

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

OREGON AVIATION WATCH, an	)	
Oregon non-profit corporation,	)	
MICHELLE BARNES, JIM LUBISCHER,	)	
and RUTH WARREN,	)	LUBA No. 2012-098
	)	
Petitioners,	)	
	)	
v.	)	
	)	
CITY OF HILLSBORO, a political	)	
Subdivision of the state of Oregon,	)	
	)	
Respondent	)	
	)	

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**PETITIONERS' PETITION FOR REVIEW**

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1 I. PETITIONER’S STANDING

2  
3 Oregon Aviation Watch, Michelle Barnes, Jim Lubischer, and Ruth Warren  
4 (Petitioners) have standing to petition the Land Use Board of Appeals (LUBA) to hear this  
5 appeal because Petitioners filed a timely notice of intent to appeal on December 26, 2012,  
6 and Petitioners appeared and participated before the local government by submitting written  
7 testimony to the City of Hillsboro (City or Respondent). Rec. 23-28, 29-34, 50-51.

8 II. STATEMENT OF THE CASE

9  
10 A. Nature of Decision and Relief Requested

11  
12 The decision under review is the City’s Ordinance No. 6037, which became final on  
13 December 4, 2012. Rec. 1. Ordinance No. 6037 repealed Hillsboro Municipal Code (HMC)  
14 Subchapter 8.32 in its entirety because, according to the Respondent, federal law has  
15 preempted regulation by local governments with respect to airspace use and management,  
16 traffic control, safety and the regulation of aircraft noise. Rec. 1. Subchapter 8.32 includes  
17 sections 8.32.010 to 8.32.050.<sup>1</sup> See Appendix 3. Petitioners respectfully request reversal or  
18 remand of the City’s decision.

19 B. Summary of Arguments

20  
21 Ordinance No. 6037 is a land use subject to LUBA’s jurisdiction because it amends,  
22 by repeal, land use regulations that implement Hillsboro’s comprehensive plan. Specifically,  
23 HMC 8.32.010 through 8.32.040 implements various policies and goals related to  
24 transportation, public facilities, and air, water, and land resources. Numerous ORS  
25 provisions indicate that HMC 8.32.020 is a land use regulation itself, and, therefore, the  
26 amendment, by repeal, of HMC8.32.020 is a land use decision subject to LUBA’s  
27 jurisdiction.

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<sup>1</sup> Petitioners respectfully request that LUBA take official notice of HMC subchapter 8.32.  
See Appendix 3.

1           Ordinance No. 6037 concerns the application of Hillsboro comprehensive plan  
2 policies and goals. Specifically, Ordinance No. 6037 concerns the application of various  
3 policies and goals related to transportation, public facilities, and air, water, and land  
4 resources, and these policies and goals act as substantive approval criteria. Because the City  
5 failed to interpret these policies and goals and because these policies and goals certainly  
6 could be interpreted to apply to Ordinance No. 6037, the decision must be remanded to allow  
7 the City to interpret them.

8           Ordinance No. 6037 will have significant impacts on present and future uses of land.  
9 The repeal of HMC subchapter 8.32 will allow unregulated intrastate airport-related uses to  
10 contribute more lead pollution to the City and decrease safety by abdicating any authority to  
11 regulate low altitude flying, acrobatic flying, and dropping articles from aircraft. In addition,  
12 repealing HMC subchapter 8.32 will remove the City's authority to approve new airports,  
13 which will have significant impacts on future uses of land.

14           The City misconstrued applicable law because Ordinance No. 6037 repeals a  
15 provision related to the City's authority to approve new airports, but the City failed to cite to  
16 any law that preempts a city's authority to approve new airports. Instead, the City's analysis  
17 focuses exclusively on preemption as it relates to airspace use and management, traffic  
18 control, safety and regulation of aircraft noise. Because none of those issues or any authority  
19 in the City's legal analysis implicates a City's authority to approve new airports, the City  
20 misconstrued applicable law.

21           HMC subchapter 8.32 is not federally preempted because each of its provisions falls  
22 within one of two identified exceptions to federal preemption. Although federal aviation  
23 preemption may regulate many local regulations and ordinances, it does not regulate an  
24 airport's ability to approve future uses of land for airports, and it does not preempt intrastate

1 aviation activities. Here, HMC 8.32.020 is not federally preempted because it regulates the  
2 future use of land and provides the City with authority to approve a new airport. The  
3 remaining sections contained in HMC subchapter 8.32 are not federally preempted because a  
4 substantial portion of the aviation activity at the Hillsboro Airport occurs entirely within the  
5 state. As such, HMC subchapter 8.32 is not preempted, and, therefore, the City misconstrued  
6 applicable law in adopting Ordinance No. 6037.

7 Ordinance No. 6037 does not comply with various provisions of the Hillsboro  
8 comprehensive plan related to transportation, public facilities, and air, water, and land  
9 resource quality. Because the City did not interpret its comprehensive plan policies and  
10 goals, the City is not given any deference. In addition, the decision must be remanded to  
11 allow the City to interpret the policies and goals and explain whether the policies and goals  
12 apply to Ordinance No. 6037.

13 Although the City's decision is legislative, the decision lacks substantial evidence to  
14 demonstrate compliance with applicable comprehensive plan policies and goals. There must  
15 be enough in the way of findings to allow LUBA to perform its review function and the  
16 scope and meaning of some of the comprehensive plan policies is sufficiently unclear that the  
17 City's decision will require some findings in order to be defensible on appeal. The City's  
18 decision also lacks substantial evidence to demonstrate that any or all aviation activity at  
19 Hillsboro Airport is interstate aviation activity. Without any such findings, there is nothing  
20 in the record to demonstrate that aviation activities are interstate in nature, and, therefore, the  
21 decision lacks substantial evidence to demonstrate that HMC subchapter 8.32 is preempted.

