; drywall; air conditioning; and/or double- or triple-glazed windows. Building permit applications for construction of noise sensitive uses shall include documentation from a certified acoustician that the building design and construction will achieve an indoor noise level equal to or less than 45 dBA.

F. Compatibility and Safety Standards regarding Development. The following items have the potential to create hazards to aircraft flight. Applications for land use approvals, limited land use approvals, or building permits on properties within the boundaries of the ASCO zone received after [effective date of this Ordinance] shall demonstrate compliance with the requirements of this Section. The requirements of Section F shall not be construed to require the compliance of any pre-existing legally established development improvement not conforming to these requirements.

1. Outdoor Lighting. Industrial, commercial, institutional, or recreational uses or facilities shall not use outdoor lighting which projects vertically. Outdoor lighting for all developments shall incorporate shielding in its design to reflect light downward. No outdoor lighting shall be approved which is similar in size, pattern or intensity to airport lighting, and which may impede the ability of pilots to distinguish such outdoor lighting from airport lighting.

2. Reflectivity. Use of exterior metal or glass on the east, west, and south building faces or roofs of new structures shall include any of the following or equivalent methods to reduce the reflectivity of these materials: glare control film or tinting on windows; reduced pane size or overall window area; enlarged mullions; downward-angled windows; exterior louvers, panels, or screens on windows; and matte finishes on metal surfaces. For the purposes of this section, solar panels, collectors and arrays installed with permits issued by the City are not considered reflective materials and are not subject to the provisions of this section.

3. Emissions. Within the ASCO approach surface boundaries, emissions of smoke, dust or steam that could obscure a pilots' visibility are

discouraged. Applications for new industrial, commercial, institutional, or other uses which are anticipated to regularly or intermittently create such emissions shall, during the Development Review process under Zoning Ordinance Section 133, provide documentation that the applicant has consulted with the Port of Portland to ensure that under normal weather conditions such emissions are likely to dissipate and not obscure pilot visibility before reaching the nearest runway approach surface elevation. The City may impose as conditions of approval requirements for reasonable and practical mitigation measures as necessary to ensure that emissions are unlikely to obscure pilot visibility.

4. Communications Facilities and Electrical Interference. No land use, facility, or utility installation shall cause or create radio transmissions or electrical interference at frequencies or levels which may disrupt navigational signals or radio communications between the Airport and an aircraft. Applications or proposals for the location of new or expanded radio, radiotelephone, ~~and~~ television transmission facilities, electrical transmission lines, or facilities using high frequency electrical impulses in any on-site process within the ASCO zone shall be coordinated with the Port of Portland prior to approval or installation. Approvals of cellular and other telephone or radio communication towers on leased property located within the Airport Imaginary Surfaces illustrated on Figure 135B 2 shall be conditioned to require their removal within 90 days following the expiration of the lease agreement and shall be further conditioned with a requirement to provide a bond or other security to ensure such removal.

5. Water and Waste Water Treatment Facilities: Sewage and industrial waste treatment systems and water treatment systems using permanent open ponds or tanks that attract and sustain wild life populations which pose a threat to the safe operation of fixed wing aircraft are not allowed within the ASCO zone boundaries, with the exception of the following:

a. Structural walled flocculation/sedimentation basis, mix basins, and/or structural walled filter basins all with permanently attached structurally framed roofs and open air side walls.

b. Closed piped industrial waste treatment such as Acid Waste Neutralization, and solvent waste collection systems used by semiconductor and solar industries are not open waste water treatment facilities.

c. Closed piped industrial water treatment systems such as RO / DI plants and associated pre-treatment are not open water treatment facilities.

d. Collection, use, or treatment of rainwater or gray water, which does not attract or sustain wild life populations that threaten safe operation of fixed wing aircraft.

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G. Compatibility and Safety Standards regarding Land Use.

Within the six Airport Compatibility Zones in the ASCO zone, land uses established after [effective date of this Ordinance] shall be limited or restricted as described in this Section. In the event of conflict with the underlying zone, the more restrictive provisions shall control. As used in this section, a limited use means a use that is allowed subject to special standards specific to that use. The requirements of Section G shall not be construed to require the discontinuance of any pre-existing legally established land use not conforming to these requirements.

1. Compatibility Zone 1: Runway Protection Zone

(a) Prohibited land uses include the following: public assembly facilities; residential, commercial, industrial, and institutional land uses; athletic fields, sanitary landfills, water treatment plants, mining, water impoundments, wetland mitigation, and the storage of fuel and other hazardous materials.

(b) Uses and facilities are restricted to those requiring location in Compatibility Zone 1 for which no practicable alternative location exists.

(c) Roads and parking areas may be permitted in Compatibility Zone 1 upon demonstration that there are not practicable alternatives. Plans for lights, guardrails and related road and parking area improvements may be subject to conditions recommended by the Port of Portland based on FAA airport design standards.

(d) No structures are allowed in Compatibility Zone 1, with the sole exception of structures accessory to airport operations whose location within Compatibility Zone 1 has been approved by the FAA.

(e) Utilities, power lines and pipelines shall be underground.

2. Compatibility Zone 2: Inner Approach/Departure Zone

(a) Prohibited land uses include the following: commercial child care facilities; schools; hospitals, commercial senior or convalescent care facilities; and sanitary landfills.

(b) Residential development shall be limited to the densities specified on the Hillsboro Comprehensive Plan Land Use Map as of [effective date of this Ordinance]. Land use approvals which would increase residential densities above the existing densities as of [effective date of this Ordinance] shall not be approved by the City.

(c) Nonresidential development intensity in new developments shall be limited to:

(1) A maximum average intensity of 60 people per gross acre at any time.

(2) A maximum intensity of 120 people on any single gross acre at any time.

(d) Structures shall be located as far as practical from the extended runway centerline.

(e) Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable.

(f) Water impoundments up to 10,000 square feet in surface area are permitted. Applications for water impoundments shall include documentation to the Planning Department that the applicant has consulted with the Port of Portland to ensure that the design of the water impoundment reduces its attractiveness to wildlife and minimizes the risk to aviation.

3. *Compatibility Zone 3: Inner Turning Zone*

(a) Prohibited land uses include the following: commercial child care facilities; schools; hospitals, commercial senior or convalescent care facilities; and sanitary landfills.

(b) Residential development shall be limited to the densities specified on the Hillsboro Comprehensive Plan Land Use Map as of [effective date of this Ordinance]. Land use approvals which would increase residential densities above the existing densities as of [effective date of this Ordinance] shall not be approved by the City.

(c) Nonresidential development intensity in new developments shall be limited to:

(1) A maximum average intensity of 100 people per gross acre at any time.

(2) A maximum intensity of 200 people on any single gross acre at any time.

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(d) Structures shall be located as far as practical from the extended runway centerline.

(e) Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable.

(f) Water impoundments up to 10,000 square feet in surface area are permitted. Applications for water impoundments shall include documentation to the Planning Department that the applicant has consulted with the Port of Portland to ensure that the design of the water impoundment reduces its attractiveness to wildlife and minimize the risks to aviation.

4. *Compatibility Zone 4: Outer Approach/Departure Zone*

(a) Prohibited land uses include the following: commercial child care facilities; schools; hospitals, commercial senior or convalescent care facilities; and sanitary landfills.

(b) Residential development shall be limited to the densities specified on the Hillsboro Comprehensive Plan Land Use Map as of [effective date of this Ordinance]. Land use approvals which would increase residential densities above the existing densities as of [effective date of this Ordinance] shall not be approved by the City.

(c) Nonresidential development intensity in new developments shall be limited to:

(1) A maximum average intensity of 100 people per gross acre at any time.

(2) A maximum intensity of 300 people on any single gross acre at any time.

(d) Structures shall be located as far as practical from the extended runway centerline.

(e) Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable.

(f) Water impoundments up to 10,000 square feet in surface area are permitted. Applications for water impoundments shall include

documentation to the Planning Department that the applicant has consulted with the Port of Portland to ensure that the design of the water impoundment reduces its attractiveness to wildlife and minimizes the risk to aviation.

5. *Compatibility Zone 5: Sideline Zone*

(a) Prohibited land uses include the following: commercial child care facilities; schools; hospitals, commercial senior or convalescent care facilities; and sanitary landfills.

(b) Residential development shall be limited to the densities specified on the Hillsboro Comprehensive Plan Land Use Map as of [effective date of this Ordinance]. Land use approvals which would increase residential densities above the existing densities as of [effective date of this Ordinance] shall not be approved by the City.

(c) Nonresidential development intensity in new developments shall be limited to:

(1) A maximum average intensity of 150 people per gross acre at any time.

(2) A maximum intensity of 300 people on any single gross acre at any time.

(d) Structures shall be located as far as practical from the extended runway centerline.

(e) Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable.

(g) Water impoundments up to 10,000 square feet in surface area are permitted. Applications for water impoundments shall include documentation to the Planning Department that the applicant has consulted with the Port of Portland to ensure that the design of the water impoundment reduces its attractiveness to wildlife and minimizes the risk to aviation.

6. *Compatibility Zone 6: Traffic Pattern Zone*

(a) Prohibited land uses include the following: schools; hospitals, commercial senior or convalescent care facilities; sanitary landfills, and publicly-owned water treatment plants.

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(b) Water impoundments are permitted. Applications for water impoundments shall include documentation to the Planning Department that the applicant has consulted with the Port of Portland to ensure that the design of the water impoundment has reduced its attractiveness to wildlife and minimized the risk to aviation to the greatest extent practicable.

(c) Applications for increased densities of residential development may be approved if implementation of such increased densities can be conditioned to be constructed consistent with the safety and compatibility standards in this Ordinance regarding building height and noise management. Approvals by the City of increased residential densities shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable.

(d) There are no nonresidential development intensity limitations in this compatibility zone.

H. Wetland Mitigation, Creation, Enhancement and Restoration

1. To minimize risk and reduce hazards to air navigation near the Airport, the establishment of wetland mitigation banks outside the ASCO zone boundaries is encouraged.

2. Wetland mitigation, creation, enhancement or restoration projects existing or approved on the effective date of this ordinance and located within the ASCO zone boundaries are recognized as lawfully pre-existing non-conforming uses.

