

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 No. 2010-011

PETITION FOR REVIEW

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1 **I. STANDING**

2 As this proceeding involves the amendment of a land use regulation, ORS 197.830(2) and
3 ORS 197.620(1) establish the requirements for standing to bring a LUBA appeal. The Petitioner
4 must have (1) filed a timely notice of intent to appeal under ORS 197.830(1), and (2) participated
5 in the proceedings below. *Century Properties LLC v. City of Corvallis*, 207 Or App 8, 139 P3d
6 990 (2006). The final order on the proceedings was issued on January 19, 2010, and Petitioner’s
7 Notice of Intent to Appeal was filed on February 8, 2010, within 21 days of the final decision. In
8 addition, Petitioner participated in the proceedings both orally and in writing. Rec pp 102, 245,
9 279, and elsewhere. Thus, Petitioner has standing.

10 **II. STATEMENT OF THE CASE**

11 **A. Nature of the Decision and Relief Sought.**

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

17 **B. Summary of Argument.**

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

24 The City’s application of the recently created zones also improperly delegate legislative
25 authority to other bodies, including the Port of Portland. The unlawful delegation includes the
26

1 definition of “hazardous substances,” as well as the uses allowed at the Hillsboro Airport and the
2 mitigation standards applicable to development at the Hillsboro Airport.

3 Finally, the City’s decision ignored the applicable law and failed to comply with Goal 12
4 and the Transportation Planning Rule, because the City failed to determine if the newly created
5 zones would have a “significant effect” on the City’s transportation system.

6 **C. Summary of Material Facts.**

7 In 2005 the “Hillsboro Airport Compatibility Study” recommended the adoption of new
8 zones for the Hillsboro Airport, which is owned and operated by Intervenor-Respondent the Port
9 of Portland (“Intervenor” or the “Port of Portland”). Rec p 33. In the fall of 2009, the City
10 began its implementation of that study by adopting Ordinances 5925 (Rec p 33) and 5926 (Rec p
11 45), which amended the Hillsboro Comprehensive Plan and Zoning Ordinance by creating new
12 zones - the AU Airport Use Zone and the ASCO Airport Safety and Compatibility Overlay Zone.
13 Rec p 19. However, the City did not apply the newly created zones to any property at that time.

14 Thereafter, the City began the process of applying these newly created zones to various
15 areas within the City. All properties owned by the Intervenor that are in use or proposed for
16 aviation related uses were zoned AU. The ASCO Zone was applied to all properties extending
17 approximately 6,000 feet from the Hillsboro airport runways. In total, the new zones were
18 applied to approximately 7100 properties. Rec pp 19, 91.

19 The AU Zone allows a variety of uses, specifically airport related uses as listed in HZO
20 Section 135A(E), including a number of new uses that were not previously allowed at the
21 Hillsboro Airport. Most significantly, it allows “air passenger and air freight services and
22 facilities that are consistent with levels identified in the most current, adopted Master Plan for the
23 Hillsboro Airport.” Rec p 48. In addition, the AU zone requires all new uses and activities to
24 “comply with all currently applicable Port of Portland standards.” Rec p 51.

25 The ASCO Zone is an overlay zone that applies one of includes six Airport Compatibility
26 Zones of varying requirements to properties depending on proximity and relationship to the

1 Airport. Each of the Airport Compatibility Zones (numbered 1 – 6) limits the uses permitted on
2 properties surrounding the Hillsboro Airport and, in addition, imposes requirements when new
3 development is undertaken. Rec p 23. These requirements include the obligation to dedicate an
4 “Avigation Easement” to the Port of Portland upon development.

5 The City held a number of public hearings to consider this request. Petitioner testified in
6 opposition. Rec pp 102, 245, 279. On January 19, 2010, the City Council adopted Ordinance
7 5935 applying the AU and ASCO zones as proposed. Rec p 19. This appeal followed.

8 **III. STATEMENT OF JURISDICTION**

9 Respondent’s final decision involves amending the City of Hillsboro’s Official Zoning
10 Map, thereby amending the City’s land use regulations, by applying the new AU Zone and
11 ASCO Zone for the first time. Accordingly, the City’s adoption of the ordinance is a land use
12 decision as that term is defined under ORS 197.015(10).

