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

MICHELLE BARNES, Petitioner, v. CITY OF HILLSBORO, Respondent, and THE PORT OF PORTLAND, Intervenor-Respondent.	LUBA Case No. 2010-011

JOINT RESPONDENTS' BRIEF

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Exhibits and Appendices

I. STANDING OF PETITIONER AND JURISDICTION OF THE BOARD.

Respondent City of Hillsboro ("City") and Intervenor-Respondent Port of Portland ("Port"), collectively referred to as Respondents, accept Petitioner's statement of standing and her statement regarding LUBA's jurisdiction.

II. STATEMENT OF THE CASE.

a. Nature of the Decision.

The Respondents accept Petitioner's description of the City's decision on appeal, however Petitioner's First and Second Assignments of Error are not directed at the decision on appeal.

b. Summary of Material Facts.

The Respondents generally accept Petitioner's summary of the material facts, with one exception. The Respondents deny that the Airport Safety and Compatibility Overlay ("ASCO") zone compels a property owner to provide an easement to the Port of Portland. As discussed below and assuming the Board's scope of review in this appeal permits it to reach this issue, the City is obligated to apply the ASCO's requirements in a constitutional manner when property develops in the ASCO zone. Part of the City's obligation would include a determination on a case-by-case basis whether it could require a property owner to grant the easement described in the Petitioner's First Assignment of Error.

The avigation easement standard that Petitioner challenges descends from the Airport Planning Rule at OAR Chapter 660, division 13. That rule directs the Oregon Department of Aviation ("ODA") to adopt a system plan and related documents "to provide state policy guidance and a framework for planning and operation of a convenient and economic system of airports, and for land use planning to reduce risks to aircraft operations and nearby land uses."

Consistent with the rule, the Oregon Aviation Board (the ODA's governing board) adopted the "Airport Land Use Compatibility Guidebook" in January 2003. The guidebook seeks to assist those responsible for planning and zoning in and near airports to ensure

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compatibility among competing land uses. The guidebook contains model legislation in the form of an overlay zone that specifically contemplates the use of avigation easements as a tool to achieve that compatibility.[1]

c. Summary of Arguments.

Petitioner's First and Second Assignments of Error are directed at standards contained in the existing Airport Use Zone ("AU") and ASCO Zone, which resulted from land use decisions that are not the subject of this appeal. The only land use decision subject to this appeal is a zoning map amendment that applies the AU and ASCO zones. If the Board reaches the merits of Petitioner's First Assignment of Error, Respondents assert that Petitioner may not assert a facial challenge to the ordinance adopting the avigation easement standard. Additionally, the City is obliged to apply the standard in a constitutional manner and nothing in the record or in the Petition demonstrate that it cannot or will not.

If the Board reaches the merits of Petitioner's Second Assignment of Error, existing and recent case law support Respondents' position that the challenged provisions do not unlawfully delegate the City's legislative authority. As such, the Board can and should conclude that the provisions do not amount to a prospective delegation of the authority. In addition, the Board should avoid any potential constitutional question concerning the challenged provisions based on a recent Court of Appeal's decision.

In response to the Third Assignment of Error, Respondents note that the Petitioner does not allege that the zoning map amendment "significantly affects" transportation facilities in violation of the Transportation Planning Rule, and as such the Third Assignment of Error provides no basis for a reversal or remand. In any event, the map amendment complies with the Transportation Planning Rule because, as demonstrated in the record and through the findings contained in this brief, the rezone is a down-zone that drastically reduces the permissible land

[1] The model overlay zone is attached as Exhibit 1, and the avigation easement standard is found at page 20. The Board may take judicial notice of the guidebook and its model overlay zone pursuant to ORS 40.090(2).

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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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Therefore, *Griggs* and *Thornburg* are not relevant to Petitioner's facial challenge that collaterally attacks the ordinance that contains avigation easement standard. In those cases, courts were presented with concrete facts regarding flight patterns, the height of the flights at issue, and the precise nature and degree of alleged interference with the properties under review. Moreover, and perhaps most distinguishable from Petitioner's collateral attack, the *Thornburg* court's analysis was premised on the fact that "a plaintiff aggrieved by a public activity must show that there has been a taking of his property. There must be more than merely the suffering of some damage." *Id.* at 184, 103.

A more recent case additionally illustrates why cases such as *Griggs* and *Thornburg* are distinguishable from Petitioner's facial challenge in this appeal. In *Testwuide v. U.S.*, 56 Fed Cl 755 (2003), the Court of Federal Claims considered a complaint filed by property owners who alleged a taking due to naval aircraft operations in Virginia. Although the case focused on whether a class of plaintiffs could be certified, the court did address the difficult hurdle such plaintiffs (whether or not they are part of a class) have in making a prima facie case for aviation-related takings.

The *Testwuide* court noted that the Supreme Court has stated that the "ancient doctrine that the common law ownership of the land extended to the periphery of the universe . . . has no place in the modern world, as [t]he air is a public highway." *Id.* at 763 (quoting *U.S. v. Causby*, 328 US 256, 66 S Ct 1062, 90 L Ed 1206 (1946)). The court further stated that "[c]ases following *Causby* have concluded that flights above 500 feet in non-congested areas are in the public domain, *i.e.* in navigable airspace." *Id.*

The *Testwuide* court summarized the general test for such takings claims that a plaintiff must meet: "(1) that the planes flew directly over the claimant's land; (2) the flights were low . . . and frequent, and (3) the flights directly and immediately interfered with the claimant's enjoyment and use of the land." *Id.* at 764.

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Simply put, Petitioner can make no such showing in this appeal. The record is silent as to whether any damage to any property owner exists (let alone damage that would rise to the level of a taking) for the simple reason that flights and their effect on property owners are not at issue in the decision on appeal. Similarly, there is no evidence in the record that the Petitioner is a property owner that could bring a cognizable claim for inverse condemnation from overhead flights at the Hillsboro Airport, much less whether she is a person from whom an avigation easement may be compelled in the future. Indeed, the record does not reveal that Petitioner owns any property affected by the AU or ASCO zones, nor has she made that assertion. Finally, the record does not suggest whether properties potentially subject to the avigation easement experience or will experience flights that would permit a property owner to allege a taking of property. To the extent flights over such properties never fall below navigable airspace, no taking is cognizable.

The absence of such facts supports Respondents' position that Petitioner is improperly replying on *Griggs* and *Thornburg* as circumstantial, case-specific authority to support its wholesale facial challenge to the ordinance that contains the avigation easement standard. At most, the Petitioner can attempt to assert in its collateral attack that the standard violates *Dolan's* rough proportionality requirement. However, as the following discussion illustrates, that attempt necessarily fails as well.