3. Applications to expand existing wetland mitigation projects or to create new wetland mitigation projects within the ASCO zone boundaries shall be permitted only in Airport Compatibility Zone 6 upon demonstration to the Planning Department that:

a. The existing or proposed wetlands have a site-specific ecological function, including but not limited to critical habitat for threatened, endangered or state sensitive species, ground water recharge, etc.

b. The proposed mitigation created will be designed and located to avoid creating a wildlife hazard or increasing hazardous movements of birds across runways or in Airport Compatibility Zones 1-5.

4. Applications to create, enhance or restore wetlands within Airport Compatibility Zones, which include expansion of an existing water impoundment or creation of a new water impoundment, shall be permitted upon demonstration that:

a. The subject wetlands have or will have a site-specific ecological function, including but not limited to critical habitat for threatened, endangered or state sensitive species, ground water recharge, etc; and

b. The proposed wetland will be designed and maintained to avoid increasing hazardous movements of birds feeding, watering or roosting in areas across runways or in Airport Compatibility Zones 1-5.

5. Applications for new or expanded mitigation submitted under Section 3, or applications for wetlands creation, enhancement or restoration submitted under Section 4 shall be coordinated with the Port of Portland.

6. Any approval of new or expanded mitigation submitted under Section 3, or for wetlands creation, enhancement or restoration submitted under Section 4 shall be conditioned as deemed appropriate and necessary by the City to prevent increasing hazardous bird movements across runways and Airport Compatibility Zones 1-5.

I. Nonconforming Structures or Uses

1. The requirements of this Section shall not be construed to require the removal, lowering or alteration of any pre-existing legally constructed structure not conforming to these requirements. These regulations do not require any change in the construction, alteration or intended use of any structure, the construction or alteration of which was approved prior to [effective date of this Ordinance].

2. Notwithstanding Section 1 above, if an existing structure is determined by the City, based on FAA obstruction standards, to have an adverse effect on air navigational safety, the provisions of this Section shall be construed to allow the City to require that the owner of that structure to install or allow the installation of obstruction markers, in order to make the structure more visible to pilots.

3. No land use approval, limited land use approval, building permit or other permit shall be issued by the City after [effective date of this Ordinance] that would increase any air navigation hazard caused by a pre-existing nonconforming use or structure.

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J. Land Use Applications in Airport Safety and Compatibility Overlay Zone.

1. In addition to the materials specified elsewhere in the Zoning Ordinance, applications for land use or limited land use approvals on properties within the ASCO zone shall include the following documentation:

a. Elevation data on the site plan, showing native grade and height of all existing and proposed structures, measured in feet above mean sea level.

b. Vicinity maps showing the location of the subject property in relation to the Imaginary Surfaces shown on Figure 135B 2; the Airport Noise Impact Boundaries shown on Figure 135B 3; and the Compatibility Zone boundaries shown on Figure 135B 4.

c. Documentation of a landscaping plan that is consistent with the standards in Section 5.2.4 Vegetation Management in the Port of Portland's 2007 Hillsboro Airport Wildlife Hazard Management Plan.

2. The Planning Department shall provide to the Port of Portland notice of City review of applications for quasi-judicial land use or limited land use decisions or legislative decisions such as Comprehensive Plan or Zoning Ordinance text amendments, affecting properties within the ASCO zone, in the same manner and at the same time as notice is provided to surrounding property owners, as required elsewhere in the Zoning and Subdivision Ordinances and in the Comprehensive Plan.

3. Within Compatibility Zones 2, 3, 4, or 5, land divisions such as partitions, subdivisions, or condominiums, and Development Review approvals for multi-family residential development of any size, or non-residential structures exceeding 10,000 gsf, shall be conditioned to require provision to the Port of Portland of an Avigation Easement and an Airport Activity Disclosure Statement. Documentation of the recordation of the Avigation Easement and Airport Activity Disclosure Statement shall be provided prior to issuance of Certificates of Occupancy.

Section 4. Zoning Ordinance No. 1945 is amended with the addition of four (4) Figures, attached hereto as Attachments I, II, III, and IV, to be included in Section 135B:

Attachment I:	*Figure 135 B 1 Hillsboro Airport Runways*
Attachment II:	*Figure 135 B2 Hillsboro Airport Imaginary Surfaces*
Attachment III:	*Figure 135 B 3 Airport Noise Impact Contour Boundaries*
Attachment IV:	*Figure 135 B 4 Airport Compatibility Zones*

Section 5. This ordinance shall be effective form and after 30 days following its passage and approval by the Mayor.

First approval of the Council on this 18 day of September, 2009.

Second approval of the Council on this 10 day of October, 2009.

Approved by the Mayor this 10 day of October, 2009.

Mayor

ATTEST: _____
City Recorder

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ORDINANCE NO. 5935

ZC 7-09: AU AIRPORT USE ZONE AND ASCO AIRPORT SAFETY AND COMPATIBILITY OVERLAY ZONE

AN ORDINANCE AMENDING THE OFFICIAL ZONING MAP, A PORTION OF HILLSBORO ZONING ORDINANCE NO. 1945, AS AMENDED, CHANGING THE ZONING OF AFFECTED PROPERTIES AT AND SURROUNDING THE HILLSBORO AIRPORT BY APPLYING THE AU AIRPORT USE ZONE AND THE ASCO AIRPORT SAFETY AND COMPATIBILITY OVERLAY ZONE.

WHEREAS, ORS 836.610 to 836.630 requires local governments to adopt zoning and planning regulations for airports and safety zones for lands surrounding airports consistent with airport planning rules adopted by the Department of Land Conservation and Development ("DLCD");

WHEREAS, pursuant to ORS 836.610 to 836.630, DLCD adopted OAR 660, Div. 13 (the "Airport Planning Rule"), which requires local governments with airports inside their jurisdictions to adopt comprehensive plan and zoning regulations to enhance the safety of airport flight operations and the compatibility of surrounding areas with airport operations; and

WHEREAS, consistent with the Airport Planning Rule, the City Council adopted Ordinance Nos. 5925 and 5926 on October 6, 2009 amending the Hillsboro Comprehensive Plan and Zoning Ordinance, respectively, to create the AU Airport Use Zone and the ASCO Airport Safety and Compatibility Overlay Zone; and

WHEREAS, on October 14, 2009, the Hillsboro Planning Commission adopted Order No. 8018, which initiated this zone change application to rezone the Hillsboro Airport to the newly adopted AU Airport Use Zone and to apply the ASCO Zone to properties extending approximately 6,000 feet from the Hillsboro airport runways; and

WHEREAS, the City mailed Measure 56 notices (ORS 227.186) on October 15 and again on October 26, 2009 to the Port of Portland, owner of the Hillsboro Airport, and to the owners of all properties proposed for the ASCO Zone, plus the owners of all properties extending 500 feet beyond as required by Zoning Ordinance Section 116 (10 (b); and

WHEREAS, the City also provided pre-hearing notice of the rezoning proposal to DLCD and scheduled two public hearings on the proposal for November 4 and November 18, 2009 to take testimony and evidence and consider the application; and

WHEREAS, the Board received Planning Department staff reports dated October 28 and November 12, 2009, testimony in support of the application by representatives of the Port of Portland, one witness in opposition to the proposal, neutral testimony from 19 individuals and e-mail inquiries from five individuals, and

WHEREAS, on December 10, 2009 the Board issued Order No. 4010 approving the zone change application, and

WHEREAS, the Notice of the Board's Decision was mailed to participating parties on December 14, 2009, and

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WHEREAS, the City Council hereby adopts the staff reports dated October 28, 2009 and November 12, 2009 and their attachments, and Hearings Board Order No. 4010, attached as Exhibits A, B, and C, respectively, as findings in regard to this matter, and

WHEREAS, based on the findings of fact and conclusionary findings for approval contained in the staff reports and in Order No. 4010, the City Council hereby determines that the proposed zone changes conform with the Hillsboro Comprehensive Plan and Zoning Ordinance, and that the particular zones recommended are the best suited for the subject sites.

NOW, THEREFORE, THE CITY OF HILLSBORO ORDAINS AS FOLLOWS:

Section 1. The properties listed on Exhibit D are hereby rezoned from M-2 Industrial and M-P Industrial Park to AU Airport Use.

Section 2. The properties listed on Exhibit E are hereby rezoned with the addition of the ASCO Airport Safety and Compatibility Overlay zone Planning and Zoning Hearings Board decision in this matter is based on the findings attached as Exhibit A, which are adopted and incorporated herein by this reference.

Section 3. The Planning Director is hereby instructed to cause the official zone map, a part of Ordinance No. 1945, to be amended to induce the zone change set forth in Section 1 and 2 hereof.

Section 4. Except as amended, Zoning Ordinance No. 1945, as amended, shall remain in full force and effect.

Section 5. This ordinance shall be effective from after and 30 days following its passage and approval by the Mayor.

First approval of the Council on this 5th day of January 2010.

Second approval and adoption by the Council on this 19th day of January 2010.

Approved by the Mayor this 19th day of January 2010.

Mayor

Attest: Dilly Wemer
City Recorder

CITY OF HILLSBORO

October 28, 2009

TO: Hillsboro Planning and Zoning Hearings Board
FROM: Hillsboro Planning Department

RE: Request for Zone Change - ZC 7-09: Application of Recently Adopted AU Airport Use Zone and ASCO Airport Safety and Compatibility Overlay Zone

REQUEST

The Planning Department requests that the Planning and Zoning Hearings Board recommend approval of zone changes on approximately 7100 properties at and in the vicinity of the Hillsboro Airport. Properties proposed for rezoning to the AU Airport Use zone are illustrated on Exhibit A, and properties proposed for rezoning with the addition of the Airport Safety and Compatibility Overlay (ASCO) zoning are illustrated on Exhibit B.

Pursuant to Zoning Ordinance Section 112, the Planning Commission initiated this zone change on October 14, 2009.