13 **IV. STANDARD OF REVIEW**

14 Under ORS 197.835(9)(a)(E), LUBA must reverse or remand the City’s decision if it is
15 unconstitutional. As discussed below, the City’s decision is unconstitutional because it contains
16 a requirement for developing properties to provide an avigation easement to the Port of Portland.
17 In addition, the City’s decision was unconstitutional because it prospectively delegates decision
18 making to the Port of Portland in contravention of the Oregon Constitution. Therefore, LUBA
19 must reverse or remand the County’s decision.

20 Under ORS 197.835(9)(a)(C) and (D), LUBA must also reverse or remand the City’s
21 decision if it improperly construed the law or made a decision unsupported by substantial
22 evidence. The City’s decision amends its comprehensive plan without complying with
23 Transportation Planning Rule (“TPR”) (OAR Division 660-012) and Statewide Planning Goal
24 12. Although the City states that the decision does not implicate Goal 12, this conclusion
25 represents a misunderstanding of the analysis and findings required by Goal 12. Because the
26 challenged decision involves application of state law, LUBA is not required to give the City’s

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

7 V. ASSIGNMENTS OF ERROR

8 **FIRST ASSIGNMENT OF ERROR – The City Erred in Adopting a** 9 **Requirement for Property Owners to Provide an Avigation Easement to a** 10 **Separate Entity as a Requirement of Developing Property.**

11 A. Introduction to the HZO Section 135B Avigation Easement 12 Requirements

13 HZO Sections 135B(G)(2)(e), 135B(G)(3)(e), 135B(G)(4)(e), 135B(G)(5)(e) and
14 135B(G)(6)(c) ¹ all require the City to condition land use or limited land use approvals in each of
15 the compatibility zones to provide an “Avigation Easement” to the Port of Portland. Thus, in
16 order to develop most of the approximately 7,100 properties affected by these new overlay
17 zones, the property owner will have to cede certain property rights as set forth in the ordinance.

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

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

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

24 This provision explicitly applies only in ASCO Compatibility Zone 1; however, the provisions of ASCO
25 Compatibility Zones 2 – 5 each contain identical language imposing the same requirement within those
26 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.

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

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

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

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

25 In *Griggs v. Allegheny County*, 369 US 84, 82 SCt 531, 7 L.Ed.2d 585 (1962), the US
26 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

1 feet. *Matson v. United States*, 171 F Supp 283, 145 Ct.Cl. 225, (1959), held that
2 the plaintiff should recover for a taking, even though the court recognized that the
3 taking was accomplished in what today would be navigable airspace. *Griggs v.*
4 *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).

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

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

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

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

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

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

21 Perhaps even more troubling, the HZO Section 135B Easement Requirements do not
22 protect the neighboring property owner (the Hillsboro Airport) from the effects of the developing
23 property owner, who is now subject to the avigation easement, nor does it attempt to mitigate
24 harm resulting from the developing property. Instead, the HZO Section 135B Easement
25

26 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.

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

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

9 **B. The HZO Section 135B Easement Requirements Violate the**
10 **Constitutional Ban on Taking Private Property without Just**
11 **Compensation.**

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

14 “nor shall private property be taken for public use, without just compensation.”

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

16 “Property shall not be taken for public use, nor the particular services of any man
17 be demanded, without just compensation.”

18 The U.S. Supreme Court cases of *Nollan v. California Coastal Com’n*, 483 US 825
19 (1987), and *Dolan v. City of Tigard*, 512 US 374 (1994), provide the general framework
20 regarding when the imposition of conditions of approval violate the takings clause of the United
21 States Constitution. *Nollan* involved an owner of ocean front property who sought to build a
22 new home. The owner was required to obtain a permit from the California Coastal Commission
23 (“CCC”). The CCC imposed a condition on the property owner’s permit that required him to
24 provide an easement across their beachfront property. The CCC required the condition because
25 of the Commission’s conclusion that a new home would block views of the ocean. The US
26 Supreme Court concluded that the condition violated the Fifth Amendment to the U.S.
Constitution by taking property without providing just compensation.

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

4 “repeatedly held that, as to property reserved by its owner for private use ‘the
5 right to exclude [others is] ‘one of the most essential sticks in the bundle of rights
6 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)).