The Petitioner cites to no authority permitting a *Dolan*-based takings claim in the context of a facial challenge to a regulation. That is because such authority does not exist. To the contrary, courts have consistently held that takings claims premised upon *Dolan* are not permitted in facial challenges to land use regulations.[5] Because *Dolan's* rough proportionality

[5] Other cases include *Action Apartment Ass'n v. City of Santa Monica*, 166 Cal.App.4th 456, 82 Cal.Rptr.3d 722 (2008); *Kamaole Pointe Development LP v. County of Maui*, 573 F.Supp.2d 1354 (D. Hawai'i 2008); *Wisconsin Builders Ass'n v. Wisconsin Dept. of Transp.*, 285 Wis.2d 472, 702 N.W.2d 433 (Wis. App. 2005); *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 277 Ga. 295, 588 S.E.2d 694 (Ga. 2003).

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test is designed to limit overreaching in ad-hoc, quasi-judicial settings, it is cognizable only in as-applied challenges.

The Ninth Circuit had the opportunity to consider *Dolan's* applicability in a facial challenge in *Garneau v. City of Seattle*, 147 F3d 802 (1998). In that case, the City of Seattle passed an ordinance that required landlords to pay one-half the cost of relocating low-income tenants. *Id.* Certain affected property owners sued and claimed in part that the ordinance was a taking under *Dolan*.

The *Garneau* court left little doubt as to *Dolan's* applicability to facial challenges when it stated "[t]he *Dolan* analysis *cannot* be applied in facial takings claims." *Id.* at 811 (emphasis added). The court held that *Dolan* relates "only to as-applied challenges" to regulations and that "*Dolan* does not address when a taking has occurred [but rather] only how close a fit the exaction (which would otherwise constitute a taking) must have to the harms caused by development." *Id.*

The *Garneau* court recognized that the limitations inherent in a *Dolan* analysis do not assist courts in deciding facial takings claims. That is because a facial challenge necessarily "involves a claim that the mere enactment of [legislation] constitutes a taking, while an as-applied challenge involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Id.* As the court explained, in the *Dolan* case, the Supreme Court considered whether the exaction was disproportionate to the permit requested. *Id.* However, in a facial challenge, a court cannot analyze the exaction at all, because it necessarily has not yet occurred. *Id.* The court cited to *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992) as an example of a successful facial claim. In *Lucas*, the Coastal Council promulgated regulations that prohibited all beneficial use of the owner's property. *Id.* The Supreme Court found that the mere enactment of such regulations rendered the owner's property unusable and without value. *Id.*

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The *Garneau* court also found no support for *Dolan* in a facial challenge because *Dolan* doesn't address when a taking occurs, but rather if a taking occurs whether under the rough proportionality test the government can avoid paying just compensation in exchange for granting a permit. *Id.* Again, this can only be determined on a case-by-case basis and in consideration of the myriad facts that accompany every development proposal.

Regardless of *Dolan's* inapplicability to facial challenges, it is not at all clear that the Board can consider Petitioner's facial takings challenge. The Ninth Circuit has clearly held that in order to sustain a facial takings challenge, the person bringing the challenge must have owned property subject to the challenged regulations at the time the regulations were enacted. *See Carson Harbor, supra,* at 476. As stated above, the record does not demonstrate that Petitioner owns any property in the area subject to the zone changes.

iii. <u>The mere enactment of the avigation easement standard does not cause a taking and City may exercise discretion in applying the avigation easement standard</u>.

If the Board were ultimately to determine that: (1) Petitioner's facial challenge is not a collateral attack against a prior land use decision; (2) Petitioner can raise *Dolan*-based arguments in her facial challenge; and (3) the Board can consider Petitioner's facial claims even though the record does not indicate that she owns affected property, the Respondents offer the following response.

First, the mere enactment of the avigation easement standard has not reduced the value of any property, much less any of Petitioner's property, and certainly does not cause any property interest to be transferred. *See Carson Harbor* at 476 (in takings context, basis of facial challenge is regulation enactment itself has reduced property values or has transferred a property interest). Petitioner can point to no evidence in the record that analyzes the easement standard and its effect on property values, and certainly cannot demonstrate that the standard *will* reduce property values. Similarly, Petitioner cannot and does not argue that the City's enactment of the easement

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standard itself transfers any property interest. For these reasons, Petitioner's facial takings challenge to the easement must be denied.

Petitioner's arguments essentially predict a future scenario where the City compels an avigation easement from every person developing property in the ASCO zone, where in every instance compelling the easement would be a taking[6] and in every instance the City could not demonstrate that rough proportionality exists. These are rather absurd assumptions, and precisely why such takings claims are only susceptible to analysis on an as-applied basis.

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.[7] 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.

iv. <u>The avigation easement standard does not violate any substantive due process rights</u>.

Although the record does not indicate that she owns affected property, the Petitioner also asserts that the avigation easement standard violates the substantive due process rights of

[6] Given the legislative nature of the easement standard, it is not clear that it *Dolan* will be applicable. Both *Dolan* and its predecessor, *Nollan v. California Coastal Com'n*, 483 US 825 (1987) addressed conditions that resulted from adjudicatory, not legislative processes. *See Ehrlich v. City of Culver City,* 12 Cal 4th 854, 911 P2d 429 (1996); *San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal 4th 643, 41 P3d 87 (2002). In any event, the "essential nexus" demanded by *Nollan* and the "rough proportionality" test under *Dolan* are or can be met when the standard is applied. The easement requirement is one tool to assure that the area around the Airport is safe and that uses near the Airport will be compatible with one another, and thus an essential nexus exists between the standard and the City's legitimate interest in protecting and improving safety in the area.

[7] To the extent Dolan would be applicable to the easement requirement, this as-applied analysis would include whether and to what extent the easement may constitutionally permit a right of entry on property.

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property owners in the ASCO zone. There are a few problems with this assertion. To establish a substantive due process violation, the Petitioner must prove that the avigation easement is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F2d 1398, 1407 (9th Cir. 1989). Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a "clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 US 314, 331-32, 101 S Ct 2376, 2387, 69 L Ed 2d 40 (1981). Moreover, and contrary to the Petitioner's implication that an avigation easement would be irrationally turned over to a third party, the easement would be provided to the Port of Portland, the governmental entity responsible for ensuring that the Airport's operations occur in a manner that facilitates and promotes regional air travel while balancing the safety needs of the surrounding area.