LEGISLATIVE BACKGROUND

The proposed zone change is the final step in a three-year process intended to reduce and mitigate conflicts between future development and airport operations, as required by the Oregon Revised Statutes (ORS) 836.610 and Oregon Administrative Rules (OAR) 660-13. These statutory requirements are summarized in Exhibit C. The proposed zone change also implements the 2005 update of the Hillsboro Airport Master Plan and the associated Land Use Compatibility Study. An Airport Use zone and Airport Safety and Compatibility Overlay zones were part of the recommended actions in the Compatibility Study.

The Hillsboro Airport Issues Roundtable (HAIR) citizen advisory committee formed land use sub-committee in January 2007 specifically to develop the recommended Airport Use (AU) zone and the Airport Safety and Compatibility Overlay (ASCO) zones. The sub-committee determined that the preferable zoning for Hillsboro would be a hybrid: combining the height, noise and development regulations from the Oregon Model Airport Zone example with a more refined ASCO zone model used in California, Washington and Minnesota. The "Six Zone California" model was included because it has two advantages over the "Oregon Two Zone" model"

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- The Six Zone model is based on actual air traffic accident data from the National Traffic Safety Board and differentiates between flight paths and traffic patterns; and
- The Six Zone model can be "fine-tuned" specifically for urban airports, whereas the Two Zone model was designed to be applied statewide to both urban and rural airports;

After the locations of the six zones were established, the City contacted industrial property owners potentially most affected by the proposed zones: SolarWorld; Genentech and Intel. Revisions were made in the draft language to reflect the industries' operational concerns, and to provide clear and objective standards for future development.

The HAIR made its recommendation on the proposed AU and ASCO zone language to the City in January 2009. Following a work session, the Planning Commission initiated Comprehensive Plan and Zoning Ordinance text amendments and held its public hearings in May, June and July. To provide additional opportunity for public comment, the City and the Port of Portland co-sponsored an Open House in April. Both the AU and ASCO language were revised to reflect comments made at the hearings and the open house, and in July the Planning Commission recommended City Council approval. The City Council approved the Comprehensive Plan and Zoning Ordinance amendments in early October.

The Comprehensive Plan amendments update language on airport-related policies and implementation measures. To implement the updated policies, the Zoning Ordinance amendments add the new AU Airport Use Zone and the new ASCO Airport Safety and Compatibility Overlay zone. The new ASCO zone has several components:

- Creation of six sub-zones with varying standards intended to reduce and mitigate conflicts between future development and airport operations.
- Restrictions against establishment of new noise sensitive uses (day care facilities commercial senior care facilities; schools; and hospitals) within the airport noise contour boundaries;
- Regulations on new development regarding airborne emissions (smoke, steam or dust), electrical emission sources, outdoor lighting, reflectivity and bird attractants, which have documented negative impacts on aviation and pilot safety;
- Limitations on future residential density increases and future higher concentrations of people in airport approach/departure, turning, and sideline zones;
- Requirements for new development in airport approach/departure, turning, and sideline zones to provide avigation easements and airport activity disclosure statements

The Comprehensive Plan and Zoning Ordinance text amendments as adopted by City Council are shown on Exhibits D and E.

IMPACTS ON PROPERTIES PROPOSED FOR AU AIRPORT USE ZONING

The proposed AU Airport Use zoning will be applied only to properties owned by the Port of Portland that are in use or proposed for use for airport or aviation-related operations and activities. The new AU zone allows aviation-related activities outright and specifies development standards for new structures at the airport. Most of the development standards (excluding setbacks) are similar to those in the M-P Industrial Park zone. The AU zoning is proposed to replace the current M-2 Industrial zoning on the airport properties. The Port of Portland supports the proposed zone change to AU: the City anticipates receiving a letter from Hillsboro Airport General Manager Stephen Nagy which will be provided at the public hearings.

IMPACTS ON PROPERTIES PROPOSED FOR ASCO AIRPORT SAFETY AND COMPATIBILITY OVERLAY ZONING

The proposed ASCO zoning would be applied to properties within an approximate 6000 foot radius of the Hillsboro Airport, and also as an overlay zone to the AU zone on the airport properties. It should be noted that the ASCO zone would be applied only to properties within the city limits: Washington County will consider its own versions of the ACSO zoning during its twice-yearly legislative amendments cycle. The provisions of the ASCO zone are summarized on Attachment F "ASCO Zoning Regulations Summary."

Regulations in the six Compatibility zones vary in intensity, with the strictest regulations in Zone 1, the Runway Protection zone immediately off the ends of the runways. (All property within this zone is owned by the Port of Portland) The remaining zones, in descending order of regulatory intensity, are:

Compatibility Zone 2: Inner Approach/Departure zone
Compatibility Zone 3: Inner Turning zone
Compatibility Zone 4: Outer Approach/Departure zone
Compatibility Zone 5: Sideline zone
Compatibility Zone 6: Traffic Pattern zone

As previously mentioned, the locations of the zone boundaries, and the varying intensities of regulation, are based on long-term studies of aviation accidents and complaints in and around urban airports in California, Washington and Minnesota. These studies demonstrated that the areas with the highest incidence of accidents and complaints are in the approach paths directly off the ends of the runways, in the aircraft turning patterns, and closest to the airport itself.

The new ASCO provisions are the least restrictive levels necessary to meet State requirements and to establish development standards reducing both air navigational safety hazards and potential safety hazards for persons living, working or recreating near the Airport. It is important to note that the provisions of the ASCO zones were carefully crafted to apply to new development, and are not applicable to existing non-conforming uses or structures. There are no requirements for mandatory amortization or "sun-setting" of non-conforming uses or structures,

with the rare exception of extraordinarily tall trees already subject to Federal Aviation Administration height restrictions.

COMPLIANCE WITH APPLICABLE ZONE CHANGE CRITERIA

Zoning Ordinance Section 114 (2) sets forth the criteria for a zone change as follows:

> (2) Before the City Council or Hearings Board grants a zone change, they shall require that the applicant demonstrate compliance with the following criteria:
>
> a. That the request must conform with the Hillsboro Comprehensive Plan and this Ordinance;
>
> b. That, where more than one designation is available to implement the Comprehensive Plan designation (e.g. R-7 vs. R-10), the applicant must justify the particular zoning being sought and show that it is best suited for the specific site, based upon specific policies of the Hillsboro Comprehensive Plan.

Since the zone change was initiated by the City, the burden of proof to demonstrate compliance with these criteria rests on the City. The City's responses to the criteria are listed below:

A. The proposed zone change conforms to the Hillsboro Comprehensive Plan and this Ordinance.

The proposed zone change conforms with and implements the following Comprehensive Plan policies and implementation measures:

> *Air, Water, and Land Resource Quality Policy (K): To reduce potential impacts of airport operations on surrounding properties, the City shall limit noise sensitive and public assembly and uses in proximity with the Hillsboro airport, consistent with the current Airport Master Plan and Compatibility Study.*

Zoning Ordinance Section 135B (G) contains provisions prohibiting new commercial child care and senior care facilities, schools, and hospitals in ASCO zones 1-5. Public assembly uses are limited by non-residential development intensity limits expressed in number of persons person gross acre. These provisions were found by the Planning Commission, and the City Council to be consistent with the current Airport Master Plan and the Compatibility Study. Application of these provisions will implement this Policy.

> *Air, Water, and Land Resource Quality Implementation Measure 18: The City shall adopt compatibility requirements for land uses and properties surrounding the Airport, in compliance with state statutes and administrative rules. At a minimum, the compatibility requirements shall accomplish the following:*

(a) *Prohibit new residential development and public assembly uses within the runway protection zones;*
(b) *Limit the establishment of new noise-sensitive land uses within identified airport operations impact boundaries;*
(c) *Regulate new industrial emissions or expansion of existing industrial emissions of smoke, dust, or steam that would obscure visibility within airport approach corridors;*
(d) *Regulate outdoor lighting for new industrial, commercial, or recreational uses or the expansion of such uses to prevent light from projecting directly into existing airport approach corridors;*
(e) *Coordinate review of radio, radiotelephone, and television transmission facilities within identified airport operations impact boundaries; and electrical transmission lines with aviation agencies;*
(f) *Regulate water impoundments and wetland mitigation projects consistent with state statute and Clean Water Services requirements; and*
(g) *Prohibit establishment of new landfills.*

Zoning Ordinance Section 135B (F) contains provisions regulating industrial emissions, electrical and communications emissions, outdoor lighting, reflectivity, and outdoor water treatment facilities. Section 135B (H) regulates creation and expansion of wetlands. Section 135B (G) prohibits new landfills. Application of these provisions will satisfy this implementation measure.

Transportation Implementation Measure (V): The City shall support implementation of the current Hillsboro Airport Master Plan.

Zoning Ordinance Sections 135A and 135B (G) were specifically written and adopted to implement the Hillsboro Airport Master Plan Compatibility Study and the Oregon State Airport Planning Rule. The City's participation in the preparation and application of these provisions satisfy this implementation measure.

B. Where more than one zone is available to implement the Comprehensive Plan designation, the particular zoning is best suited for the specific site, based upon specific policies of the Hillsboro Comprehensive Plan.

The majority of the airport properties are designated PF Public Facility although some more recently purchases properties retain an earlier IND Industrial Plan designation. The AU zone was created specifically to implement the PF designation on Port-owned properties used or intended for aviation activities. The AU zone will implement the Comprehensive Plan policies and implementation measures cited above. No other zone is available for this purpose.

The proposed zone change involving the ASCO zone is not a change of the underlying residential, commercial, or industrial zones. Rather, it is application of an overlay zone affecting some development standards of the underlying zones. Again, the ASCO zones will implement the Comprehensive Plan policies and implementation measures cited above, and no other zones or overlay zones are available for this purpose.

PLANNING AND ZONING HEARINGS BOARD HEARINGS

Due to the large number of properties affected by the proposed zone change, the City has scheduled two public hearings: on November 4th and November 18th, 2009. Notice of the on November 4th hearing was mailed to property owners northwest and northeast of the airport on October 15th. Notice of the November 18th hearing was sent to property owners southwest and southeast of the airport on October 26th. Since both hearings concern the single proposal, interested parties may testify at either.

Information on the proposed zone change has been available on the City's web site, and Planning staff have responded to both telephone calls and e-mail messages. Two citizen e-mails have been received as of October 28th: the emails and written responses from Planning staff are attached.