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

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

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

18 “The Commission may well be right that it is a good idea, but that does not
19 establish that the Nollans (and other coastal residents) alone can be compelled to
20 contribute to its realization. Rather, California is free to advance its
21 ‘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.

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

25 _____
26 ³ It is not at all clear that the aviation 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.

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

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

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

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

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

11
12 C. **The HZO Section 135B Easement Requirements Violate the Adjoining
Property Owners Substantive Due Process Rights.**

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

18 "[t]he touchstone of due process is protection of the individual against arbitrary
19 action of government,' whether the fault lies in a denial of fundamental procedural
20 fairness, or in the exercise of power without any reasonable justification in the
21 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).

22 The Court has also noted that,

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

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

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

15 "Fundamental rights" are rights that are generally considered to be objectively "deeply
16 rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)
17 (plurality opinion). See also, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in
18 the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the
19 concept of ordered liberty," such that "neither liberty nor justice would exist if they were
20 sacrificed," *Palko v. Connecticut*, 302 US 319, 325, 326 (1937). The right to property is such a
21 right; it is explicitly listed in both the Fifth and Fourteenth Amendments as protected by the
22 Constitutional right to due process. See *Lynch v. Household Finance Corp.* 405 US 538, 553, 92
23 SCt 1113 (1972) (Holding that rights in property are long recognized basic civil rights); J. Locke,
24 *Of Civil Government* 82-85 (1924); J. Adams, *A Defense of the Constitutions of Government of*
25 *the United States of America*, in F. Coker, *Democracy, Liberty, and Property* 121-132 (1942); 1
26 *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):

1 “[T]he City would no doubt be forbidden from taking petitioners’ land for the
2 purpose of conferring a private benefit on a particular private party. See *Midkiff*,
3 467 U.S., at 245 (“A purely private taking could not withstand the scrutiny of the
4 public use requirement; it would serve no legitimate purpose of government and
5 would thus be void”); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896).
6 Nor would the City be allowed to take property under the mere pretext of a public
7 purpose, when its actual purpose was to bestow a private benefit.” *Kelo* at 477-
8 478.

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

18 Even if the right to property is not a “fundamental right,” the imposition of the easement
19 requirement on the surrounding property owners is still arbitrary and bears no reasonable
20 relationship to a legitimate governmental interest. In the first instance, the easement requirement
21 is not applied to all property owners, but only upon development of property. HZO Section
22 135B Easement Requirements. The purpose of land use conditions of approval are to ensure that
23 the City’s public facilities are adequate to accommodate the proposed development and to ensure
24 that any impacts that the developing property causes are properly mitigated. However, as
25 discussed above, the avigation easement is not designed to mitigate impacts associated with the
26 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

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

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

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

17
18 **D. The HZO Section 135B Easement Requirements Results in the Imposition of Unconstitutional Conditions.**

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

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

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

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

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

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

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

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

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

9 The Court of Appeals has recognized that Article I, section 20 is “textually and
10 historically a leveling provision aimed at prohibiting laws that confer special benefits on an
11 aristocratic or quasi-aristocratic ‘class.’” *State v. Borowski*, 231 Or App 511, 220 P3d 100
12 (2009). The Oregon courts have developed a framework for analyzing arguments under the
13 Privileges and Immunities clause that first requires a determination of whether there is a “true
14 class,” i.e., a class that is not defined by the challenged law, but by a characteristic apart from the
15 law. *Shineovich v. Shineovich*, 229 Or App 670, 214 P3d 29 (2009): In this case, the
16 characteristic is that all of the affected individuals own property within 6000 feet of the Hillsboro
17 Airport. That distance characteristic exists and remains whether the amendment to the HZO is
18 overturned or not – in other words, the affected individuals are members of a “true class.”

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

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

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

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

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

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

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

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

25 Although the *Advocates for Effective Regulation* involved consideration of a voter
26 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

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

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

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

12 HZO Section 135(A)(D)(6) further defines “Environmental Laws” as follows:

13 “any and all federal, state and local statutes, regulations, rules, permit terms and
14 ordinances *now or hereafter in effect, as the same may be amended from time to*
15 *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.)

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

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

23 “K. Compliance with Port of Portland Requirements.