Petitioner indicates that an avigation easement may implicate a fundamental right, but concedes that it may well not. *Cf.* PFR at 12, 10-22; PFR at 13, 15. At the very least, Petitioner has not established with any degree of certainty that the easement affects a fundamental right, and as discussed above Petitioner cannot and does not argue that the City's enactment of the avigation easement standard itself transfers any property interest. As such, the standard does not violate substantive due process and the standard must be upheld as long as it advances any legitimate public purpose, *Construction Indus. Ass'n v. Petaluma*, 522 F2d 897, 906 (9th Cir. 1975) and if it is "at least fairly debatable" that the decision to adopt the standard was rationally related to legitimate governmental interests. *Christensen v. Yolo County Bd. of Supervisors*, 995 F2d 161, 165 (9th Cir. 1993).

The avigation easement standard easily clears that hurdle. It is tool that is recommended and endorsed by the ODA to address airport compatibility and avoid land use conflicts in areas surrounding airports. It is part of the ASCO's development standards and is one that implement's the zone's purpose. The zone's purpose is "to establish compatibility and safety

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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." R. at 51. Based on such language, it is beyond debatable that the standard is rationally related to the City's interest in promoting safety in and around the Hillsboro Airport and supporting its operations.

In addition, in light of Petitioner's takings challenge discussed above, she may not bring a substantive due process challenge. If she can establish that the mere adoption of the avigation easement standard took private property, and because the takings clause "provides an explicit source of constitutional protection" against the challenged governmental conduct, a substantive due process argument is not proper in this appeal. *See Garneau, supra*, at 806; *see also Macri v. King County*, 126 F3d 1125, 1129 (9th Cir. 1997).

v. The avigation easement standard does not result in the imposition of an unconstitutional condition.

The Petitioner's assertion that the avigation easement standard constitutes an unconstitutional condition is substantively a return to its *Dolan* arguments, described and responded to above. To the extent it is necessary, Respondents incorporate that response here.

In addition, the Petitioner "must establish that no set of circumstances exists under which the [easement standard] would be valid. The fact that [the easement standard] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [it] wholly invalid." *Rust v. Sullivan*, 500 US 173, 111 S Ct 1759 (1991) (quoting *United States v. Salerno*, 481 US 739, 745, 107 S Ct 2095, 2100, 95 L Ed 2d 697 (1987)). The Petitioner has certainly not established that there are no set of circumstances under which the easement could be imposed in a constitutional manner. And as Respondents discuss above, there may be future instances when the standard is applicable that the City would choose not to require a property owner to provide the easement, thereby avoiding an unconstitutional condition.

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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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Petitioner's reliance on *Advocates*, and her attempt to distinguish the recent Court of Appeals decision in *Olson v. State Mortuary and Cemetery Board*, 230 Or App 376, 216 P3d 325 (2009), do not provide any basis for this Board to remand the City's decision for four reasons:

First, the challenged provisions of the HZO can and should be interpreted to avoid any constitutional problem of "prospective delegation" as the Court of Appeals had no trouble doing in *Olson* in 2009. Under the Court of Appeals' reasoning in *Olson*, the challenged provisions are not prospective regulations.

Second, although indeed the City Council's enactment of the text amendments in October, 2009 may have been a legislative decision from a land use perspective (*see* Section V(a), *infra*), Petitioner fails to make the critical legal distinction between a legislative enactment for purposes of the constitutional doctrine of unlawful prospective delegation, and a legislative enactment such as this one in the land use context. Case law makes clear that such a distinction must be made, and that the constitutional doctrine does not apply in this context.

Third, even if the Board determines that the constitutional doctrine of unlawful prospective delegation applies here, and that the challenged provisions cannot be interpreted to avoid any constitutional problem, subsequent Development Review proceedings will take place as otherwise required by the HZO. Those later proceedings provide the needed procedural safeguards sought by Petitioner. See, Section L of HZO Section 135(A), R. at 51; Section J of HZO Section 135(B), R. at 66. As such, the admonitions of *Warren v. Marion County*, 222 Or 307, 353 P2d 257 (1960) are directly addressed by the text amendment.

Finally, even if the Board determines that the challenged provisions violate the constitutional prohibition, they must be severed from the remainder of the Ordinance under well-established principles of Oregon law on severability as applied to municipal ordinances.

b. Discussion.

i. Preliminary Matter – Petitioner's appeal must be dismissed as untimely.

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As a preliminary matter, Respondents reassert and incorporate here their response to the First Assignment of Error with respect to the timeliness of Petitioner's appeal. Again, the Second Assignment of Error relates to the language of the Prior Decisions and Petitioner acknowledges as much. PFR at 2, 9-10. As such, the Second Assignment of Error constitutes an impermissible collateral attack on the City's acknowledged amendments to the HZO and must be dismissed.

ii. The constitutional doctrine prohibiting prospective delegation to another authority does not apply in this case.

As discussed more fully below, the doctrine of unlawful prospective delegation does not apply in this context. But as a threshold matter the Board does not even need to wade through the constitutional analysis in this case, because even if the doctrine did apply, the facts of this case do not support the determination sought by Petitioner. The challenged ordinance provisions do not constitute a prospective delegation in the first instance, and the doctrine is not triggered.

Petitioner's challenge in the Second Assignment of Error is 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) (R. at 47-48), 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. R. at 51. For the Board's convenience, the relevant provisions are appended to this brief as Appendix A.

Petitioner relies on *Advocates for Effective Regulation v. City of Eugene*, *supra*, in support of her argument. For the reasons discussed below that case is not applicable here. But the Board need not wade into the weeds of constitutional doctrine to deny the Second Assignment of Error. The facts here simply do not support Petitioner's contention, and her

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argument attempts to explain away - but cannot avoid - the impact of the Court of Appeals' 2009 decision in *Olson v. State Mortuary and Cemetery Board, supra.* Under the reasoning in that decision, the Board can and should interpret the challenged regulation "[t]o avoid the potential constitutional problem of 'prospective delegation'..." 230 Or App at 388.

The doctrine of prospective delegation is triggered when an enactment improperly incorporates future, unknown regulations. The concept arises under Article I, Section 21 of the Oregon Constitution (and related separation of powers provisions at Article III, Section 1), which provides: "nor shall any law be passed, the taking effect of which shall be make to depend upon any authority***." The Court of Appeals in *Advocates* noted that this provision "has been construed to prohibit laws that delegate the power of amendment to another governmental entity." 160 Or App at 311. Respondents do not dispute that the HZO amendments challenged here are "enactments". Respondents do contend that the City is nevertheless not subject to the constitutional doctrine as discussed more fully in Section IV(b)(ii)(6), below. However, the Board must first examine whether on the facts of this particular case the constitutional issue can be avoided. Respondents contend that the Board can avoid the constitutional question with respect to each of the challenged provisions here.