RECOMMENDATION

Planning staff recommends that the Planning and Zoning Hearings Board open the public hearings on November 4th, receive testimony and questions on the proposed zone change, and continue the hearing to November 18th. Following the conclusion of testimony on that later date, the Hearings Board should close the public hearing and deliberate toward a decision. Planning staff recommends that the Planning and Zoning Hearings Board approve ZC 7-09 without further conditions.

Respectfully submitted,

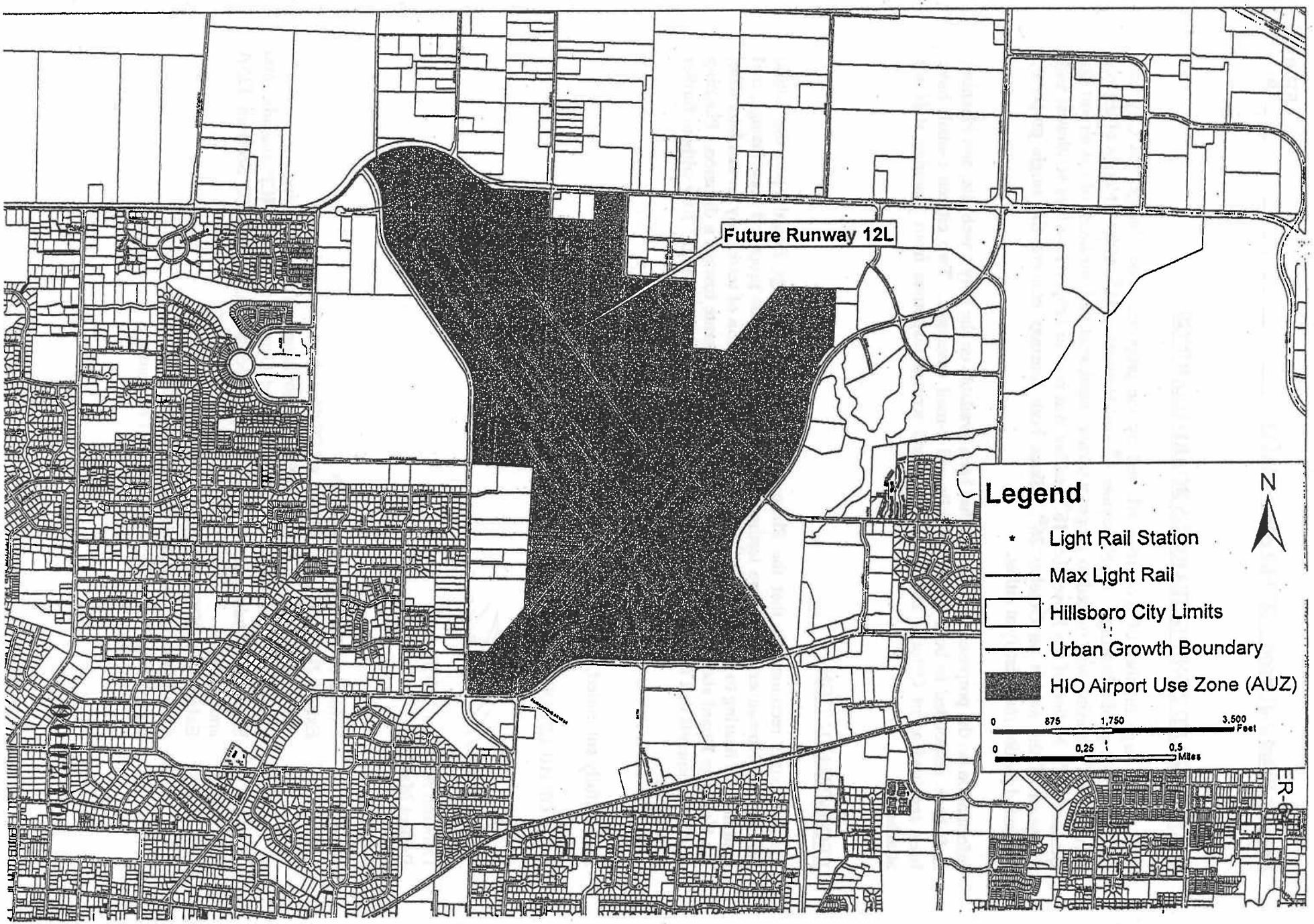
CITY OF HILLSBORO PLANNING DEPARTMENT

Deborah A. Raber

Deborah A. Raber AICP
Project Manager

Exhibit:
Exhibit A AU Zone boundaries
Exhibit B HZO Figure 135B 4 ASCO Zone boundaries
Exhibit C Summary of ORS and OAR provisions on airport zoning
Exhibit D Ordinance No. 5925, adopted October 6, 2009 (HCP amendments)
Exhibit E Ordinance No. 5926, adopted October 6, 2009 (HZO Sections 135A and 135B)
Exhibit F ASCO Zoning Regulations Summary
e-mail from Edward Mor and staff response
e-mail from Phil de la Motte and staff response

Exhibit A: Proposed AU .irport Use Zone Boundaries



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ORIGINAL

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHELLE BARNES, Petitioner,	)	LUBA No. 2010-011
v.	)	
CITY OF HILLSBORO, Respondent.	)	

NOTICE OF INTENT TO APPEAL

I.

FEB09'10 AM11:20 LUBA

Notice is hereby given that petitioner intends to appeal that land use decision of respondent entitled Ordinance No. 5935; ZC 7-09 AU AIRPORT USE ZONE AND ASCO AIRPORT SAFETY AND COMPATIBILITY OVERLAY ZONE, which involves amending the official Zoning Map, a portion of Hillsboro Zoning Ordinance No. 1945 (as amended), changing the zoning of affected properties at and surrounding the Hillsboro Airport by applying the AU Airport Use zone and the ASCO Airport Safety and Compatibility Overlay zone. The decision was adopted by the Hillsboro City Council on January 19, 2010.

II.

Petitioner, Michelle Barnes, is represented by William J. Kabeiseman and Carrie A. Richter, Garvey Schubert, Barer, 121 SW Morrison Street, #1100, Portland, Oregon 97204, telephone (503) 228-3939.

I. STANDING

As this proceeding involves the amendment of a land use regulation, ORS 197.830(2) and ORS 197.620(1) establish the requirements for standing to bring a LUBA appeal. The Petitioner must have (1) filed a timely notice of intent to appeal under ORS 197.830(1), and (2) participated in the proceedings below. *Century Properties LLC v. City of Corvallis,* 207 Or App 8, 139 P3d 990 (2006). The final order on the proceedings was issued on January 19, 2010, and Petitioner's Notice of Intent to Appeal was filed on February 8, 2010, within 21 days of the final decision. In addition, Petitioner participated in the proceedings both orally and in writing. Rec pp 102, 245, 279, and elsewhere. Thus, Petitioner has standing.

II. STATEMENT OF THE CASE

A. Nature of the Decision and Relief Sought.

The challenged decision, the City of Hillsboro's (hereinafter the "City") adoption of Ordinance No. 5935, amends the official Zoning Map of the City of Hillsboro changing the zoning of multiple properties at and surrounding the Hillsboro Airport by applying the Airport Use ("AU") Zone and the Airport Safety and Compatibility Overlay ("ASCO") Zone. Petitioner seeks reversal or remand of the adoption of the City's Ordinance No. 5935.

B. Summary of Argument.

The City's application of the recently created zones to land within the City for the first time wrongfully requires developing property owners to provide an Avigation Easement to a separate entity as a condition of developing property. This imposition of a required Avigation Easement violates provisions of the United States and Oregon Constitutions, including the Fifth Amendment Takings Clause, the Fourth and Fourteenth Amendment Due Process Clause, the doctrine of Unconstitutional Conditions and the Oregon Privileges and Immunities Clause.

The City's application of the recently created zones also improperly delegate legislative authority to other bodies, including the Port of Portland. The unlawful delegation includes the

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interpretation of the state administrative rules deference; instead LUBA must determine whether the city correctly interpreted and applied the TPR and Goal 12 regulations. *Collins v. Klamath County*, 148 Or App 515, 520, 941 P2d 559 (1997) (citing *Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 380, 936 P2d 990 (1997)). As will be shown below, the City misinterpreted the state land use regulations and inadequately addressed the approval criteria. Therefore, LUBA must reverse or remand the City's decision.

V. ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR – The City Erred in Adopting a Requirement for Property Owners to Provide an Avigation Easement to a Separate Entity as a Requirement of Developing Property.

A. Introduction to the HZO Section 135B Avigation Easement Requirements

HZO Sections 135B(G)(2)(e), 135B(G)(3)(e), 135B(G)(4)(e), 135B(G)(5)(e) and 135B(G)(6)(c) [1] all require the City to condition land use or limited land use approvals in each of the compatibility zones to provide an "Avigation Easement" to the Port of Portland. Thus, in order to develop most of the approximately 7,100 properties affected by these new overlay zones, the property owner will have to cede certain property rights as set forth in the ordinance.

Section 135B(C)(6) defines exactly what must be included in the avigation easement required by these developments:

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[1] HZO Section 135B(G)(2)(e) provides:

"Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable." R. 61.

This provision explicitly applies only in ASCO Compatibility Zone 1; however, the provisions of ASCO Compatibility Zones 2 – 5 each contain identical language imposing the same requirement within those zones.

ASCO Compatibility Zone 6 is worded differently and requires that the Avigation Easement and Airport Activity Disclosure Statement be provided to the Port of Portland only for "applications for increased densities of residential development," instead of any land use approval.

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"6. Avigation Easement. A type of easement which contains the following rights:

- "A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).
- "A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.
- "A right to prohibit the erection or growth of any structure, tree or other object that would penetrate the imaginary surfaces as defined in this ordinance.
- "A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surface as defined in this ordinance.
- "A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance."

In other words, regardless of what development is proposed and regardless of the specific effects of that development, people who develop property in any of the ACSO overlay zones will have to provide an easement, not to the City, but to one of their neighbors, the Intervenor.

The Avigation Easement is a property right that allows the dominant estate, the Hillsboro Airport, to impose an intrusion into the property rights of the servient estate, the developing property. The impacts of such intrusions have been found by both the US Supreme Court and the Oregon Supreme Court to be significant and to constitute takings of private property when done by a governmental agency.