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

26 “1. Hillsboro Airport Standards for Development;

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

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

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

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

1 would be able to change as the airport use intensifies. Rec pp 233 and 246 (discussing the
2 recommended construction of the third runway, for example). However laudable that may be,
3 the Oregon Constitution prevents the City from delegating its authority in that way. The City
4 can not prospectively tie its regulations to the actions of the Port of Portland rather than the City
5 of Hillsboro in the standards documents listed in HZO Section 135A(K) as those documents are
6 adopted⁴ and modified.

7 The purpose of the review for improper prospective delegation is to provide adequate
8 safeguards to property owners affected by an administrative action. *Warren v. Marion County*,
9 222 Or 307, 314, 353 P2d 257 (1960). The affected property owners may include not just the
10 property owner subject to the provision, but the owner's neighbors who would also be affected
11 should the criteria change. In prospectively delegating the compliance of uses and activities
12 occurring within the City of Hillsboro to the Port of Portland, property owners are not provided
13 any safeguards against improper administrative action by the Port of Portland in adopting those
14 provisions or reviewing those determinations. In contrast, the *Warren* case offered an appeals
15 process for a building inspector's improper application of building codes. Here, there is no
16 method in the record that would allow a property owner to appeal the Port of Portland's review
17 of its adoption and application of the standards and criteria affecting a particular use in the
18 future. Thus HZO Section 135A(K) constitutes improper prospective delegation. Therefore,
19 LUBA must remand the Ordinance in this case.

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

25 _____
26 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."

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

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

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

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

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

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

1 Rec p 44. However, under Goal 12, the Transportation Planning Rule (“TPR”) as set forth in
2 OAR 660-012-0060, requires the City to make a finding of whether a zone change will have a
3 significant effect on a transportation facility. The record contains no findings in compliance with
4 the TPR, therefore, the City could not lawfully approve the zone changes.

5 The City acknowledged early in its planning process (when the Planning & Zoning Board
6 first recommended approval of zone changes to apply the AU and ASCO Zones to the affected
7 properties) that the City did not have any zoning that would permit an airport. Rec p 100-101.
8 Under the challenged zone change to AU and ASCO, the airport is a new use that must be
9 analyzed under the TPR because an airport use could have a significant effect on the City’s
10 transportation system.

11 The City’s decision to approve Ordinance 5935 is not adequately supported by the
12 findings quoted above because the City did not identify the relevant approval criteria in Goal 12
13 and the TPR. In *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 35, ___ P3d ___
14 (2009), the Court of Appeals ruled that, in a zone change process, the TPR requires that a local
15 government

16 “[d]emonstrate that an evaluation of significant effect is intended to be performed
17 prior to a contemplated amendment.” (Emphasis in original).

18 Further, the Court stated in no uncertain terms that,

19 “[o]nly after the local government makes a determination of whether an
20 amendment will have a significant effect on a transportation facility can it
21 approve the amendment and either put in place measures to mitigate the impact
22 pursuant to OAR 660-012-0060(2) or make a determination pursuant to OAR
23 660-012-0060(3) that approval is permissible regardless of that effect.”

24 *Id.* at 36. Earlier LUBA decisions also support this holding. For example, in *Oregon*
25 *Department of Transportation v. City of Madras*, 55 Or LUBA 347, 348 (2007), an annexation
26 and the related rezonings were alleged to have a significant effect on US Highway 97, a
transportation facility within the city’s Transportation System Plan (TSP). However, the City
failed to make any finding regarding whether the proposed amendment would cause a significant

1 effect under the TPR and LUBA found that the decision unequivocally required remand. *Id.*
2 Similarly, Hillsboro has failed to make a significant effect finding prior to adoption of Ordinance
3 5935 and its passage of the ordinance violated Goal 12 and the TPR.