22 Finally, the City failed to comply with ORS 197.610(1). The City deleted  
23 acknowledged land use regulations, and failed to submit the proposed changes to the DLCD

1 director, as well as failed to hold hearings pursuant to ORS 197.610(1). A complete failure  
2 to comply with the requirements of ORS 197.610(1) requires remand.

3 C. Summary of Material Facts

4  
5 1. The Hillsboro Airport

6  
7 The Hillsboro Airport<sup>2</sup>:

8  
9 is located in the city of Hillsboro in Washington County, Oregon, 12 miles west of  
10 downtown Portland. The Port of Portland assumed ownership of [Hillsboro Airport]  
11 in 1996. In 2008, [Hillsboro Airport] became Oregon's busiest airport, surpassing  
12 Portland International Airport (PDX) in number of airport operations.

13  
14 [Hillsboro Airport's] increasingly important role in the Portland metropolitan area  
15 and the Oregon state system of airports is the result of its serving all three segments  
16 of the air transportation industry: commercial air carriers, military, and general  
17 aviation (GA). Commercial air carrier is broadly defined as any domestic or foreign  
18 aircraft carrying passenger or cargo for hire. HIO accommodates a broad range of

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<sup>2</sup> The Record contains a detailed history of the City and the airfield:

In 1842 settlers founded a community at the Hillsboro area. Settlers arrived in Forest Grove in the 1840s and Pacific University's Old College Hall in Forest Grove was erected in 1850. The Hill Cemetery located east of Gaston has monuments that date to 1847. The town of Gaston was plotted out about 1871. In 1853 the "Century House" on Kinnaman Road near 209<sup>th</sup> in Aloha/Reedville was built. This house served as a school, church, community hall and postal exchange station. In the late 1800s Simeon Reed, who died in 1895, operated a hobby farm in the Reedville area. In 1877 the Reedville post office was established. By the 1860s, a small community had formed in the area that would later be named Banks. The Helvetia area had settlers in the mid 1800s with a schoolhouse being built in 1879. By 1853 settlers were coming to what is now Sherwood. In the 1850s pioneers first arrived in the Orenco area with the town of Orenco being established in 1908. What was to become the city of North Plains was first platted in September 1910.

By the late 1800s rural residences, farms, and communities were present throughout Washington County. Not until 1928 was an airfield established northeast of the City of Hillsboro by Dr. Elmer H. Smith. In the early 1930s the City of Hillsboro purchased the airfield. The Port of Portland assumed ownership in 1965.

Human habitation without aviation activity has existed in what is now Washington County for at least 5700 years. Only in the past 84 years has there been aviation activity. Farms, rural residences, and communities in Washington County existed long before the advent of any aviation activity

commercial air carriers, including scheduled air carrier activity using aircraft with nine or fewer passenger seats; air cargo carriers using aircraft with a payload capacity less than 7,500 pounds; on-demand air carriers using aircraft with 30 or fewer passenger seats and a payload capacity of less than 7,500 pounds; on-demand air carriers using aircraft with 30 or fewer passenger seats and a payload capacity of less than 7,500 pounds; and commuter operations with non-turbojet aircraft with nine or fewer passenger seats and a payload capacity of less 7,500 pounds. [Hillsboro Airport] also accommodates local and transient operations by military rotocraft and occasionally military jet aircraft. Finally, GA is defined as all aviation other than military and commercial airlines. It includes a diverse range of activities such as pilot training, sightseeing, personal flying, agricultural spraying and seeding, fractional business jet operations, and emergency medical services. Seventy percent of the hours flown by general aviation are for business purposes.

[Hillsboro Airport's] role is defined within both state and federal aviation plans. [Hillsboro Airport] is designated as a reliever airport in FAA's *Natural Plan of Integrated Airport Systems* (NPIAS). Reliever airports are specially designated to reduce congestion at large commercial airports by segregating GA aircraft from commercial airlines and air cargo activities. [Hillsboro Airport] is classified as a reliever for PDX. At the state level, the *Oregon Aviation Plan* prepared by the Oregon Department of Aviation (ODA) classifies [Hillsboro Airport] as a Category 2, Business or High Activity General Aviation Airport. Neither the NPIAS nor the *Oregon Aviation Plan* anticipate [the Hillsboro Airport] changing from a GA airport to a commercial service airport in the future.

*Barnes v. United States Dep't of Interior*, 655 F.3d 1124, 1126-1127 (9<sup>th</sup> Cir. 2011). The Hillsboro Airport "has evolved as the primary GA airport in the Portland-Vancouver metropolitan area." *Id.* at 1128.

## 2. Flight Training

Flight training comprises a significant amount of aviation activity at Hillsboro

Airport:

Almost all of the take-offs and landings at the Hillsboro Airport (HIO) are flight training operations including 1) "Touch & Goes" which repetitively circle over the City of Hillsboro, 2) flights to designated "high intensity" flight training areas over western Washington County, 3) flights to other local airports, and 4) occasional one way flights to various locations including farm fields, a state park, and on two occasions a school's sports field in Portland.

Rec. 25.