In *Griggs v. Allegheny County*, 369 US 84, 82 SCt 531, 7 L.Ed.2d 585 (1962), the US Supreme Court found that the impacts of airport flights from a municipal airport, such as the Hillsboro Airport, can constitute takings and that compensation must be paid to the owners of the lands thus burdened. The attempt to impose avigation easements such as these are takings of property and cannot be imposed simply by fiat. As the Oregon Supreme Court has held

> "There is no doubt that a taking of private property can occur even though the flights are within navigable airspace as defined by law if the flights are below 500

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> feet. *Matson v. United States*, 171 F Supp 283, 145 Ct.Cl. 225, (1959), held that the plaintiff should recover for a taking, even though the court recognized that the taking was accomplished in what today would be navigable airspace. *Griggs v. Allegheny County, supra*, is a square holding that taking of private property can be accomplished by planes taking off and landing within navigable airspace. 369 U.S. 84, 82 SCt 531, 533, 7 LEd 2d 585, 588." *Thornburg v. Port of Portland*, 233 Or 178, 376 P2d 100 (1962).

In this case, the issue is not whether the governmental imposition of an avigation easement requiring a property owner near an airport can constitute a taking. The avigation easement requires neighboring property owners to allow "unobstructed passage of aircraft" over their properties and to allow "noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity." *Griggs* and *Thornburg* already establish that these impacts constitute an invasion of property sufficient to require compensation and to be considered a "taking" of property.

It is no defense to say that, in *Thornburg*, the court did not establish that a taking always occurs through aircraft overflight of other impacts, but is a question for the jury and, therefore, we do not know whether a taking has occurred – it will have to be established on a case by case basis. That may well be true, if the airport does not already have an easement to create such impacts. However, in this case, the airport obtains an easement free of charge and will be able to impose overflights and other impacts that constitute nuisances all without obtaining any future property right to do so or paying any compensation.

In any event, even if obtaining the right to subject neighboring properties to overflight and "noise, vibrations, fumes, dust and fuel particle emissions" without compensation did not constitute a taking, the avigation easement also requires the property owner to provide a "right of entry" onto the property to mark and otherwise affect the owner's property, to control the development of structures and to prohibit the growth of trees. These types of controls impose a significant burden on property owners and are also the types of servitudes that constitute infringement of property rights and are sufficient to constitute takings as well. *See Nollan v. California Coastal Com'n*, 483 US 825 (1987) (Discussed further below, holding that "the right

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to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.")

What is even more troubling is that this avigation easement is not a typical condition of approval. In most cases challenging conditions of approval, an easement or dedication requirement is obtained on behalf of the public, as represented by the conditioning agency. Thus, in *Nollan,* the California Coastal Commission sought to obtain a access along the beach for the benefit of the public. Similarly, in *Dolan v. City of Tigard,* 512 US 374 (1994) (also discussed in greater detail below), the City of Tigard sought to impose an easement for a public trail along Fanno Creek (as well as the dedication of the floodplain). None of these cases authorize the conditioning agency to mandate that the condition inure to the benefit of a third party.

In the case of the properties affected by this re-zoning, the HZO Section 135B Easement Requirements do not impose an easement to the public or require a dedication to the regulating entity. Instead, the HZO Section 135B Easement Requirements require a property owner to provide an easement to a neighboring property owner – the Port of Portland.[2] The easement rights do not run to the public or even to the City; instead, a developing property owner must provide property rights to their neighbor whereby the neighbor gains substantial control over their land and gains the ability to inflict substantial damage to that property without payment of compensation. As far as Petitioner's research shows, this is the only municipal regulation it can find requiring one property owner to turn over property interests to its neighbor.

Perhaps even more troubling, the HZO Section 135B Easement Requirements do not protect the neighboring property owner (the Hillsboro Airport) from the effects of the developing property owner, who is now subject to the avigation easement, nor does it attempt to mitigate harm resulting from the developing property. Instead, the HZO Section 135B Easement

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[2] Although the Port of Portland is a governmental entity, it is not acting in its regulatory or governmental capacity in receiving the easement. It is simply acting as any other property owner in accepting a property interest.

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Requirements require the developing property owner to accept all impacts from the Hillsboro Airport, whether associated with current activity levels or any future expansions of use, even if the expansion results in a level of use commensurate with flight activities at Portland International Airport.

As noted above, there is no issue whether the avigation easement is a substantial property interest. It is. The issue is whether a city can exact that property interest as a condition of approval for the development of the neighboring property and, at the same time, whether the Port of Portland may thereby escape compensating the owner for that substantial property interest.

B. <u>The HZO Section 135B Easement Requirements Violate the Constitutional Ban on Taking Private Property without Just Compensation.</u>

The Fifth Amendment to the United States Constitution prohibits the taking of private property without just compensation:

"nor shall private property be taken for public use, without just compensation."

The Oregon Constitution contains a similar prohibition in Article I, section 18:

> "Property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation."

The U.S. Supreme Court cases of *Nollan v. California Coastal Com'n*, 483 US 825 (1987), and *Dolan v. City of Tigard*, 512 US 374 (1994), provide the general framework regarding when the imposition of conditions of approval violate the takings clause of the United States Constitution. *Nollan* involved an owner of ocean front property who sought to build a new home. The owner was required to obtain a permit from the California Coastal Commission ("CCC"). The CCC imposed a condition on the property owner's permit that required him to provide an easement across their beachfront property. The CCC required the condition because of the Commission's conclusion that a new home would block views of the ocean. The US Supreme Court concluded that the condition violated the Fifth Amendment to the U.S. Constitution by taking property without providing just compensation.

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The *Nollan* Court began by noting that a requirement for a property owner to provide an easement to the public *without conditioning* it on the building of a house would clearly have been a taking. The Court noted that it has

> "repeatedly held that, as to property reserved by its owner for private use 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property."'" *Nollan*, 483 US at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 US 164, 176 (1979)).

Thus, any time a property owner loses the ability to exclude others from his property, a taking has occurred, unless that deprivation is otherwise justified.

The Court in *Nollan* concluded that when individuals are given a permanent right to pass onto property, a "permanent physical occupation" has occurred. The only question was whether requiring the easement to be conveyed as a condition of issuing a land use permit alters the outcome. The court concluded that, in order for a condition to be constitutionally valid, there must be an essential "nexus" between the condition of approval and a substantial governmental purpose that would allow the development to be prohibited.

Ultimately in *Nollan*, the Court recognized that the purpose of the easement, to provide a continuous strip of publicly accessible beach along the coast, was a good idea. But, the court concluded:

> "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' *see* U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 US 841.

In this case, it is not at all clear that the imposition of avigation easements on the properties surrounding the Hillsboro Airport is a good idea,[3] but it is clear, as discussed above in the *Griggs* and *Thornburg* cases, that, like the condition in *Nollan*, the intrusions countenanced

[3] It is not at all clear that the avigation easements are a good idea. Certainly, from a neighbor's perspective, the increased "noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity" are not an allowed good and, in fact, are a significant detriment to their property.

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by the avigation easements are physical occupations of the neighboring properties and, if the Port of Portland wants an easement across the properties in the compatibility zones, it must pay for the avigation easement and cannot compel those neighboring citizens to contribute to the realization of the Port's goals.

In *Dolan*, the US Supreme Court further explained the limitations on conditions of approval. In that case, Mrs. Dolan wanted to expand her plumbing supply store and the City of Tigard required Mrs. Dolan to dedicate the floodplain of Fanno Creek and a 15 foot pedestrian/bicycle pathway in order for the City to issue a permit. The U.S. Supreme Court overturned the dedication requirement, finding that such requirements must be "roughly proportional" to the impacts caused by the development. 512 US 391. The Court said that

> "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

In this case, there are no circumstances that allow the City of Hillsboro to make such a determination; in no case can the impacts of residential development cause impacts to the airport in such a way as to require the developer to provide an avigation easement to its neighbor. The avigation easements do not protect the airport from development on adjoining property. Instead, the avigation easements allow the Port of Portland to subject neighboring properties to what would otherwise be nuisances and allowing the Port to enter onto the neighboring property. The avigation easements are not designed to protect the airport, but to allow the airport to impose impacts on its neighbors. The airport cannot, through the instrumentality of the City, impose these burdens on neighboring property owners without paying compensation for the right to subject those properties to these burdens. To be clear, whatever else the avigation easement might do it strikes at the heart of the neighbor's property interests and the requirement to endure noise vibrations, dust, etc. does not make anyone any safer. All that provision does is allow the Airport to impose impacts that otherwise should be compensated.

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The City is simply unable to find either a nexus between the impacts of the developing property owner and the easement requirements. Developing one's property does not mean it should then become subject to "noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity," simply because of the development. Moreover, there will be no way that the City can make a calculation of whether the easement is "roughly proportional" to the impacts of the development, because the impacts of the development do not require that the developing property become subject to a nuisance from its neighbor. Thus, the requirement for developing property to provide an Avigation easement of the type required by the newly imposed ASCO Zones is improper and violates the constitutional prohibition on takings of property.

C. The HZO Section 135B Easement Requirements Violate the Adjoining Property Owners Substantive Due Process Rights.

In addition to violating the takings clause, the imposition of the avigation easement violates substantive due process. The Due Process clause of the Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." US Const, Amend XIV, § 1. As emphasized by the United States Supreme Court,

> "'[t]he touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.'" *County of Sacramento v. Lewis*, 523 US 833, 845-46, 118 S Ct 1708, 140 L Ed 2d 1043 (1998) (citations omitted; brackets in original).

The Court has also noted that,

> "While due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id.* at 846 (citations omitted).