1. The challenged provisions.

Petitioner cites to three specific ordinance text provisions that she argues run afoul of the prospective delegation rule. Two of the challenged provisions are definitions, and one is a development standard.

The definitions challenged are those of the terms "Environmental Laws" and "Hazardous Substances".[8] Although the definition of "Environmental Laws" does reference laws "as the same may be amended from time to time" – and thus might appear on its face to amount to a prospective delegation – it is important to note that the potentially offending definition only

[8] The definition of "Hazardous Substances" is only subject to Petitioner's challenge because it relies on its terms upon the definition of "Environmental Laws." R. at 48.

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appears in the definitions section of the ordinance and is never used elsewhere, except in another definition – that of "Hazardous Substances". The definition of Hazardous Substances contains no independent prospective language, except that it includes the term "Environmental Laws." R. at 47-48. And, the only use of the term "Hazardous Substances" in the entire Ordinance is in one provision applicable only to crop dusting activities on Port-owned properties. R. at 49.

At best, the "prospective" delegation here requires that persons engaged in crop dusting activities on Port property must provide a list of hazardous substances to the Port at the time when they engage in those crop dusting activities. It is hard to imagine how the challenged definition deprives Petitioner of anything; at best, she will not have the opportunity to know exactly what substances might be on such a list when and if a third party engages in crop dusting on Port property. Petitioner argues that "the Port of Portland would be permitted to prospectively change approval standards for a land use application." PFR at 19. No such consequence can be divined from the text of these definitions; crop dusting does not constitute development and does not trigger a land use application. And as discussed more fully below, any land use application under the Ordinance will be subject to the City's otherwise applicable Development Review processes and standards in any event.

The other challenged provision in the Second Assignment of Error is subsection K of Ordinance Section 135(A), "Airport Use Zone", requiring that development complies with "currently applicable Port of Portland standards", and listing three specific standards.

2. Analysis.

In order to address Petitioner's assertion, the Board must examine the language of the challenged provisions. The question for the Board is whether, on their face, the challenged provisions in fact contain any prospective delegation by implicating future laws or regulations that do not presently exist. To do so, the Board should apply the well-established standards of

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statutory construction at ORS 174.010.[9] The Board does so under its standard of review at ORS 197.829(1). The Board has recently and over the course of many years articulated that this is its approach. *See generally Abeel, et al v. City of Portland*, et al, 58 Or LUBA 247, 254 (2009). The statutory principles apply not only to the construction of state statutes but to the construction of municipal ordinances as well. *Western Land and Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210, 214 P3d 68 (2009).

In analyzing each of the challenged ordinance provisions, the Board can and should conclude that the provisions do not amount to a prospective delegation of the authority to modify the HZO.

3. "Environmental Laws."

As noted above, the only use of this allegedly offending term occurs in the definitions. The effect of the definitions is further limited to the situation where a crop duster engages in activities on defined lands owned by the Port, and then only requires that party to submit a list of any identified substances to the Port. The regulation does not apply to any land use application and is not a standard for review. Moreover, federal law requires compliance with hazardous substance requirements – by their very nature – at the time those substances are deployed. See, for example, the Federal Insecticide, Fungicide and Rodenticide Act, 7 USC § 136, et seq. By requiring conformance to applicable federal law, the City's zoning regulation carries out a mandate that it does not have the discretion to ignore. Numerous provisions of state law require compliance with these and other federal regulations; see, for example, ORS Chapter 453, OAR Chapter 333.[10] Thus, although the definition does refer to regulations that will be applicable at the time of crop dusting, such reference is unavoidable.

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[9] ORS 174.010, as the Board is well aware, provides: "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted or to omit what has been inserted..."

[10] An exploration of federal environmental laws and their implementation in Oregon is beyond the scope of this proceeding; these examples are provided as one relevant federal regulation that applies in this context. The Wildlife

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It is further noteworthy to contrast the language in this definition with that of the following language also challenged by Petitioner. Though the definition of "Environmental Laws" must be and clearly is written to apply prospectively, the standard requiring compliance with Port standards is not.[11]

4. "Compliance with Port of Portland Standards."

The ordinance provision challenged here requires compliance with "currently applicable Port of Portland standards, as follows: Hillsboro Airport Standards for Development; General Aviation Minimum Standards for the Hillsboro Airport; and Wildlife Hazard Management Plan for the Hillsboro Airport." R. at 51.

Petitioner insists that use of the phrase "currently applicable" regulations means that the provision requires compliance with these specific Port standards as they may be amended over time. Quite to the contrary, the standard references three specific and existing issued documents that are readily available from the Port. The reference to three specific standards, with their titles capitalized, further supports the interpretation that the provision references concrete, existing documents, as they are named by their titles. This analysis can be applied even without looking at the referenced documents. However, copies of excerpts from the three standards are appended as Appendices B, C and D to this Brief. The referenced standards were issued by the Port under its authority as the owner and operator of a federally regulated airport facility.[12]

In order to give the challenged provision the meaning advocated for by Petitioner, the Board would be required to read into the language additional words, such as "then currently

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Hazard Management Plan of the Port of Portland referenced herein and at Record 51 includes a listing of all of the potentially applicable federal environmental laws.

[11] The Board, in carefully examining the language of these provisions, will also note that the language used in describing airport activities in the adopted Airport Master Plan (Response to Assignment of Error 3) bases its description of aviation activities as those in the "*most* current, adopted Master Plan." (emphasis supplied). These differences in selected wording within the same ordinance demonstrate a clear intent to differentiate between present and future regulations.

[12] The Board may take official notice of the existence of these three standards as they are regulations issued under the Port's authority pursuant to the Oregon Evidence Code, ORS 40.090(4).

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applicable" or "applicable at the time of the proposed development". It is axiomatic that the Board – nor indeed any reviewing authority – engages in such exercises when examining the text of enactments. ORS 174.010; *Western Land and Cattle, Inc. v. Umatilla County, supra.*

5. The reviewing authority's duty to avoid reaching the constitutional question.

Petitioner's theory here is further and completely undermined by the Court of Appeals holding in *Olson*, though she tries mightily to explain it away as "unlike" the case on review here.