1                   3.       Adverse Impacts of the Hillsboro Airport

2  
3       According to Oregon Aviation Watch:

4  
5       Adverse impacts from aviation activity include noise intrusions, environmental  
6       pollution, climate change, health risks, social injustice, property devaluation, safety  
7       hazards, security threats, land use restrictions, and fiscal inequities. That these are  
8       significant concerns is evident by the creation of the Hillsboro Airport Roundtable  
9       Exchange (HARE), formerly HAIR. While meeting on a regular basis, this Port of  
10      Portland group, with support from the City of Hillsboro, Washington County, Metro,  
11      and Oregon legislators, has failed to reduce in any way the aforementioned adverse  
12      aviation effects. In fact, HARE participated in the formulation of a zoning ordinance  
13      that was found to violate both the U.S. Constitution and the Oregon Constitution  
14      (LUBA and State Court of Appeals) [*Barnes v. City of Hillsboro*, \_\_ Or LUBA \_\_  
15      (LUBA No. 2010-011, June 3, 2010), *Barnes v. City of Hillsboro*, 239 Or App 73  
16      (2010)], and also countenanced an attempt to build a third runway without proper  
17      environmental studies (9<sup>th</sup> Cir. Court ruling) [*Barnes*, 655 F.3d 1124].

18  
19      Rec. 23.

20  
21           “Hillsboro Airport ranks 21<sup>st</sup> in the nation among nearly 20,000 U.S. airports in toxic  
22      lead emissions (0.7 tons per year or more)....” Rec. 14. “Lead emissions from [Hillsboro  
23      Airport] flight training activity were estimated by the Environmental Protection Agency to be  
24      0.68 tons in 2008. Recent scientific research shows that accumulation of lead in a child’s  
25      blood at very low levels contributes to the development of Attention Deficit Hyperactivity  
26      Disorder.” Rec. 26. Lead is a “potent neurotoxin that has especially debilitating effects on  
27      children, damaging the brain and nervous system and impairing development. According to  
28      the Centers for Disease Control, there is no identified level of lead exposure without harmful  
29      effects and the effects appear to be irreversible.” Rec. 14 (citing Waxman, Henry. Rep  
30      Waxman Call on FAA to Reduce Lead Emissions by Expanding Use of Unleaded Fuel  
31      (10/23/12)).<sup>3</sup> According to U.S. Congressman Henry Waxman, “lead emissions from general  
32      aviation located within close proximity to residential areas are a particular concern and  
33      pointed out that ‘frequent touch-and-go flights by piston aircraft can also result in pollution

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<sup>3</sup> See Rec. 34 (diagram on lead pollution levels).

1 concentrations in areas surrounding an airport.” *Id.* At the Santa Monica Airport in  
2 California, a study found “elevated lead levels where planes taxi and idle prior to take-off.  
3 These findings have a direct application to [Hillsboro Airport] in that it is surrounded on  
4 three sides by residential developments and the majority of operations at [Hillsboro Airport]  
5 are touch and go training flights.” Rec. 14. “The Centers for Disease Control has called for  
6 all levels of government to assist in the primary prevention of lead exposure. Primary  
7 prevention entails elimination of all non-essential uses of lead. Flight training is a non-  
8 essential use of lead.” Rec. 26-27.<sup>4</sup>

9 According to Ruth Warren, a resident of the City of Hillsboro:

10  
11 I am concerned with the livability in our City. The Hillsboro Airport is a source of  
12 excessive noise with their flight schools and repair business/run-ups. There are times  
13 when there is helicopter training, fixed winged touch and gos and run ups all going on  
14 at the same time. My reality is I have to turn up my TV and wear ear plugs to bed;  
15 this is not right.  
16

17 I have heard from several high tech employees based in Hillsboro, they will not live  
18 here due to airport noise. It is a shame to allow a business to interrupt a city to this  
19 extent.  
20

21 Rec. 22. According to Jim Lubischer, a local pediatrician:

22  
23 Prior to the establishment of what is now the Hillsboro Airport, residents of  
24 Washington County enjoyed quiet, peaceful skies. The air of Washington County  
25 was not polluted by aviation noise and aviation related chemical pollutants. Aviation  
26 lead pollution did not exist. [It is imperative to understand the extremely damaging  
27 effects of lead on our children. Lead is a contributory factor in childhood Attention  
28 Deficit Hyperactivity (ADHD). ADHD affects some 9% of our children. The  
29 consequences of ADHD both to the individual and to society cannot be understated.]  
30

31 Rec. 29 (brackets in original).<sup>5</sup>  
32

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<sup>4</sup> Lead pollution originates from “piston driven flight training and hobbyists’ aircraft.” Rec. 32.

<sup>5</sup> “The Hillsboro airport emits nearly a ton of lead into our community each year. Recent research is showing that even very, very low levels of lead in a child’s blood contribute to ADHD. Equivalent blood lead levels of 0.024 ug/dl result in an 11% decrease in brain cell growth. (See attachment titled “Blood Lead Levels”. Currently, our ability to even measure such a low level in a child’s blood is likely impossible.)” Rec. 30.

1                   4.       The City of Hillsboro’s Rationale for Repeal of HMC Subchapter 8.32

2  
3           The City of Hillsboro’s repeal of subchapter 8.32 rests on the following legal  
4   analysis:

5           The review of this subchapter was on the code housekeeping list as a follow up to the  
6   code audit project that was completed in 2011. A citizen inquiry prompted staff to  
7   request the City Attorney’s office to review HMC Subchapter 8.32 to interpret the  
8   City’s legal authority over helicopter low altitude flying. It was discovered that the  
9   Code language is obsolete as the use of aircraft in regard to minimum height, low  
10   altitude flying and dropping of articles is now controlled by the federal Aviation  
11   Administration. Consequently, a repeal of HMC Subchapter 8.32 is necessary.