4 The facilities that are identified in the City's TSP are intended to be adequate to ensure
5 that the desired service levels will be maintained throughout the planning period. *Craig Realty*
6 *Group-Woodburn, LLC v. City of Woodburn*, 39 Or LUBA 384, 390 (2001). In *Craig Realty*, the
7 City of Woodburn took the position that expansion of the outlet mall through annexation of
8 additional acreage would not currently affect transportation facilities and LUBA found error in
9 this approach. *Id.*

10 It appears that the City of Hillsboro is taking a approach similar to the approach of the
11 City of Woodburn by deciding not to analyze the effects of the newly allowed uses under the
12 new zoning because the present level of use on the properties subject to the new zoning do not
13 currently affect transportation facilities. However, the City is ignoring the critical fact that the
14 Port of Portland is charged with creating the Hillsboro Airport Master Plan and could decide to
15 intensify the use at any time. Rec p 643. Nothing in the City's Zoning Ordinance prevents
16 changes to the Hillsboro Airport that would allow it to become as intensive as the Portland
17 International Airport without first demonstrating compliance with the TPR. Given this potential
18 intensification, the zone change will allow significant effects on the City's identified
19 transportation facilities with no further action or review on the part of the City. Because of those
20 effects, the City of Hillsboro is required to analyze the zone change under the TPR over the
21 transportation planning period because the levels of services of identified transportation facilities
22 in the TSP could be rendered inadequate by a series of amendments that, viewed individually
23 might not have the immediate effect of making any existing facility fail. *Craig Realty Group-*
24 *Woodburn, LLC v. City of Woodburn*, 39 Or LUBA 384, 390 (2001). But, as LUBA explained,
25 requiring that the questions posed by OAR 660-012-0060(2) be asked and answered for the TSP
26 planning period avoids that result, and is consistent with the language of the rule. *Id.*

1 In failing to make any findings whatsoever related to the zone change's compliance with
2 the Transportation Planning Rule under OAR 660-012-0060, the City's decision must be
3 remanded for findings in compliance with Goal 12.

4 **VI. CONCLUSION**

5 For all of the reasons set forth above, LUBA should reverse or remand the City's
6 decision.

7 Dated: April 28, 2010.

8 Respectfully submitted,

9 GARVEY SCHUBERT BARER

10
11 By: 

12 William K. Kabeiseman, OSB No. 944920

13 Jennifer M. Bragar, OSB No. 091865

14 *Of Attorneys for Petitioner*

APPENDIX A

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

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.

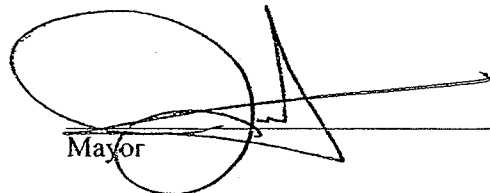
Section 4. Except as amended, Zoning Ordinance No. 1945, as amended, shall remain in full force and effect.

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

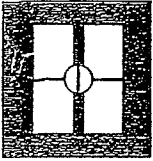
First approval of the Council on this 5th day of January 2010.

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: Dolly Werner
City Recorder



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

- 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 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 Airport Use Zone Boundaries