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When it is a legislative act that is at issue, the Oregon Court of Appeals has described the criteria used to evaluate the legislative act as follows:

> "[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and * * * the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 US 602, 637, 113 S Ct 2264, 124 L Ed 2d 539 (1993) (internal quotation marks and citations omitted). Thus, unless the legislation implicates a fundamental right, the party challenging the legislation on due process grounds must show that the legislation bears no reasonable relation to a legitimate governmental interest. *Washington v. Glucksberg*, 521 US 702, 722, 117 S Ct 2258, 138 L Ed 2d 772 (1997)." *Thunderbird Mobile Club, LLC v. City of Wilsonville*, ___Or App ___, ___ P3d ___ (2010)

"Fundamental rights" are rights that are generally considered to be objectively "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). See also, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 US 319, 325, 326 (1937). The right to property is such a right; it is explicitly listed in both the Fifth and Fourteenth Amendments as protected by the Constitutional right to due process. *See Lynch v. Household Finance Corp.* 405 US 538, 553, 92 SCt 1113 (1972) (Holding that rights in property are long recognized basic civil rights); J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defense of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries, 138-140); *see also West Virginia State Board of Education v. Barnette*, 319 US 624, 638-639, 63 SCt 1178 (1943).

Moreover, the US Supreme Court has already held that it is an improper purpose to take property from someone only to turn it over to someone else. As the Court held in *Kelo v. City of New London*, 545 U.S. 469 (2005):

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> "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 U.S., at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896). Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo* at 477-478.

In this case, the City of Hillsboro is regulating a large number of property owners and requiring that those owners turn over a substantial property interest to one of their neighbors. The avigation easement serves no legitimate purpose of the City of Hillsboro; it is hard to understand a legitimate public purpose of forcing certain neighbors to submit to "noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity" or other nuisance type activities that are generated by a neighbor. The City, in adopting the HZO Section 135B Easement Requirements, is using a mere pretext to provide a benefit to the Port of Portland. At least the plaintiff in *Kelo* was provided just compensation; in this case, no compensation would be due.

Even if the right to property is not a "fundamental right," the imposition of the easement requirement on the surrounding property owners is still arbitrary and bears no reasonable relationship to a legitimate governmental interest. In the first instance, the easement requirement is not applied to all property owners, but only upon development of property. HZO Section 135B Easement Requirements. The purpose of land use conditions of approval are to ensure that the City's public facilities are adequate to accommodate the proposed development and to ensure that any impacts that the developing property causes are properly mitigated. However, as discussed above, the avigation easement is not designed to mitigate impacts associated with the development, but to force the developing property to endure impacts from a neighbor and prevent the developing property owner from complaining about those impacts. There are no legitimate governmental interests that would support the imposition of burdens in this way. This is not the type of economic regulations that simply "adjusts the burdens and benefits of economic

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life." The avigation easements take substantial property rights from one group of property owners for the benefit of another, thereby allowing the other property owner avoid the compensation requirement.

It is difficult to anticipate exactly what "legitimate governmental impact" the City will argue it is attempting to implement, the most likely choice is safety. However, a requirement for certain persons to endure aircraft overflight and the "noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity" seems difficult to square with protecting the safety of those persons. Imposing those conditions on property owners also does not appear to protect the safety of anyone else either. These impacts will occur with the continued development of the Hillsboro Airport; all this regulation does is allow the Port of Portland to avoid paying compensation for the substantial property rights it gains from the imposition of these conditions.

At the end of the day, although the Port of Portland may have an interest in obtaining avigation easements over all of the property within 6,000 feet of the Hillsboro Airport, it cannot use the instrumentality of the City of Hillsboro to do it in a manner that does not comport with the United States Constitution.

D. The HZO Section 135B Easement Requirements Results in the Imposition of Unconstitutional Conditions.

Even if the exaction of the avigation easements does not violate the takings or due process clauses of the United States Constitution, the HZO 135B Easement Requirements clearly violate the doctrine of "unconstitutional conditions."

This doctrine was referred to by the *Dolan* court as "well settled" and can be traced to *Home Ins. Co. of New York v. Morse*, 87 US 445 (1874) ("a man may not barter away his life or his freedom or his substantial rights."). The doctrine has been used in a variety of circumstances, such as striking residency requirements as a condition for obtaining welfare benefits. *Shapiro v. Thompson*, 394 US 618, 631 (1969) ("if a law has 'no other purpose . . . than to chill the

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assertion of a constitutional right by penalizing those who choose to assert them, it is patently unconstitutional.'" (Quoting *United States v. Jackson*, 390 US 570 (1968)).

In *Dolan*, the US Supreme Court described the doctrine of unconstitutional conditions as follows:

> "[T]he government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Dolan* at 385.

That is exactly what the HZO 135B Easement Requirements do here; they require property owners in the ACSO zones to give up their constitutional right to compensation in order to provide an easement to their neighbor, the Port of Portland. The *Dolan* court explicitly noted that the "right to receive just compensation when property is taken" is a constitutional right that can not be bartered away. 512 US 385. The discretionary benefit here involves the right to develop one's property and the HZO 135B Easement Requirements bear no relationship to the easements. The HZO 135B Easement Requirements provide no discretion to the City on imposing the easement requirement ("land use or limited land use approvals by the City *shall be conditioned to provide an avigation easement* . . . to the Port of Portland." (Emphasis added.)) The HZO Section 135B Easement Requirements apply regardless of the level of development or the impacts on the City of Hillsboro or even the Hillsboro Airport.

In fact, it is difficult to conceive of a development that would have impacts such that it would justify allowing another property to impose a nuisance on it. That is the fundamental problem with the HZO 135B Easement Requirements; the avigation easement does not address the impacts of the proposed development. The avigation easements instead arbitrarily require developing properties to be subject to nuisance and trespass, simply in return for the act of developing. There can be no justification for requiring these easements to be provided to the Hillsboro Airport. It is quite simply an attempt by the Port of Portland, aided and abetted by the City of Hillsboro, to take by fiat what it would otherwise be required to compensate and should not be countenanced.

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E. The Easement Requirements Violates the Oregon Constitutional Privileges and Immunities Clause.

Regardless of the US Constitutional problems, the HZO 135B Easement Requirements also violate the Oregon Constitutional Privileges and Immunities Clause. Article I, section 20 of the Oregon Constitution provides that "no law shall be passed granting to any citizen or class of citizens privileges or immunities, which upon the same terms, shall not equally belong to all citizens." In this case, the Port of Portland is provided the privilege of trespassing and imposing nuisances on adjoining property owners in a way that no other citizen may do.

The Court of Appeals has recognized that Article I, section 20 is "textually and historically a leveling provision aimed at prohibiting laws that confer special benefits on an aristocratic or quasi-aristocratic 'class.'" *State v. Borowski*, 231 Or App 511, 220 P3d 100 (2009). The Oregon courts have developed a framework for analyzing arguments under the Privileges and Immunities clause that first requires a determination of whether there is a "true class," i.e., a class that is not defined by the challenged law, but by a characteristic apart from the law. *Shineovich v. Shineovich*, 229 Or App 670, 214 P3d 29 (2009): In this case, the characteristic is that all of the affected individuals own property within 6000 feet of the Hillsboro Airport. That distance characteristic exists and remains whether the amendment to the HZO is overturned or not – in other words, the affected individuals are members of a "true class."

The next step in the analysis of the Oregon Privileges and Immunities Clause is whether the true class is a "suspect class;" one that has been "the subject of adverse social or political stereotyping or prejudice." *Tanner v. OHSU*, 157 Or App 502, 523, 971 P2d 435 (1998). The class at issue here is not a "suspect class," thus the easement requirement is subject only to rational basis review. *Huckaba v. Johnson*, 281 Or 23, 573 P2d 305 (1978).

In this case, there is no rational basis for imposing a requirement to turn over a substantial property interest to a neighboring property owner simply for the privilege or developing property. As discussed above, the City has neither identified, nor does it seem likely

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that it could justify any rational basis for imposing this avigation easement requirement. For these reason, the City's decision should be reversed or remanded.

SECOND ASSIGNMENT OF ERROR – The City's Application of the AU Zone to Particular Properties through Adoption of Ordinance 5935 Unlawfully Delegates Legislative Authority to the Port of Portland.

Ordinance 5935, adopted January 5, 2010, applied the recently enacted AU Zone and the ASCO zone to individual properties, thereby making effective the new zones that were initially adopted in Ordinance 5926. However, the AU zone has a problem in that certain provisions unconstitutionally delegate authority to other bodies.

Article I, section 21, of the Oregon Constitution provides,

> "[n]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution* * *"

This constitutional provision has been construed to prohibit laws that delegate the power of amendment to another governmental entity. *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 311, 981 P2d 368 (1999). In *Advocates for Effective Regulation,* the Court of Appeals considered a Eugene initiative, the Right to Know Initiative. The Court examined whether the initiative's new Charter provisions directing requiring businesses within the city to disclose their use of hazardous substances. The list of "hazardous substances" in the initiative included a variety of lists and noted specifically that the lists included "any substances added, subsequent to the effective date of this Act" to those lists. *Id.* at 296. The lists included lists maintained by a variety of federal agencies. *Id.* The Court held that federal regulations defining "hazardous substances" not promulgated at the time the Eugene Right to Know Initiative was enacted, yet incorporated by reference in the initiative language, violated the rule against prospective delegation. *Id.* at 313.

Although the *Advocates for Effective Regulation* involved consideration of a voter enacted initiative altering local government regulations, the case makes clear that the term "law" in Article I, Section 21 of the Oregon Constitution would also include an ordinance adopted by a

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city council. *Id.* at 312. The same kind of improper prospective delegation to future standards adopted by the Port of Portland is incorporated by reference in the language of the AU zoning code text.

Notwithstanding the clear direction in the *Advocates for Effective Regulation* case, the City of Hillsboro appears to have created an almost identical issue to the one faced by the City of Eugene in that case. In *Advocates,* the issue involved the prospective definition of "hazardous substances" to be defined in a law adopted by the federal government, including prospective changes. 160 Or App 313. In HZO Section 135A(D)(7), the newly applied zone Ordinance defines hazardous substances to mean:

> "any and all substances, emissions, pollutants, materials or products defined or designated as hazardous, toxic, radioactive dangerous or regulated wastes or materials, or any other similar term in or under any Environmental Laws."

HZO Section 135(A)(D)(6) further defines "Environmental Laws" as follows:

> "any and all federal, state and local statutes, regulations, rules, permit terms and ordinances *now or hereafter in effect, as the same may be amended from time to time,* which in any way govern materials, substances, regulated substances and wastes, emissions, pollutants, animals or plants, noise or products and/or relate to the protection of health, safety or the environment." (Emphasis added.)