In *Olson*, the Court of Appeals was examining rules of the State Mortuary and Cemetery Board in the face of a challenge by a funeral services provider who had been penalized for violation of those rules. In the funeral services area, Congress enacted the Federal Trade Commission Act of 1982, 15 USC §45 (1982), and under rulemaking authority thereunder the Federal Trade Commission has adopted a rule known as the FTC Funeral Rule, 16 CFR § 453 (1984). Oregon law requires compliance with the FTC Funeral Rule, specifying that "'violation of ***regulations adopted by the Federal Trade Commission regulating funeral industry practices' constitutes an additional cause for disciplinary action by the State Mortuary and Cemetery Board against its licensees." ORS 692.180(1)(h). *Olson*, 230 Or App at 381.

As in this case, the funeral services provider in *Olson* challenged the State Board's authority to enforce the FTC Funeral Rule, in part asserting that the result would amount to an unconstitutional prospective delegation. The Court of Appeals held that the state statute quoted above should be interpreted to refer to the FTC Funeral Rule "as it was then written and not as an attempt to adopt rules that will change from time to time as the federal government changes its rules", citing *Advocates*, in order to "avoid the potential constitutional problem of 'prospective delegation.'" *Olson*, at 388.

In so holding, the Court of Appeals expressed a standard to which this Board must adhere when examining challenged regulations for the existence of any unlawful prospective delegation.

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As discussed above, it is clearly possible – consistent with well-established rules of statutory construction – to interpret the challenged provisions here in a way that "avoids the constitutional problem" of prospective delegation. The Board can and should do so, and Petitioner's Second Assignment of Error should be denied.

6. Prospective delegation doctrine does not apply in this context.

Although the City Council's enactment of the text amendments in October, 2009 may be a legislative decision from a land use perspective (see, argument *infra* at Section V(a)), Petitioner fails to make the critical legal distinction between a legislative enactment for purposes of the constitutional doctrine of unlawful prospective delegation, and a legislative enactment such as this one in the land use context. Case law makes clear that such a distinction must be made, and that the constitutional doctrine does not apply in this context.

The sole authority cited by Petitioner in support of her theory is *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 981 P2d 368 (1999). Petitioner cites no case making the leap from the law of initiative and referendum as applied to city charters (to which the constitutional limitation clearly applies, and which *Advocates* addressed) to the context of land use decisions amending a local zoning ordinance or map. This is probably because there is no such case.[13]

In the only case to consider a related question, the Court of Appeals engaged in extensive analysis and was still unable to flatly conclude even that decisions amending comprehensive plans or zoning codes are always subject to the initiative and referendum powers under the Oregon Constitution. Only matters of predominantly local concern, and matters that are not ministerial or administrative in nature, are subject to those constitutional powers. *Allison v.*

[13] LUBA has only considered the doctrine in passing, and only in the context of annexation laws in a case not similar to the one on review here. See *Cogan, et al v. City of Beaverton*, 57 Or LUBA 217 (2008). In *Bullock v. City of Ashland, et al*, 57 Or LUBA 635 (2008) LUBA addressed a related separation of powers argument under another provision of the Oregon Constitution, in a challenge involving delegation of a subsequent administrative duty to the planning staff, and correctly gave the argument short shrift.

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Washington County, 24 Or App 571, 548 P2d 188 (1976). While noting that "the local voters have no more or less legislative authority than the local governing body", the Court concluded that "the question of whether any given aspect of a comprehensive plan or zoning ordinance is a matter of predominantly statewide or predominantly local concern must be decided on a case-by-case basis, applying *Heinig* to the facts presented." 24 Or App at 584, citing *State ex rel Heinig v. City of Milwaukie*, 231 Or 473, 373 P2d 680 (1962). To flatly assert – as Petitioner does here – that all zoning ordinance amendments are subject to the constitutional prohibition against prospective delegation of legislative authority – goes too far.

Petitioner makes a glancing reference to another doctrine of LUBA precedent at pages 20-21 of the Petition for Review, asserting that "the Ordinance provides no indication of how review for compliance with these provisions will occur" and citing to *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007). As discussed below, the *Gould* case is inapposite here as it was a challenge of the development application for a resort, not a zoning ordinance or map amendment with later development review requirements that are applied exclusively by the City, as is the present case.

Moreover, Petitioner's apparent attempt to trigger LUBA's line of reasoning in cases concerning the impermissible delegation of authority does nothing to advance her constitutional argument. Those cases include the requirement that later opportunity for comment be provided and that findings demonstrate that substantial evidence supports the conclusion that any future condition is feasible, and are not at issue here. The well understood principles to be derived from this line of cases are not relevant to Petitioner's present argument. See, for example, *Mitchell, et al v. Washington County, et al*, 37 Or LUBA 452 (2000); *Baker v. Lane County*, 43 Or LUBA 493 (2003).

7. Subsequent procedures provide procedural protections.

The HZO specifically requires development review for any application on the property subject to the challenged provisions. Those later proceedings provide the needed procedural

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safeguards sought by Petitioner. *See*, Section L of HZO Section 135(A), R. at 51; Section J of HZO Section 135(B), R. at 66. As such, the admonitions of *Warren v. Marion County*, 222 Or 307, 353 P2d 257 (1960) are addressed by the text amendment.

As noted by the Oregon Supreme Court in *MacPherson v. Department of Administrative Services*, 340 Or 117, 130 P3d 308 (2006), providing that subsequent procedural step is all that is required:

> "We continue to take the following view, first expressed by this court nearly a half century ago: 'There is no constitutional requirement that all delegation of legislative power must be accompanied by a statement of standards circumscribing its exercise.'[citing *Warren*]. Rather, the procedure established for the exercise of that power must furnish adequate safeguards against the arbitrary exercise of the delegated power." 340 Or at 135-36.

The cited sections of the two ordinances require development review as otherwise required under HZO Section 133, "Development Review." HZO Section 133 is attached to this brief as Appendix E. All "construction" and "development" within Hillsboro, as defined broadly in the HZO, must comply with the submittal requirements, standards and procedures established in Section 133.14 As is evident from Subsections X and XI of Section 133, the City's procedures call for notice, appeal and hearings consistent with state law. The law requires nothing more.

Gould v. Deschutes County, 216 Or App 150, 171 P3d 1017 (2007), cited by Petitioner, is fully distinguishable from this case. In *Gould*, the decision on review was a quasi-judicial development review decision (approval of a resort master plan); such development review is yet to come with respect to any development on airport property in this case. No subsequent hearing process to review the mitigation plan in that case was slated to occur. The delegation in *Gould* was the delegation of future discretionary review of a mitigation plan to state and federal agencies. And probably most telling, the mitigation plan required in *Gould* did not even exist

[14] Development within the ASCO zone is also subject to the additional submittal requirements, procedures and standards in Subsection J of Section 135(B); R. at 66.