12  
13       *Legal Analysis*

14  
15           The Federal Aviation Act provides that “[t]he United States Government has  
16   exclusive sovereignty of airspace of the United States.” 49 U.S.C.A. section  
17   40103(a)(1). In short, the federal government has preempted the areas of  
18   airspace use and management, traffic control, safety and the regulations of  
19   aircraft noise. *See San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306,  
20   FN21 (9<sup>th</sup> Cir. 1981). Case law and Federal Aviation Administration (FAA)  
21   policies have distinguished federal control from local control of aircraft;  
22   specifically, state and local governments may “protect citizens through land  
23   use controls and other police power measures not affecting aircraft  
24   operations.” *Id.*, citing U.S. Dep’t of Transp., Federal Aviation Admin.,  
25   Aviation Noise Abatement Policy 34 (1976) (emphasis added). In other  
26   words, any regulation affecting *how, where or when* (i.e. use of airspace)  
27   aircraft is operated is preempted. *See also Abdullah v. American Airlines,*  
28   *Inc.*, 181 F.3d 363, 364, 367 (3<sup>rd</sup> Cir. 1999) (preempting state standards of  
29   care for air safety); and *Command Helicopters, Inc. v. City of Chicago*, 691 F.  
30   Supp. 1148, 1148, 1150 (N.D. Ill. 1988) (preempting ordinance requiring  
31   certain equipment for helicopter external-load lifting).

32  
33   Rec. 20; Appendix 2. The City’s legal analysis fails to address whether federal preemption  
34   applies to the siting and location of a new airport, as provided in HMC 8.32.020. Rec. 52-53.

35                   5.       HMC Subchapter 8.32 Aircraft

36  
37       HMC subchapter 8.32 includes five sections:

38  
39       8.32.010:

40       No person may operate an aircraft in or over the city at a height less than 1,000 feet  
41       above ground level, except when engaged in taking off or landing except under HMC  
42       8.32.030.

1 8.32.020:  
2 No person may operate an aircraft in the city other than an approved airport, except  
3 for emergency purposes. Applications for approval of a proposed airport must be  
4 made in writing to the council. The council may approve with or without any  
5 conditions or restrictions it deems appropriate or deny the application entirely.  
6

7 8.32.030:  
8 (A) Acrobatic flying over the city is prohibited except when an acrobatic flying  
9 permit has been issued for the purposes of a public show, demonstration or  
10 advertising and must specify if operations less than 1,000 feet above ground level is  
11 allowed.

12 (B) A person intending to operate an aircraft less than 1,000 feet above ground level  
13 for purposes of aerial photography, pesticide spraying, search and rescue operations  
14 or other similar use deemed to be in the public interest, must first obtain an altitude  
15 variance permit from the manager. The manager may issue the permit only upon a  
16 finding that the low altitude flying will not present an unreasonable risk to the lives or  
17 property of the public within the city and would provide some public benefit.  
18

19 8.32.040:  
20 No person operating an aircraft in or over the city may drop, cause or allow to be  
21 dropped, any article or material from the aircraft, except in the case of manage  
22 approved operation of aircraft for the purpose of aerial dusting or spraying under  
23 HMC 8.32.030(B).  
24

25 8.32.050:  
26 A person may appeal a decision by the manager under this subchapter to the council  
27 by filing written notice of appeal with the city within 15 days of receipt of the  
28 manager's decision.  
29

30 HMC 8.32 (Appendix 3).  
31

### 32 III. LUBA'S JURISDICTION 33

34 As relevant here, LUBA's jurisdiction is limited to land use decisions and decisions  
35 that have a significant impact on present and future land uses. ORS 197.825(1)<sup>6</sup>; *City of*  
36 *Pendleton v. Kerns*, 294 Or 127 (1982). Here, Ordinance No. 6037 falls within the statutory

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<sup>6</sup> ORS 197.825(1) provides:

Except as provided in ORS 197.320 and subsection (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

definition of “land use decision” provided in ORS 197.015(10)(a)(A)<sup>7</sup>, and Ordinance No. 6037 falls within LUBA’s significant impacts test. Because petitioners anticipate that the City will contest LUBA’s jurisdiction, Petitioners have set forth an assignment of error arguing that LUBA has jurisdiction over this appeal. *See also Zirker v. City of Bend*, Or LUBA 188 (2007) (failure to include adequate jurisdictional statement in petitioner review will not result in dismissal if an issue is whether the challenged decision is a land use decision subject to LUBA review).

#### IV. ARGUMENT

A. First Assignment of Error: LUBA has jurisdiction over this appeal as a land use decision or a decision having significant impact

LUBA has jurisdiction over this appeal because Ordinance No. 6037 (1) amends land use regulations; (2) concerns the application of Comprehensive Plan policies and goals; and (3) will have significant impacts on present and future land uses.

1. Ordinance No. 6037 Amends Land Use Regulations

The amendment of land use regulations falls within the definition of a “land use decision.” *See* ORS 197.015(10)(a)(A). Here, Ordinance No. 6037 amends, by repeal, HMC subchapter 8.32. *See Churchill v. Neahkahnie Water District*, 27 Or LUBA 721 (1994) (special district’s repeal of a program affecting land use, like its adoption or implementation of such a program is an “action ... with respect to programs affecting land use” that must be in accordance with the goals pursuant to ORS 195.020(1), and, therefore, is a land use

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<sup>7</sup> ORS 197.015(10)(a) defines a land use decision to include the following:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- (i) The goals;
- (ii) A comprehensive plan provision;
- (iii) A land use regulation; or
- (iv) A new land use regulation[.]