In mirroring the exact issue that caused the City of Eugene's voter-initiated ordinance to be struck, the City of Hillsboro also violated the constitutional prohibition on delegating its authority to prospectively determine the contents of the City's ordinances to any federal or state laws that could identify hazardous substances in the future.

HZO 135A(K) also incorporates the prospective rules of the Port of Portland by requiring that certain "currently applicable standards of the Port of Portland," will be applied by the Port of Portland in future City of Hillsboro land use decision:

> "K. Compliance with Port of Portland Requirements.
>
> "All uses and activities permitted outright within the AU Airport Use Zone shall be reviewed for compliance with, and shall comply with, currently applicable Port of Portland standards as follows:
>
> "1. Hillsboro Airport Standards for Development;

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"2. General Aviation Minimum Standards for the Hillsboro Airport; and
"3. Wildlife Hazard Management Plan for the Hillsboro Airport." Rec p 51.

However, the Port of Portland's "currently applicable standards" are unknown until a use application is submitted to the City by a property owner. This ordinance language is effectively the same as the Right to Know Initiative language that unlawfully permitted federal agencies to alter the application of the City of Eugene's ordinance. Here, the Port of Portland would be permitted to prospectively change approval standards for a land use application. Such action is an impermissible delegation of authority by the City to the Port of Portland. Therefore, LUBA must reverse the application of the AU Zone to the properties described in Ordinance 5935.

This case is dissimilar from the one that Court of Appeals faced in *Olson v. State Mortuary and Cemetery Board*, 230 Or App 376, 387, 216 P3d 325 (2009). In *Olson*, the Court of Appeals reviewed a state law that governed license violations in the funeral industry. In 1985, the state amended the statute to allow funeral industry license violations to be triggered by violations of "regulations adopted by the Federal Trade Commission regulating the funeral industry." *Id.* In order to avoid the potential constitutional problem of prospective delegation, the Court of Appeals interpreted the amendment to refer to the Federal Trade Commission Funeral Rule as it was then written, in 1985. *Id.* at 388.

However, unlike the phrase "adopted" used in the state statute in *Olson*, the City's HZO states that a property owner in the AU zone "shall comply with the *currently applicable* Port of Portland standards." (Emphasis added). The use of "currently applicable" is prospective and does not lend itself to the kind of avoidance of delegation adopted by the Court in *Olson*. In addition, the HZO language uses future tense in the preceding phrase "shall be reviewed," which suggests that the future versions of the standards documents to be used by the City of Hillsboro will be in compliance with the Port of Portland's standards. Further, in the context of the entire legislative process in adopting and applying both the AU and ASCO Zones, it is clear that the City of Hillsboro along with the Port of Portland have attempted to create a source of criteria that

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would be able to change as the airport use intensifies. Rec pp 233 and 246 (discussing the recommended construction of the third runway, for example). However laudable that may be, the Oregon Constitution prevents the City from delegating its authority in that way. The City can not prospectively tie its regulations to the actions of the Port of Portland rather than the City of Hillsboro in the standards documents listed in HZO Section 135A(K) as those documents are adopted[4] and modified.

The purpose of the review for improper prospective delegation is to provide adequate safeguards to property owners affected by an administrative action. *Warren v. Marion County,* 222 Or 307, 314, 353 P2d 257 (1960). The affected property owners may include not just the property owner subject to the provision, but the owner's neighbors who would also be affected should the criteria change. In prospectively delegating the compliance of uses and activities occurring within the City of Hillsboro to the Port of Portland, property owners are not provided any safeguards against improper administrative action by the Port of Portland in adopting those provisions or reviewing those determinations. In contrast, the *Warren* case offered an appeals process for a building inspector's improper application of building codes. Here, there is no method in the record that would allow a property owner to appeal the Port of Portland's review of its adoption and application of the standards and criteria affecting a particular use in the future. Thus HZO Section 135A(K) constitutes improper prospective delegation. Therefore, LUBA must remand the Ordinance in this case.

Moreover, the Ordinance provides no indication of how review for compliance with these provisions will occur. In *Gould v. Deschutes County,* 216 Or App 150, 171 P3d 1017 (2007), the Court of Appeals held that a provision that required the creation of a mitigation plan must be based on substantial evidence in the record and the mitigation measures must be included in the record of the decision. 216 Or App at 159 – 60. In this case, it is not clear how compliance with

[4] Nothing in the record establishes that these documents currently exist or what process the Port of Portland would use in adopting or amending them, much less how the Port would determine whether uses or activities complied with those "standards."

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the standards identified in HZO Section 135A(K) will be reviewed or complied with. To the extent the City of Hillsboro relies on the determinations of the Port of Portland, there will be no way to determine if those mitigation standards identified in the three Port of Portland standard documents have been met. The inclusion by reference of these Port of Portland documents will almost inevitably lead to a variety of *Gould* improper deferral issues.

Finally, HZO Section 135A(E)(1) sets forth the "uses and activities permitted outright" in the AU zone. Subsection 2 states that "air passenger and air freight services and facilities that are consistent with levels identified in the most current, adopted Master Plan for the Hillsboro Airport" are outright permitted uses. At the present time, no air passenger or air freight services are present at the Hillsboro Airport and these services are not identified in the existing Master Plan, thus any change that would allow these services would require an amendment to the Master Plan for the Hillsboro Airport.

At first glance this process seems relatively innocuous, until one realizes that the Master Plan for the Hillsboro Airport is not adopted by the City of Hillsboro but, instead, by the owner of the airport facility, the Port of Portland. In other words, the determination of when and how much air passenger and air freight services will be made not by the City of Hillsboro, but by the Port of Portland. Once again, the City is improperly delegating to a different body the ability to determine the standards imposed by the City's ordinances. As discussed above, this type of delegation is clearly in derogation of the constitutional prohibition on delegation of authority.

THIRD ASSIGNMENT OF ERROR – The City's Decision Ignored Applicable Law and Failed to Comply with Goal 12 and the Transportation Planning Rule.

Under ORS 197.250 the City is required to comply with Goal 12 in its review of the zone change. The findings related to Goal 12 state,

> "This Section of the Plan is not relevant to the proposed amendments as they do not relate to transportation facilities. All development will still be required to comply with adopted City plans and regulations related to transportation facilities."

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uses on affected properties and the related traffic that could have been generated by previously allowed uses. Therefore, the map amendment will not significantly affect transportation facilities.

III. RESPONSE TO FIRST ASSIGNMENT OF ERROR.

a. Short Answer.

Petitioner's arguments under its First Assignment of Error are outside the scope of LUBA's review because they collaterally attack existing legislation arising out of a distinct, prior land use decision that is not the subject of this appeal. To the extent LUBA finds Petitioner's arguments to be within the scope of its review in this appeal and not a collateral attack, Petitioner cannot assert in a facial attack that the legislation constitutes a taking under *Dolan v. City of Tigard*, 512 US 374 (1994). If LUBA were to determine that Petitioner may indeed facially challenge the legislation under *Dolan*, the City will apply the relevant criteria in a constitutional manner on a case-by-case basis. Finally, the legislation does not violate anyone's substantive due process rights, impose an unconstitutional condition or violate the Oregon Constitution's Privileges and Immunities Clause.

b. Discussion.

i. Petitioner's arguments under the First Assignment of Error are a collateral attack against a land use decision that is not the subject of this appeal.

Petitioner's First Assignment of Error is directed entirely at a land use decision that it did not appeal and is not the subject of this appeal. As Petitioner's Notice of Intent to Appeal ("NITA") and her Petition for Review ("PFR") make clear, she is only challenging Hillsboro Ordinance No. 5935 (the "Decision").

As Petitioner correctly notes, the Decision "amends the official Zoning Map of the City of Hillsboro changing the zoning of multiple properties at and surrounding the Hillsboro Airport by applying the Airport Use ("AU") Zone and the Airport Safety and Compatibility Overlay ("ASCO") Zone." PFR at 1. In other words, the Decision simply applies the City's zone change

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standards at Hillsboro Zoning Ordinance ("HZO") Section 114(2), considers relevant goal and comprehensive plan criteria and approves the zone changes.

Under the First Assignment of Error, the Petitioner alleges a variety of constitutional violations, and states that therefore "LUBA must reverse or remand the County's [sic] decision." However, Petitioner's First Assignment of Error does not assert or imply that the *Decision* is constitutionally flawed. In fact, the First Assignment of Error does not evaluate or assign fault to *any* aspect of the Decision.

Instead, Petitioner's First Assignment of Error, and the constitutional arguments contained within it, exclusively and collaterally attacks a development standard contained in the ASCO zone. R. at 61 – 64, 66. As Petitioner admits, the zones and their relevant standards, including the avigation easement standard that is the subject of the First Assignment of Error, were previously enacted pursuant to Ordinances Nos. 5925 and 5926 (the "Prior Decisions"). PFR at 2. The Petitioner could not and does not allege that the zones and their standards, including the standard challenged in the First Assignment of Error, were created by or applied in the Decision being appealed.

The Prior Decisions were adopted in October 2009. R. at 33, 45. The Prior Decisions were not appealed by any party and are now deemed acknowledged under ORS 197.625.[2] In fact, the record demonstrates that the Petitioner was well aware of the Prior Decisions. R. at 233 – 235; 245 – 248. If she had standing pursuant to ORS 197.620, Petitioner could have appealed the Prior Decisions, including the standard she collaterally attacks in her First Assignment of Error. However, neither the Petitioner nor any other party appealed the Prior Decisions.

LUBA has never held that in an appeal of a decision implementing a zone change, a person may challenge an existing underlying standard of the zone when that standard is not applied in the zone change decision itself. This is precisely what Petitioner seeks to do in this appeal. It is analogous to a property owner whose property is rezoned from zone "X" to zone

[2] *See* Exhibit 2 (copies of DLCD's acknowledgement orders for both ordinances).