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yet; the nature of the plan was not known at the time of the development review hearing. 216 Or App 162-63. It is hardly surprising on those facts that the Court of Appeals held that "the county's conclusion that [the code requirement] is satisfied by a potential mitigation plan is legally insufficient...". Id., at 163.

In this case, the identified standards of the Port of Portland are in existence and readily identifiable, as noted extensively above. No state or federal agency is slated to undertake review outside the public process; the City is the sole decision-maker that determines compliance with all approval criteria in the AU and ASCO zones. And probably more importantly, later development review has yet to occur for any development on the affected properties. We have not yet reached the point where a *Gould* analysis is triggered.

8. Any offending provisions can and should be severed.

As is clear from Petitioner's Second Assignment of Error, she challenges only discreet provisions of Ordinance 5926. Even should the Board get past the significant hurdles articulated above, and determine that the challenged provisions are unlawful as a prospective delegation of legislative authority, the Board must sever the offending provisions to preserve the remainder of the Ordinance.

Oregon law provides a presumption of severability even in the absence of a specific "severability clause" in the enactment. As the Court of Appeals laid out in a subsequent appeal following remand of the *Advocates* case, *supra*:

> "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 174.040.15 *Advocates for Effective Regulation v. City of Eugene*, 176 Or App 370, 376, 32 P3d 228 (2001) (*appeal following remand*).

[15] The Court noted, too, that the same severability principles that apply to state statutes also apply to municipal ordinances, citing *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 16, 994 P2d 1205 (2000).

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Here, the challenged provisions are a minor part of the overall HZO amendment. The Ordinance does not specify that remaining parts do not remain in effect, the remaining parts are not so dependent on the allegedly invalid provisions as to even remotely indicate that the whole package would not have been enacted without them; and the remaining parts standing alone are fully capable of being executed. If the allegedly invalid provisions were struck, the only consequences would be that the Port of Portland would not receive notice from crop dusters on airport property of the list of substances to be deployed, and that the Port's development standards would not be specifically referenced in the HZO though as noted above they are in effect and clearly applicable in any event.

c. Conclusion.

For all of these reasons, Petitioner's Second Assignment of Error must be denied.

V. RESPONSE TO THIRD ASSIGNMENT OF ERROR.

a. Short Answer.

The Petitioner contends that the City's decision to approve Ordinance 5935 was not supported by adequate findings related to Goal 12 and the Transportation Planning Rule (the "TPR"). PFR at 21-23. Petitioner, however, does not allege that the City's decision violates Goal 12 or the TPR. Indeed, Petitioner does not argue that the application of Ordinance 5935 would significantly affect a transportation facility in violation of OAR 660-012-0060. Rather, Petitioner's sole argument under this assignment of error is that the City failed to adopt findings demonstrating that Ordinance 5935 complies with OAR 660-012-0060. The challenged zone change is a legislative decision.[16] Because LUBA and the Court of Appeals have consistently held that that no findings are required in legislative matters, Petitioner has provided no basis for

[16] There does not appear to be any dispute that the adoption of Ordinance 5935 was a legislative matter. To the extent that Petitioner argues that the adoption of Ordinance 5935 was quasi-judicial, then all of Petitioner's assignments of error must be rejected because none of the assignments of error were raised below. ORS 197.835(3); ORS 197.763(5)(c).

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reversal or remand of the City's decision. To the extent that a violation of the TPR's requirement that the zoning map amendment not have a significant effect on the transportation system has been alleged, the record and findings contained herein demonstrate that the Decision is a "downzone" that drastically reduces the worst case scenario of traffic that could be generated on the subject property, thereby not significantly affecting an existing or planned transportation system.

b. Discussion.

i. The City was under no obligation to adopt findings of compliance with Goal 12 or the TPR, so the lack of TPR findings is not a basis for reversal or remand.

As a legislative decision, the City was under no obligation to adopt findings of compliance with Goal 12 or the TPR. *Opus Dev. Corporation v. City of Eugene*, 28 Or LUBA 670, n.9 (1995)("We have consistently held that there is no statutory or administrative law requirement that all legislative decisions be supported by findings."); *see also*, *Home Depot, U.S.A., Inc. v. City of Portland*, 37 Or LUBA 870, 875 (2000); *aff'd*, 169 Or App 599, 10 P3d 316; rev. den. 331 Or 538, 19 P3d 355 (2001). In *Home Depot*, the Court of Appeals expressly agreed with LUBA that no findings are required in legislative matters. *Id.* at 169 Or App 603. ("[W]e note in particular our agreement with [LUBA's] observation that 'there is no statutory requirement that legislative decisions be supported by findings demonstrating compliance with applicable legal criteria.'").

Obviously, the City's decision must be consistent with Goal 12 and the TPR, but the City was under no obligation to adopt findings in the context of this legislative action. Because Petitioner has not alleged that the City's decision violates any substantive provision of Goal 12 or the TPR, and because the City was under no obligation to adopt findings, Petitioner has provided no basis for reversal or remand. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993). In *Oregon City Leasing*, the petitioner argued that the county failed to adopt

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findings demonstrating that the challenged legislative ordinances complied with the Statewide Planning Goals and the local comprehensive plan. As is the case here, the petitioners in *Oregon City Leasing*, did not argue that the challenged decision failed to comply with any particular substantive goal or plan provision. In *Oregon City Leasing*, LUBA held that, "absent such allegations that a legislative decision violates particular legal standards, a local government's failure to adopt findings in support of that legislative decision addressing the goals and county comprehensive plan is not, of itself, a basis for reversal or remand of the decision."

Petitioner has not argued that Ordinance 5935 violates any particular substantive provision of Goal 12 or the TPR. In particular, Petitioner does not argue that the adoption of Ordinance 5935 would significantly affect a transportation facility in violation of OAR 660-012-0060. Because Petitioner has alleged only that the City failed to adopt findings related to Goal 12 and the TPR, under *Oregon City Leasing*, the Petitioner has provided no basis for reversal or remand of the City's decision.