1 decision); *Oregon Coast Alliance v. City of Dunes City*, \_\_ Or LUBA \_\_ (LUBA No. 2011-  
2 113, June 5, 2012) (slip op at 1) (city ordinance repealing code sections related to septic  
3 system maintenance is a land use decision).

4 A land use regulation is defined as “any local government zoning ordinance, land  
5 division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance  
6 establishing standards for implementing a comprehensive plan.” ORS 197.015(11). HMC  
7 8.32.010, 8.32.030, and 8.32.040 are land use regulations<sup>8</sup> that implement the comprehensive  
8 plan policies to “[b]uild, maintain and/or support a well-defined and safe transportation  
9 system within the City for pedestrian, bicycle, transit, motor vehicles, *air* and rail travel,”  
10 Appendix 17 (emphasis added), “[t]o maintain and improve the quality of the air, water and  
11 land resources,” Appendix 4, to “work with airport authorities to decrease airport-related  
12 problems to a level compatible with surrounding land uses and the urban area,” Appendix 19,  
13 to “[d]evelop and maintain a safe City transportation system,” Appendix 16, and to  
14 “[p]rovide a safe and healthy living environment,” Appendix 8. Ordinance No. 6037  
15 amends, by repeal, HMC 8.32.010, 8.32.030, and 8.32.040, which implement various  
16 comprehensive plan policies and goals. Thus, Ordinance No. 6037 is a land use decision.

17 HMC 8.32.020 states, in relevant part: “Applications for approval of a proposed  
18 airport must be made in writing to the council. The council may approve with or without any  
19 conditions or restrictions it deems appropriate or deny the application entirely.”<sup>9</sup> HMC  
20 8.32.020 regulates the use of land for the purpose of approving a proposed airport. Under

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<sup>8</sup> Even if these isolated provisions are not sufficient to implement the identified comprehensive plan policies and goals, then subchapter 8.32, construed as a whole, is a land use regulation that implements the identified comprehensive plan policies and goals, and, therefore, the amendment, by repeal, of HMC 8.32 is a land use decision reviewable by LUBA.

<sup>9</sup> Because the Port of Portland owns the Hillsboro Airport, 8.32.020 likely applies to the future establishment of an airport within the City’s jurisdiction. *See* 836.200 *et seq.*

1 Oregon law, the decision where to site an airport is expressly a regulation of land use, and the  
2 weight of Oregon’s law governing aviation activity indicates that Ordinance No. 6037  
3 concerns amends land use regulations.

4 For example, ORS 836.200 provides explicit authority for municipalities to establish  
5 airports:

6 All municipalities of this state, separately or jointly or in cooperation with the federal  
7 government or state, may acquire, establish, construct, expand, lease, control equip,  
8 improve, maintain, operate, police and regulate airports for the use of aircraft, either  
9 within this state or within any adjoining state, and may use for such purposes any  
10 available property owned or controlled by such municipalities or political  
11 subdivisions. All municipalities shall notify the Oregon Department of Aviation of,  
12 and allow the department to participate in an advisory capacity in, all municipal  
13 airport or aviation system planning.

14 *See also* ORS 836.630 (entitled “siting of new airports to comply with land use laws;  
15 limitation on rules,” and providing that “Nothing in ORS 836.600 to 836.625 shall be  
16 interpreted to allow the siting of a new airport except as provided in ORS chapters 197 and  
17 215 and in conformance with all applicable land use regulations and ordinances.”); OAR  
18 738-020-0035(1)(e) (when approving an airport site, requires that “airport substantially meets  
19 land use and zoning requirements of the local governmental entity having jurisdiction.”);  
20 ORS 836.616 (“All land uses and activities permitted within airport boundaries, other than  
21 the uses and activities established under subsection (2) of this section, shall comply with  
22 applicable land use laws and regulations”); ORS 836.610 (“Local governments shall amend  
23 their comprehensive plan and land use regulations consistent with the rules for airports  
24 adopted by the Land Use Conservation and Development Commission under ORS 836.616  
25 and 836.619.”); ORS 836.210 (municipalities may “[d]elegate the authority for planning,  
26 construction, equipment, improvement, maintenance and operation thereof in any offices,  
27 board, or body of such municipality”); 836.215 (Municipal acquisition of property for  
28 airports).

1 HMC 8.32.020 is merely the local codification of these ORS and OAR provisions  
2 granting authority to municipalities to approve and establish airports. HMC 8.32.020 also  
3 implements comprehensive plan policies and goals to “[b]uild, maintain and/or support a  
4 well-defined and safe transportation system within the City for ... air ... travel,” Appendix  
5 17, as well as to “[d]evelop and maintain a safe City transportation system,” Appendix 16.  
6 Thus, any attempt to site a new airport within Hillsboro would have to comply with HMC  
7 8.32.020 as a land use regulation, and the amendment, by repeal, of HMC 8.32.020 is itself a  
8 land use decision.