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"Y" challenging the constitutionality of an existing setback in zone Y, when that setback is not being applied in the decision being appealed. To the contrary, LUBA and the Oregon Court of Appeals have rejected this kind of untimely challenge, and have held that a person may only challenge a land use regulation or decision that is the subject of the decision being appealed.

In *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, *aff'd* 195 Or App 763, 100 P3d 218 (2004), the Board considered the issue of whether a Petitioner could collaterally attack a prior land use decision. Unlike the unambiguous nature of the zone change decision being appealed in this case, LUBA was confronted with a very complicated fact pattern that made it difficult for the Board to evaluate the scope of its review authority in *Butte Conservancy*. 47 Or LUBA at 293.

The decision at issue in *Butte Conservancy* concerned a final plat approval that followed a 1998 tentative subdivision approval. *Id.* While it obviously could have been clearer, the tentative approval ultimately required the applicant to receive final plat approval by 2003. *Id.* However, based on a mutual misunderstanding of when the tentative approval expired, the applicant applied for and the city approved an "extension" of the approval that required the applicant to seek final plat approval by late 1999, some three years earlier than the tentative approval actually required. *Id.*

Realizing that it would not meet the revised 1999 deadline, that year the applicant applied for and the city approved placing the tentative approval on inactive status and required the final plat to be approved by 2002. *Id.* LUBA determined that the 1999 decision approving the tentative plan's inactivity, however inconsistent with the original approval, was a final decision that could not be challenged in the *Butte Conservancy* appeal. *Id.*

In 2000, Gresham staff realized that the 1999 decision "inactivating" the tentative plan was wrong based on their ultimate realization that the 1998 tentative approval was originally valid for five years. *Id.* The city informally communicated this fact to the applicant and both parties proceeded based upon the understanding that the final plat had to be filed in 2003. *Id.* at

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294. In 2002, the applicant sought and the city approved another extension to the deadline, requiring the final plat to be approved no later than 2004. *Id.*

At LUBA, the petitioner argued that the final plat approval was void based upon the original "extension" that required the final plat to be approved in 1999. The respondents argued that either staff's informal communication to the applicant in 2000 or the 2002 formal extension impliedly voided the original extension, and thus the petitioner was improperly collaterally attacking those decisions on appeal.

The Board analyzed the effect this procedural morass had on its scope of review by stating that the respondents' position "is based on the *unexceptional* principle that assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand." *Id.* at 291 (emphasis added). Having found its way through the factual thicket described above, the Board concluded that Gresham's 2002 extension voided the original extension. The Board concluded that "[t]o the extent petitioner's assignments of error are directed at the challenged May 14, 2004 decision, those assignments of error do not provide a basis for reversal or remand. To the extent petitioner's assignments of error are in substance a challenge to the December 11, 2002 decision, that decision cannot be collaterally attacked in this appeal, and therefore those assignments of error do not provide a basis for reversal or remand." *Id.* at 296.

Thankfully, this appeal presents the Board with a much simpler analysis relative to its scope of review. Only two land use decisions are relevant. Echoing LUBA's conclusion in the *Butte Conservancy* appeal, to the extent Petitioner's First Assignment of Error in this appeal is directed at the challenged Decision, it does not provide a basis for reversal or remand. This is because the Decision did not create or apply the standard to which Petitioner directs her First Assignment of Error. To the extent Petitioner's First Assignment of Error is directed at the Prior Decisions, those decisions cannot be collaterally attacked in this appeal, and therefore it similarly does not provide a basis for reversal or remand.

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The Petitioner's First Assignment of Error is without question entirely directed at the Prior Decisions. As the Board held in *Butte Conservancy*,[3] such a collateral attack is outside LUBA's scope of review and does not provide a basis to reverse or remand the Decision. Therefore, the First Assignment of Error must be denied on this basis.

ii. Petitioner's claim that the legislation constitutes a taking can only be brought as an as-applied challenge, if at all.

If the Board were to find that its scope of review in this appeal extends to Petitioner's First Assignment of Error, the Petitioner faces a fundamental hurdle in her attempt to have the Prior Decisions declared unconstitutional. Petitioner asserts a facial challenge against the Prior Decisions,[4] but the challenge necessarily depends upon analyses that apply to, and depend on facts unique to, the actual application of standards to specific property.

As Petitioner's First Assignment of Error makes clear, she believes that a standard contained in the Prior Decisions constitutes a taking of private property for which just compensation must be paid. Specifically, Petitioner asserts that the Prior Decisions on their face compel a property owner to surrender an "avigation easement" when property subject to the standard is developed.

In order to sustain her facial challenge to the Prior Decisions, the Petitioner must demonstrate to LUBA that the *mere adoption* of those decisions, and the avigation easement standard contained within, constitute a taking of private property and that they cannot be applied in a constitutional manner. *Carson Harbor Village, Ltd. v. City of Carson*, 37 F3d 468, 473 (9th

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[3] Many other cases also stand for the proposition that challenging a land use decision that is not the subject of a petitioner's NITA provides no basis for reversal or remand of the decision being appealed. *See Just v. Linn County*, 59 Or LUBA 233, 235 (2009); *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005); *Robson v. City of La Grande*, 40 Or LUBA 250, 254 (2001); *Bauer v. City of Portland*, 38 Or LUBA 715, 721 (2000).

[4] Petitioner arguments under the First Assignment of Error read at times like an as-applied challenge to the Prior Decisions. *See* PFR at 1, 20-21 ("*[t]his imposition* of a required Avigation Easement . . .); PFR at 9, 22-23 ("*the imposition* of avigation easements . . .); PFR at 13, 15-16 (*the imposition* of the easement . . . is still arbitrary . . .). The reality is that the avigation easement was not imposed or applied in this appeal. As such, Petitioner's argument under the First Assignment of Error is fairly viewed a facial challenge to the avigation easement standard.

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Cir. 1994). As discussed below, Petitioner cannot make that demonstration because her challenge relies on cases and theories that are only applicable in as-applied, not facial, challenges.

The Petitioner begins by citing approvingly to *Griggs v. Allegheny County*, 369 US 84, 82 S Ct 531, 7 LEd 2d 585 (1962) and *Thornburg v. Port of Portland*, 233 Or 178, 376 P2d 100 (1962). These cases do not assist Petitioner because they are products of inverse condemnation actions against the government, not facial challenges against a new land use regulation. While both cases involved flights over private property, their resulting decisions depended upon facts specific to such flights and relative to each specific property and its owner. Neither case establishes that flights over private property and related impacts are per se nuisances, or infringe upon any property right, as asserted by Petitioner. PFR at 6 and 8. Moreover, neither case involved a broad based challenge to a land use regulation that had yet to be applied to any property. The unique facts present in both cases are entirely absent in Petitioner's facial challenge to the Prior Decisions.

In *Thornburg* and in *Griggs*, property owners sued the government based upon facts that were unique to each owner and the airplane flights that passed over their property. The property owner in *Thornburg* resided about 6000 feet beyond of the end of one runway and 1500 feet beyond the end of a second runway. 233 Or at 181, 376 P2d at 101. The *Thornburg* owner claimed that noise from airplanes overhead were compensable takings under the Oregon Constitution. *Id.* at 180, 101.

The *Thornburg* court did not decide whether or not the flights themselves constituted takings. Instead, the court was asked to determine "whether, under the circumstances of [the case at bar], the landowner has a right to have a jury pass upon his claim." *Id.* at 183, 102. In essence, all the *Thornburg* court determined was whether the property owner in that case had alleged facts sufficient for a jury to determine whether or not a taking had occurred.

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vi. The avigation easement standard does not violate the Oregon Constitution's privileges and immunities clause.

As the Petitioner concludes under this sub-assignment, and to the extent issue is applicable and ripe for review, the avigation easement standard is subject to rational basis review. Respondents incorporate their response above at III(b)(iv) to demonstrate that the avigation easement standard clearly passes a rational basis test.

c. Conclusion.

The City respectfully requests LUBA to deny the First Assignment of Error for the above reasons.

IV. RESPONSE TO SECOND ASSIGNMENT OF ERROR.

a. Short answer.

As a preliminary matter, like the First Assignment of Error, the Second Assignment of Error collaterally attacks the Prior Decisions. On the merits, despite having crafted a creative argument, once again Petitioner fails to establish any basis for remand of the challenged zoning map amendments in the Second Assignment of Error.

Petitioner cites *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 981 P2d 368 (1999) ("*Advocates*") in support of her argument that the City unlawfully delegated authority to the Port of Portland in enacting two selected provisions of the HZO as part of Ordinance 5926. R. at 45, 47, 48. Those two provisions are (1) the definitions of "Environmental Laws" and "Hazardous Substances" appearing at Sections (D)(6) and (D)(7) of Ordinance Section 135(A), which apply in the Airport Use Zone; and (2) the requirement at Section K of that same Ordinance Section (135(A), "Airport Use Zone"), requiring that development comply with "currently applicable Port of Portland standards", and listing three specific standards.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I hereby certify this brief (Barnes v. City of Hillsboro, et al., Court of Appeals Case No. A146145) complies with the word count limitation of ORAP 5.05(2)(b) and the word count of this brief (as described in ORAP 5.05(2)(a) is 4,753 words.

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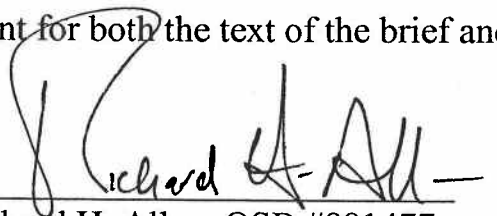

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CERTIFICATE OF FILING

I hereby certify that on August 11, 2010, I filed the original and 13 true copies of the foregoing **Brief and Excerpt of Record of Petitioners City of Hillsboro and Port of Portland** (Court of Appeals Case No. A146145) with the State Court Administrator, Appellate Court Records, Supreme Court Building, 1163 State Street, Salem, Oregon 97310, by certified, first-class mail at the United States Post Office in Portland, Oregon.

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I hereby certify that on August 11, 2010, I served two true and correct copies of the foregoing **Brief and Excerpt of Record of Petitioners City of Hillsboro and Port of Portland** (Court of Appeals Case No. A146145) by certified, first-class mail at the United States Post Office in Portland, Oregon on the following:

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