Petitioner cites *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 35, 220 P3d 445 (2009) for the proposition that the City was required to adopt findings demonstrating compliance with Goal 12 and the TPR. PFR at 22-23. There is no indication in *Willamette Oaks* that the Court of Appeals intended to overturn long-established precedent that findings are not required in the context of a legislative land use decision. *See, e.g.* , *Home Depot U.S.A. v. City of Portland*, 169 Or App at 599, 10 P3d at 316. In *Willamette Oaks*, the City adopted a quasi-judicial zone change and made an affirmative finding that entirely deferred TPR compliance to a later quasi-judicial development application. The Court of Appeals concluded that the TPR requires an evaluation of the TPR prior to the zone change, not after. While it is clear that, after *Willamette Oaks*, local jurisdictions can no longer defer compliance with Goal 12 or the TPR, *Willamette Oaks* does not set a new bright-line rule that requires local governments to adopt TPR findings in the context of a legislative zone change. Rather, *Willamette Oaks* merely prohibits local governments from deferring TPR analysis to a later phase of development.

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In the legislative context, where no findings are required, "the decision may still be upheld if the local government can demonstrate through argument in its brief and citations to the record that the decision is consistent with the applicable legal criteria." *Home Depot*, 37 Or LUBA 875-876. Thus, to the extent that LUBA elects to overturn its holding in *Oregon City Leasing*, which requires petitioners to specifically identify the legal standard alleged to be violated, LUBA should nonetheless affirm the City's decision in this case because the record conclusively demonstrates that the adoption of Ordinance 5935 will not significantly affect a transportation facility in violation of Goal 12 or OAR 660-012-0060.

ii. The AU and ASCO down-zoning will not significantly affect a transportation facility in violation of Goal 12 or OAR 660-012-0060.

While Petitioner is correct that the City's decision does not include specific TPR findings in response to OAR 660-012-0060, the City's decision is nonetheless consistent with Goal 12 and the TPR. The primary reason that the City did not focus on Goal 12 or the TPR is because Ordinance 5935 represents a significant down-zone of the property that will significantly reduce the potential trips generated on the subject property, and no participant in the extensive legislative process raised a single concern about vehicular traffic. As a result, the City's findings regarding Goal 12 correctly indicate that the adoption of Ordinance 5935 is not related to transportation facilities. R. at 44. As detailed below, prior to the map amendment, approximately 440 acres could have been completely built out with drive-thru restaurants, banks and theaters, and 215 acres could have been built out with freestanding banks, restaurants and retail uses. Under the AU zone, which applies only to Port owned property that is operated as the Hillsboro Airport, the same acreage can only be developed with land-intensive, structurally sparse and low traffic generating uses. Consequently, due to the reduction in permitted uses, and the associated reduction in potential vehicular trips, the amendments to the zoning map do not significantly affect an existing or planned transportation facility. OAR 660-012-0060(1). The City's decision, therefore, is consistent with Goal 12 and the TPR.

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The affect of the application of AU and ASCO zones is that the encumbered properties have been down-zoned, meaning that overall, fewer uses are permitted now than were permitted under the previous zones (Industrial ("M-2") and Industrial Park ("M-P")). A copy of those zones and their criteria is attached as Appendix F. As relevant to the TPR, the uses that are no long allowed or are significantly limited are some of the highest traffic generating uses in the City, and the uses that are now permitted outright are relatively low traffic generators. The upper limits on how intense aviation activities may become at the Hillsboro Airport (the "Airport") are set by the comprehensive plan, which is unchanged by the zoning map amendment. As a result, the AU and ASCO down-zone significantly reduces the transportation impacts of the reasonable worst case development scenario, when compared to what was permitted under the previous zones. All of these factors support the finding and conclusion that the amendments to the zoning map do not significantly affect an existing or planned transportation facility. OAR 660-012-0060(1).

The ASCO zone is an overlay zone that applies to properties within 6,000 feet of the Airport. The ASCO does not allow any new uses. Instead, the overlay zone restricts uses that would otherwise be allowed in the base zone, such as limiting future residential density increases and restricting new noise sensitive uses such as day care facilities, commercial senior care facilities, schools and hospitals (which also happen to be intensive traffic generators). Section 135B(G). R. at 61. The net affect on the transportation system is potential vehicle trips are significantly reduced from the pre-ASCO condition, so transportation facilities are improved.

The AU zone is applied only to the Hillsboro Airport, which is property owned by the Port of Portland that is in use or proposed for use for airport or aviation-related activities. Prior to the rezone, a majority of the Airport was zoned M-2 (approximately 440 acres), and approximately 215 acres of the Airport was zoned M-P.[17] The City of Hillsboro's zones "nest,"

[17] While all 660 acres of the "inside the fence" (i.e., property used or reserved for aviation uses) Port of Portland owned property at the Hillsboro Airport was rezoned to AU, the Port owns other property in the area that is encumbered by the ASCO zone, but retained the pre-existing M-P Industrial Park or C-1 Commercial base zones.

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meaning that more inclusive zones allow all uses that are allowed in identified more restrictive zones plus a list of additional uses that are permitted outright. The M-2 zone is one of the City's most inclusive zones. In addition to the uses that are specifically listed as being permitted in the zone, the M-2 zone also allows all uses that are allowed in the General Commercial C-1 zone (Section 60(1)) and all of the uses permitted in the Neighborhood Commercial C-4 zone (Section 54(1)). As a result, the 440 acres of previously zoned M-2 property at the Airport could have been developed with extremely high traffic generating uses such as auditoriums, banks, drive-in restaurants, theaters, and retail centers (so long as one building or business does not exceed 60,000 sf, a "major retail use," see Section 54 and 56(4)), and other high traffic generating uses such as grocery stores, general retail, restaurants, offices (Section 54) and wholesale distributors and outlets (Section 60). Similarly, the 215 acres of previously zoned M-P property could have been developed with high traffic generating uses such as freestanding banks, freestanding restaurants, and offices (including medical offices) (Section 65). All of the proceeding high traffic generating uses are prohibited or significantly limited in the AU zone.[18] Table 1 in Appendix G compares all of the uses that were allowed in the M-2 and M-P zones to those allowed in the AU zone.[19]

When comparing the traffic impacts of the new zone to the previous zones, and only the uses that are now prohibited or limited are considered, it is obvious that under the AU zoning there is a significant reduction in the "worst case scenario" of traffic that could be generated from the approximately 655 acre property. But, of course the TPR also requires an analysis of new uses that are permitted under the AU zoning. In Appendix G, Table 2 compares the uses allowed in the AU zone to what was permitted in the M-2 and M-P zones. As depicted in Table 2 and described below, when the uses that are permitted under the AU zone are compared to the

[18] For example, under the AU zone a McDonalds may locate inside the terminal to support and serve Airport users (Section 135(A)(E)(13) (R. at 49), a freestanding drive-thru McDonalds is prohibited.

[19] The Tables in the appendix are not new evidence. The list of uses is found in the HZO and the comparison constitutes legal analysis and findings, which are permitted to made in the brief of a legislative decision.