9 2. Ordinance No. 6037 Concerns the Application of Hillsboro  
10 Comprehensive Plan Policies and Goals  
11

12 Ordinance No. 6037 concerns the application of the City’s comprehensive plan  
13 policies and goals. A decision “concerns” the application of a comprehensive plan or land  
14 use regulation if (1) the decision maker was required by law to apply its comprehensive plan  
15 or land use regulation as approval standards, but did not, or (2) the decision maker in fact  
16 applied plan provisions or land use regulations. *Dorall v. Coos County*, 53 Or LUBA 32, 34  
17 (2006) (citing *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004)). Here, the City  
18 should have applied the following policies and goals when it adopted Ordinance No. 6037:

19 Section 13 (Transportation), III (Policies), A (Safety), (1) requires that the City  
20 “[b]uild, maintain and/or support a well-defined and safe transportation system within  
21 the City for pedestrian, bicycle, transit, motor vehicles, air and rail travel.” Appendix  
22 17.  
23

24 Section 13 (Transportation), III (Policies), (H)(2)(a): “The airport shall be  
25 maintained and used as, but not expanded beyond the capability of, a ‘general  
26 aviation reliever facility.’ The City shall encourage and work with airport authorities  
27 to decrease airport-related problems to a level compatible with surrounding land uses  
28 and the urban area.”<sup>10</sup> Appendix 19.  
29

---

<sup>10</sup> Plaintiffs do not contend that the word “encourage” is sufficient to act as an approval criterion, but the requirement to “work with airport authorities...” is sufficient to act as an approval criterion.



1 Section 13 (Transportation), I, (Goals), A (Safety): “Develop and maintain a safe  
2 City transportation system.” Appendix 16.

3

4 Section 12 (Public Facilities and Services), I (Goals), C: “Provide a safe and healthy  
5 living environment.” Appendix 8.

6

7 Section 7 (Air, Water, and Land Resource Quality), I (Goal): “To maintain and  
8 improve the quality of the air, water and land resources, the total waste and process  
9 discharges from all developments and activities in the planning area shall not degrade  
10 resources or threaten resource availability.” Appendix 4.

11

12 These policies and goals directly apply to Ordinance No. 6037, and they contain approval  
13 criteria applicable to Ordinance No. 6037.

14 First, with regard to policy 13(III)(A)(1), by adopting Ordinance No. 6037, the City  
15 will no longer be able to regulate intrastate aviation activity not preempted by federal law,  
16 and it will no longer have the authority to approve a new airport.<sup>11</sup> Therefore, the City can  
17 no longer “maintain and/or support a well-defined and safe transportation system within the  
18 City for ... air ... travel.” Appendix 17. Furthermore, if the City has no authority to approve  
19 a new airport in the future pursuant to HMC 8.32.020, then it will necessarily be limited in its  
20 ability to “build, maintain, and/or support” the future airport,” Appendix 17, as well as its  
21 ability to “[d]evelop and maintain a safe City transportation system.” Appendix 16.

22 Second, with regard to policy 13(III)(H)(2)(a), the City’s ability to “work with airport  
23 authority to decrease airport-related problems” will necessarily be lessened because the City  
24 has abdicated its regulatory authority to regulate intrastate aviation activity not preempted by  
25 federal law and its authority to approve new airports.

26 Third, with regard to Goal 13(I)(A) and Goal 12(I)(C), without HMC subchapter  
27 8.32, the City’s ability to “maintain a safe transportation system” and provide a “safe ...  
28 living environment” will necessarily be lessened. For intrastate aviation activities, the City  
29 will be unable to regulate minimum height of aircraft, HMC 8.32.010, “acrobatic flying over

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<sup>11</sup> Intrastate aviation activity not preempted by federal law is explained in further detail *infra*.

1 the city,” HMC 8.32.020(A), low altitude flying from “aerial photography, pesticide  
2 spraying, search and rescue operations or other similar use,” 8.32.030(B), and dropping  
3 articles from aircraft over the city, HMC 8.32.040. In fact, the City’s current regulation for  
4 low altitude flying requires “a finding that the low altitude flying will not present an  
5 unreasonable risk to the lives or property of the public within the city and would have some  
6 public benefit.” HMC 8.32.030(B). Thus, the repeal of HMC 8.32 concerns the application  
7 of goals 13(I)(A) and 12(I)(C).

8 Fourth, with regard to Goal 12(I)(C) and Goal 7(I), the City will have no regulatory  
9 mechanism to “maintain and improve the quality of the air, water and land resources” and  
10 “provide a ... healthy living environment” as it relates to intrastate aviation activity. Though  
11 airports contribute significant amounts of pollution to the environment, lead pollution from  
12 flight training and hobbyist aircraft engaged in intrastate aviation activity is the greatest  
13 concern at Hillsboro Airport. *See* Rec. 14 (“Hillsboro Airport ranks 21<sup>st</sup> in the nation among  
14 nearly 20,000 U.S. airports in toxic lead emissions (0.7 tons per year or more)....”); Rec. 32  
15 (Lead pollution originates from “piston driven flight training and hobbyists’ aircraft.”); Rec.  
16 14 (Lead is a “potent neurotoxin that has especially debilitating effects on children, damaging  
17 the brain and nervous system and impairing development.”). As a result, the City will not be  
18 able to “maintain and improve the quality of the air, water and land resources” from  
19 “activities in the planning area” as it relates to lead pollution, which arises exclusively from  
20 piston driven flight training and hobbyists’ aircraft. Appendix 4. The City has failed to  
21 interpret its comprehensive plan policies and goals, and, therefore, they are not due any  
22 deference. *Maxwell v. Lane County*, 178 Or App 210, 229 (2001), *modified on recons.*, 179  
23 Or App 409 (2002); *Alliance for Responsible Land Use v. Deschutes County*, 149 Or App  
24 259, 265 (1997).