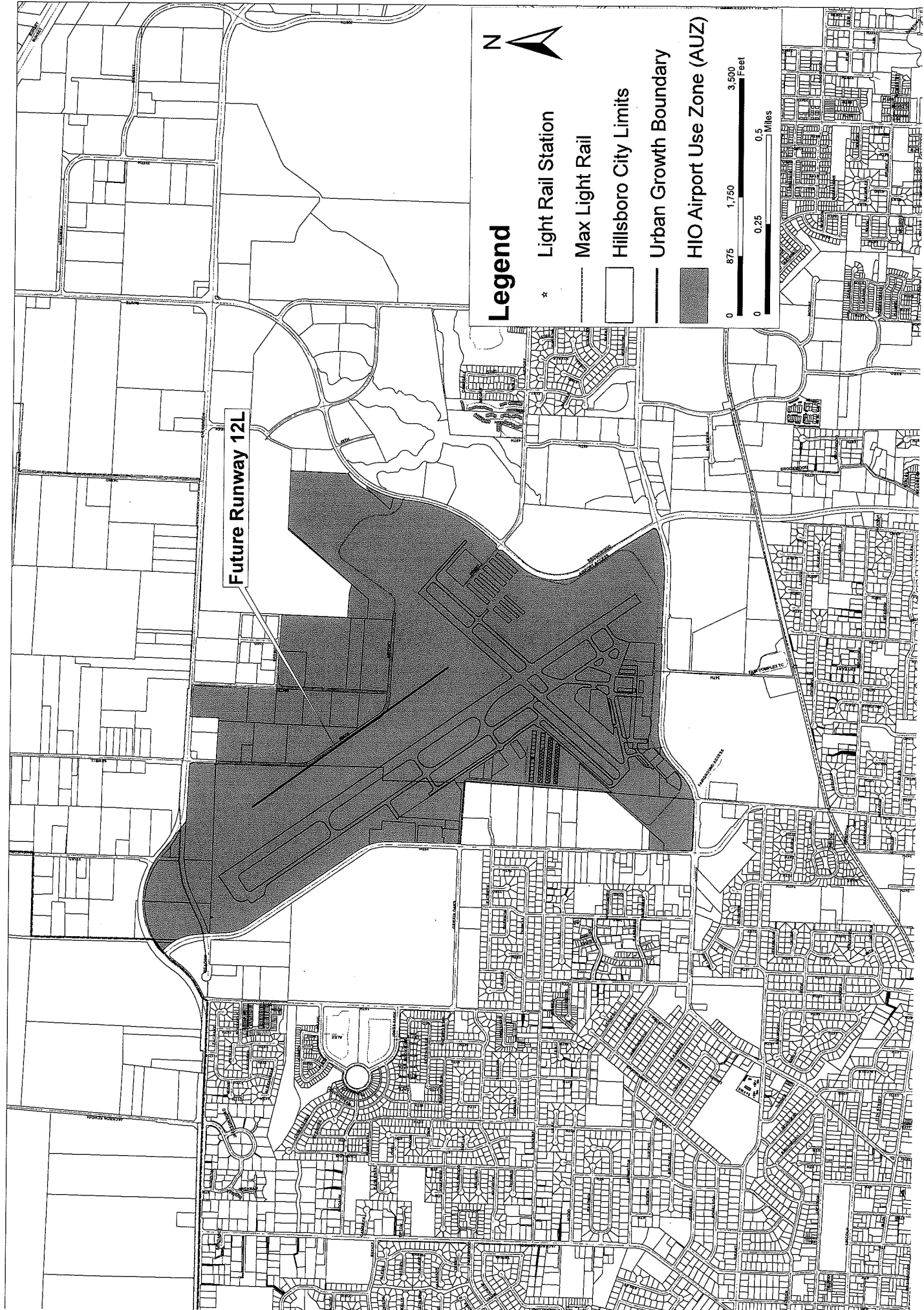
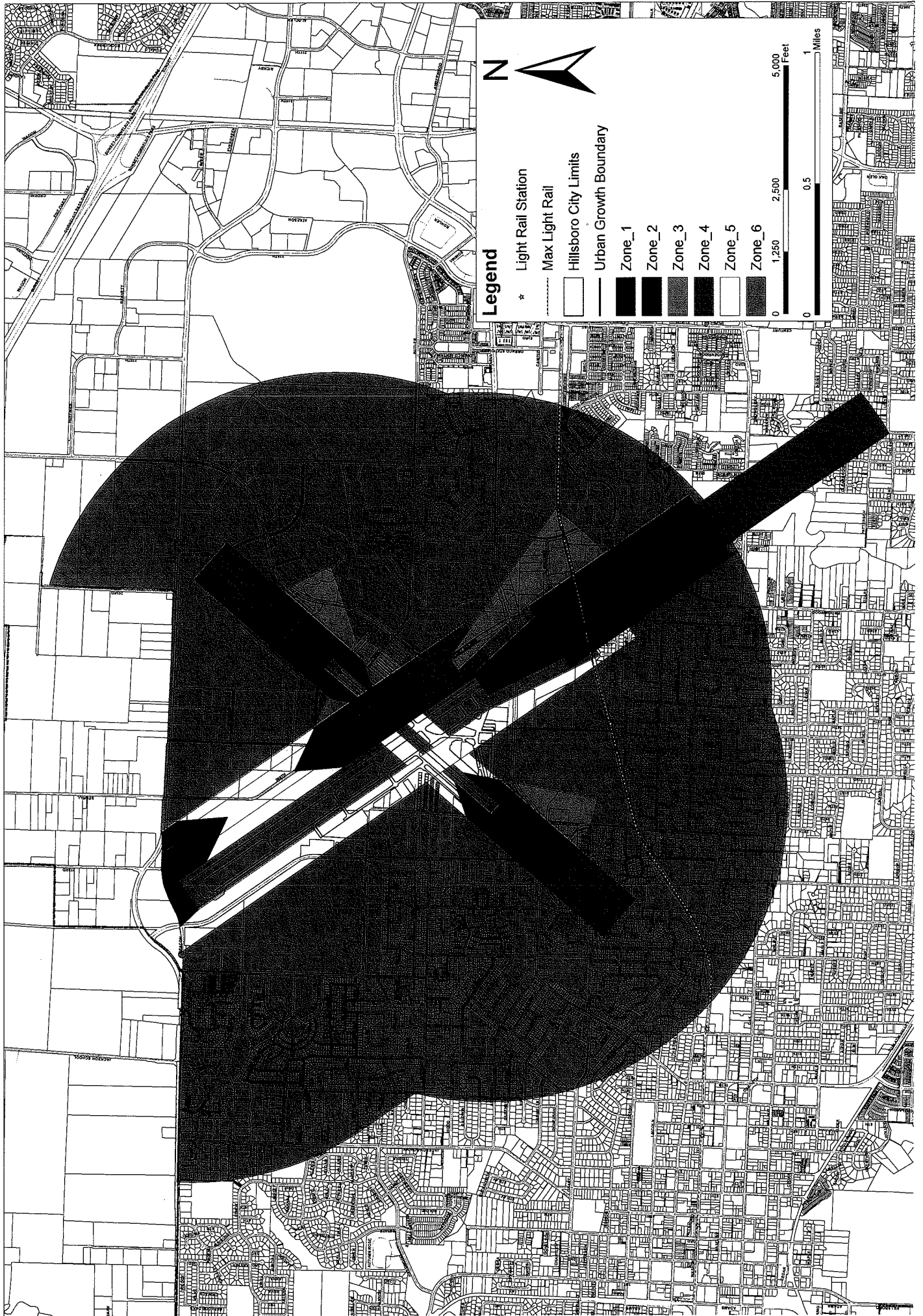