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uses permitted in the M-2 and M-P zones, the resulting reduction in potential trips demonstrates that the zoning map amendments do not significantly affect an existing or planned transportation facility.

Most of the aviation-related uses that are permitted in the AU zone, such as hangars, classrooms for aviation instruction ground training, and maintenance and service facilities for aircraft were permitted outright in the M-2 zone. The City interprets its code to not distinguish between aviation-related industrial or commercial uses and other industrial or commercial uses. For example, "manufacturing, repairing, compounding, processing and storage," and their accessory uses are permitted uses in the M-2 zone. Section 60(2). It is immaterial if the equipment being repaired is a tractor, bulldozer or aircraft, or if the accessory building to store the equipment that is being repaired is called a garage or hangar. Similarly, it is immaterial if the permitted "business, trade or technical school" (Section 54(1)(v)) is instructing students in air conditioner repair or aviation/helicopter ground school.

The M-2 and M-P zones do not permit outright aviation activities such as takeoffs and landings, air passenger and air freight services. The Airport was a lawful existing use before it was annexed into the City and City zoning was applied, so the components of the Airport's operation that were not allowed outright under the M-2 and M-P zones were nonconforming uses. Nonconforming uses are allowed to continue, subject to limitations related to enlargement, expansion, discontinuance or destruction of the nonconforming use, in all of Hillsboro's zoning districts. Sections 98, 99, 102 and 104.

The uses that were previously allowed to continue as nonconforming uses but are now allowed outright under the AU zone are the actual aviation use (i.e., takeoffs and landings) associated with air passenger service, air freight services, emergency medical flight services, law enforcement and firefighting activities, search and rescue operations, flight instruction, aircraft rental that is not associated with a school (if associated with a school, then aircraft rental is allowed outright (Section 54(1)(v)), and agricultural uses. Section 135(A)(E)(1)-(6), (8) and

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(10), R. at 48 – 50 and *see* Table 2. The only new use that is permitted outright in the AU zone that was not previously allowed and is not a nonconforming use is crop dusting. Section 135(A)(E)(10), R. at 49 and *see* Table 2. Of all of these uses, the only use in the AU zone that Petitioner specifically challenges as potentially affecting transportation facilities is "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." Section 135(A)(E)(2). R. at 48. PFR at 23. Petitioner then warns that the 655 acre Hillsboro Airport could become as intensive as the 3,300 acre Portland International Airport without first demonstrating compliance with the TPR (Id.); a hyperbolic statement that is contrary to the uses and intensity of aviation activities allowed in the previous and new zones and the comprehensive plan.

The Hillsboro Airport is a general aviation reliever facility, which is defined in the comprehensive plan as "an airport designed to normally service aircraft up to the executive jet level only and not intended for use by air carrier type equipment." Comprehensive Plan Section 13(III)(H)(1)(a). The comprehensive plan limits the maximum intensity of aviation use at the Hillsboro Airport by requiring that the Airport "shall be maintained and used as, but not expanded beyond the capability of, a 'general aviation reliever facility.'" Comprehensive Plan Section 13(III)(H)(2)(a). This limitation in the comprehensive plan is not altered by the zoning map amendment subject to this appeal. Within the confines of not allowing the Airport to expand beyond a general aviation reliever facility, the previous M-2 and M-P zones would have permitted the aviation and aviation-related uses at the Airport to intensify to the same degree that is allowed under the AU zone.

Changing from one type of flight to another (i.e., cargo to executive jet) was not regulated by the M-2 or M-P zones. As noted above, the actual aircraft takeoffs and landings were nonconforming uses under the M-2 and M-P zones. The City's nonconforming use regulations limit the enlargement or expansion of floor area or land area, but there is no limitation on the intensification of a use without expanding a physical footprint. Section 99.

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Therefore, whether or not the aircraft that were taking off and landing were filled with Intel executives or widgets, or if there are 10 flights a day or 100 are irrelevant under the M-2 and M-P zones, and nonconforming use regulations. If the change in flight type or frequency required a physical change to the structures or facilities at the Airport, then those changes would have been permitted outright in the M-2 zone. For example, a new terminal would be approved as a governmental structure (Section 54(13)), additional aircraft storage and maintenance facilities would be approved as a repairing and storage use (Section 60(2)) and a new parking garage would be approved as a garage (Section 54(12)).

Under the previous zoning, there was no upper growth threshold for the Airport; that threshold is imposed by the comprehensive plan, which is not changed by the rezone. Given the State of Oregon's policy to "encourage and support the continued operation and vitality of Oregon's airports" and the City's policy that it "shall support implementation of the current Hillsboro Airport Master Plan," there is no reason to believe that the City would not have continued to allow the Hillsboro Airport to grow as needed and operate in its current location indefinitely under the previous zoning. ORS 836.600 and OAR 660-013, Comprehensive Plan Section 13(VII)(V). The recognition in the AU zone that the airport operations may change in the future simply restates the existing condition under the M-2 and M-P zones; it does not increase the potential impacts on the existing or planned transportation system beyond what was permitted under the previous zones. The amendments to the zoning map do not significantly affect an existing or planned transportation facility.

When comparing traffic impacts of the new zone to the previous zones, it is obvious that the AU and ASCO downzone results in a significant reduction in the "worst case scenario" of traffic that could be generated from the approximately 655 acre property. One does not need reams of a traffic engineer's synchro worksheets to understand intuitively that the complete build out of 655 acres with drive-in restaurants, retail centers, freestanding banks, freestanding restaurants, general offices and theaters (the worst case scenarios under the M-2 and M-P zones)

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generates significantly more vehicular traffic than building out the same acreage with land-intensive, structurally sparse and low traffic generating uses such as those permitted in the AU zone. The amendments to the zoning map do not significantly affect an existing or planned transportation facility. OAR 660-012-0060(1).

c. Conclusion.

For these reasons, the Petitioner Third Assignment of Error must be denied.

VI. CONCLUSION.

For the reasons discussed herein, the Respondents respectfully request the Board to affirm the Decision.

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CERTIFICATE OF FILING

I certify that on May 19, 2010, I filed the original and four (4) copies of the JOINT RESPONDENTS' BRIEF with the Land Use Board of Appeals, Public Utility Commission Building, 550 Capitol Street NE, Ste. 235, Salem, OR 97301-2552, on May 19, 2010, by first-class mail, postage prepaid to the Board at the above address.

CERTIFICATE OF SERVICE

I further certify that on May 19, 2010, I served a true and correct copy of the JOINT RESPONDENTS' BRIEF on the persons listed below by first class mail, postage prepaid:

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