1 In *Kaye v. Marion County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2008-190, Feb. 18, 2009)  
2 (slip op at 1), owners of property abutting a park constructed, unbeknownst to the County, a  
3 fence that enclosed approximately 6, 135 square feet of the park, called Spong's Landing  
4 Park. Upon learning about the fenced in area, the Marion County Board of Commissioners  
5 held a public hearing, and determined that it was in the public interest to convey the strip of  
6 land to the landowners (i.e., the intervenors in that case) for \$5,000. *Id.* at 1-2. The  
7 petitioner appealed and the respondent filed a motion to dismiss, alleging that the County's  
8 decision was not a land use decision, but LUBA denied the motion because petitioners  
9 identified a comprehensive plan objective that stated:

10 Acquire 10 acres adjacent to Spongs Landing and further develop the park to include  
11 additional trails, paths, open play fields, and nature studies.  
12

13 *Id.* at 3. In light of that comprehensive plan objective, LUBA determined that:

14  
15 While it may be that the objective simply does not apply at all to a decision to *sell*  
16 Spong's Landing Park property, we believe the Objective could reasonably be  
17 interpreted to prohibit a sale of Spong's Landing Park property, particularly if the sale  
18 of Spong's Landing Park property would make it more difficult to acquire the 10  
19 acres referenced in the Objective. Stated differently, the scope of the M CCP Spong's  
20 Landing Park Objective is sufficiently ambiguous that its applicability to the  
21 challenged decision is not clear.  
22

23 *Id.* at 3-4. LUBA went on to find that:

24  
25 We agree with petitioners that the challenged decision falls within the statutory  
26 definition of "land use decision" in ORS 197.015(10(a)(A)(ii). Petitioners identified  
27 a M CCP Objective that certainly could be interpreted to apply to a decision to sell  
28 6,135 square feet of Spong's Landing property and could be interpreted to prohibit a  
29 decision to sell Spong's Landing Park property. The county did not respond to  
30 petitioners' argument or provide any basis for us to conclude that the cited M CCP  
31 Objective does not apply. Given these circumstances, we conclude that the  
32 challenged decision is a land use decision and that we have jurisdiction to review the  
33 decision. It also seems very likely that the county's decision will have to be  
34 remanded to allow the county to adopt an explanation for why the county interprets  
35 the Spong's Landing Park Objective to apply or not to apply to a decision to sell  
36 Spong's Landing Park property. If the Spong's Landing Park Objective does apply to  
37 a decision to sell Spong's Landing Park property, the county will need to determine  
38 whether the challenged sale of Spong's Landing Park property is consistent with that  
39 objective.

1  
2 *Id.* at 4. Here, the cited comprehensive plan policies and goals certainly could be interpreted  
3 to apply to the repeal of Ordinance No. 6037. In addition, the City did not respond to  
4 Petitioners’ argument below, and the City did not interpret the applicable comprehensive  
5 plan policies. As in *Kaye*, the City’s decision will likely need to be remanded to allow the  
6 City to explain whether the applicable comprehensive plan policies apply and provide an  
7 interpretation of those policies because the local government is in the best position to  
8 interpret the provisions in question. *Fessler v. City of Fossil*, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
9 2007-071, September 4, 2007) (slip op 11) (interpretation not advanced until oral argument;  
10 the city is in the best position to determine meaning of local code); *Brown v. Lane County*, 51  
11 Or LUBA 689, 693 & n 5 (2006) (no interpretation was provided; LUBA found it was  
12 appropriate to allow the local government to provide an initial interpretation). Regardless,  
13 the Ordinance No. 6037 concerns the application of comprehensive plan policies and goals,  
14 which act as approval criteria, and, therefore, LUBA has jurisdiction over this appeal.

15 3. LUBA has jurisdiction over this appeal because Ordinance No. 6037  
16 will cause significant impacts to present and future land uses  
17

18 Ordinance No. 6037 will repeal the entirety of HMC subchapter 8.32, and therefore,  
19 will repeal regulations pertaining intrastate aviation activities, as well as a regulation  
20 providing the City with authority to approve a new airport in the future. Even if a local  
21 government action is not a statutory land use decision, LUBA may review the decision if it  
22 will have a “significant impact on present or future use of land.” *Billington v. Polk County*,  
23 299 Or 471, 478-79 (1985); *Petersen v. Klamath Falls*, 279 Or 249, 254 (1977). The  
24 significant impact test “encompasses a broader range of decisions than those that apply, or  
25 should apply, statewide planning goals, comprehensive plans, or land use regulations.”  
26 *Citizens for Better Transit v. Metro Service Dist.*, 15 Or LUBA 482, 484 (1987). “[T]he

1 decision must create an actual, qualitatively or quantitatively significant impact on present or  
2 future land uses. Further, the expected impacts must be likely to occur as a result of the  
3 decision, and not simply speculative.” *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414  
4 (1994).

5 Here, LUBA has jurisdiction over this appeal because Ordinance No. 6037 will have  
6 a “significant impact on present or future use of land.” Specifically, Ordinance No. 6037 will  
7 directly and significantly impact present and future land use because it allows unregulated  
8 and unrestrained uses of land at the Hillsboro Airport and in the skies above the City for  
9 intrastate aviation activities, and it removes the City’s authority to approve and site a new  
10 airport.

11 Ordinance No. 6037 will result in unregulated intrastate airport-related uses that will  
12 contribute lead pollution, *see* Rec. 14; and it will decrease safety in the City because the City  
13 will have no mechanism to regulate intrastate airport-related uses, including acrobatic flying,  
14 low altitude flying, and dropping articles or material from aircraft, HMC 8.32.030(B),  
15 8.32.040. Thus, Ordinance No. 6037 will result in significant impacts to present and future  
16 airport-related uses of the land in the City.