Exhibit B: HZO Figure 135B 4 ASCO Zone Boundaries



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

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.*

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,

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 Compatibility 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

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.*

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

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 basins, 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.*

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.*

(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 aviation 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 aviation 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 aviation 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.

(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 aviation 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.

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:

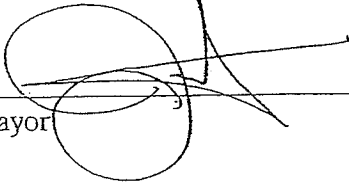
Attachment I:	Figure 135 B 1 Hillsboro Airport Runways
Attachment II:	Figure 135 B2 Hillsboro Airport Imaginary Surfaces
Attachment III:	Figure 135 B 3 Airport Noise Impact Contour Boundaries
Attachment IV:	Figure 135 B 4 Airport Compatibility Zones

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

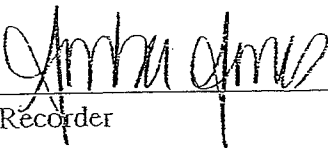
First approval of the Council on this 18 day of September, 2009.

Second approval of the Council on this 6 day of October, 2009.

Approved by the Mayor this 6 day of October, 2009.



Mayor

ATTEST: 

City Recorder

1 **CERTIFICATE OF SERVICE**

2 I certify that on the date indicated below, I filed the original and four copies of this
3 PETITION FOR REVIEW with the:

4 Land Use Board of Appeals
5 Public Utilities Building
6 550 Capitol Street, N.E., Suite 235
7 Salem, Oregon 97301-2552


8 by first-class mail, postage prepaid. On the same date I served a true and correct copy of the
9 same, by first-class mail, postage prepaid, on the following parties:

10 Pam Beery
11 David Doughman
12 Beery, Elsner & Hammond, LLP
13 Suite 380
14 1750 SW Harbor Way
15 Portland, OR 97201-5164
16 *Of Attorneys for Respondent*

Misti K. Johnson
The Port of Portland
7000 N.E. Airport Way, 3300
Portland, Oregon 97218
Of Attorneys for Intervenor-Respondent

17 DATED this 28th day of April, 2010.

18 GARVEY SCHUBERT BARER

19 By: 
20 William K. Kabeiseman, OSB No. 944920
21 Jennifer M. Bragar, OSB No. 091865
22 *Of Attorneys for Petitioner*

23 PDX_DOCS:449272.10