17 In *City of Pendleton v. Kerns*, 294 Or 126, 133 (1982), the Oregon Supreme Court  
18 recognized that authorizing construction of a street would have a significant impact because  
19 it will “‘pave the way’ for substantial residential development in the area,” *id.* at 134, and  
20 “this one improvement has not only an immediate but a long term impact on land  
21 development.” Here, Ordinance No. 6037 will remove the City’s ability to approve a future  
22 airport. Construction of a street is much less significant than the approval, siting, and  
23 construction of an airport. Therefore, the immediate and long term impact on the intrastate

1 airport-related uses of land in the City is significant, and LUBA has jurisdiction over this  
2 appeal.

3 B. Second Assignment of Error: Ordinance No. 6037 misconstrues applicable  
4 law and impermissibly repeals HMC 8.32.020

5  
6 The City misconstrued applicable law because, while it cites to numerous cases on the  
7 issue of federal preemption of state and local regulation of aviation activity, it fails to identify  
8 any federal law preempting the substance of HMC 8.32.020. *See* ORS 197.835(9)(a)(D);  
9 OAR 661-010-0071(1)(c) (LUBA shall reverse a land use decision if it violates a provision  
10 of applicable law and is prohibited as a matter of law). The City states that “the Hillsboro  
11 Municipal Code currently includes regulations applicable to the operation of aircraft in  
12 Hillsboro in regard to minimum height, low altitude flying and dropping of articles from  
13 aircraft.” Rec. 1. Each of these areas of regulation cited by the City correspond to 8.32.010  
14 (minimum height), 8.32.030 (low altitude flying), and 8.32.040 (dropping articles from  
15 aircraft), respectively. HMC subchapter 8.32, however, contains two more sections:  
16 8.32.020 (airports) and 8.32.050 (appeal). Disregarding the appeal procedure provided in  
17 HMC 8.32.050, the city’s legal analysis does not implicate HMC 8.32.020 (airports).

18 Ordinance No. 6037 states that “federal law has preempted regulation by local  
19 governments with respect to airspace use and management, traffic control, safety and  
20 regulation of aircraft noise.” Rec. 1. None of these issues implicate the “approval of a  
21 proposed airport,” as provided in HMC 8.32.020.<sup>12</sup> The City’s legal analysis is similarly  
22 deficient in identifying any federal case or statutory or regulatory provision that preempts a  
23 local municipality’s ability to approve a proposed airport as provided in HMC 8.32.020. *See*

---

<sup>12</sup> One notable characteristic of 8.32.020 that sets it apart from the remaining sections is that it likely addresses new or future uses of land for airports and not necessarily the existing Hillsboro Airport, which is likely the case for the other sections. However, the other sections could equally apply to a new airport approved under HMC 8.32.020.

1 Rec. 18-20, 52-54 (City’s legal analysis). The City apparently lumped HMC 8.32.020 in  
2 with other provisions that could potentially be preempted for those aviation activities that are  
3 interstate in nature. Simply put, the City’s federal preemption analysis fails to account for a  
4 municipality’s authority to approve new airports. Therefore, the City misconstrued  
5 applicable law, and Ordinance No. 6037 is prohibited, at least with respect HMC 8.32.020, as  
6 a matter of law.

7 C. Third Assignment of Error: HMC Subchapter 8.32 is Not Federally  
8 Preempted

9  
10 1. Federal Law Preemption of Airport Regulation  
11

12 The Federal Aviation Act of 1958, 49 U.S.C. § 40101 *et seq.*, (hereinafter the Act),  
13 gives the United States government sovereignty over the airspace of the United States. 49  
14 U.S.C. § 40103(a)(1). The Act directs the Federal Aviation Administration (FAA) to  
15 develop plans and policy for use of navigable airspace and to establish rules and orders “to  
16 ensure the safety of aircraft and the efficient use of airspace.” 49 U.S.C. § 40103(b)(1). The  
17 FAA’s rules at 14 C.F.R. part 77 implement part of the Act’s safety mandate by regulating  
18 “objects affecting navigable airspace.” The rules require persons proposing to construct  
19 “[a]ny object of natural growth, terrain, or permanent or temporary construction or alteration,  
20 including equipment or materials used therein, and apparatus of a permanent or temporary  
21 character” of certain heights or in locations within certain distances of airports or runways to  
22 notify the FAA. 14 C.F.R. §§ 77.5, 77.13.

23 In the subsequent Airport and Airway Improvement Act of 1982 (AAIA), Congress  
24 stated that aviation facilities should “minimize current and projected noise impact on nearby  
25 communities.” 49 U.S.C. § 47101(a)(2). The Act also requires the federal Secretary of  
26 Transportation to cooperate with state and local governments on airport development and

1 planning and to coordinate airport plans with local comprehensive plans. 49 U.S.C. §  
2 47101(g)(1). The FAA has adopted rules to implement the AAIA at 14 C.F.R. part 150.

3 Although the Act and the AAIA, and FAA regulations do not expressly preempt state  
4 and local regulations, the courts have held that the comprehensive federal regulatory scheme  
5 around aircraft and navigable airspace preempts a wide range of local regulations. Local and  
6 state governments are preempted from regulating airports and airport development on the  
7 basis of air safety if the development is subject to FAA regulation. “[A]ir safety is one  
8 aspect of aviation in which the federal regulatory scheme has occupied the field, and [courts]  
9 have invalidated local ordinances which infringe on the FAA’s power to regulate air safety.”  
10 *United States Cellular Operating Company of Medford v. Klamath County*, 53 Or LUBA  
11 442, 449 (2007).

12 It is also well settled that non-proprietor cities may not regulate airports in a way that  
13 interferes with aircraft operations such as limiting hours of operation or limiting types of  
14 aircraft. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, (1973). In *Burbank*, the  
15 U.S. Supreme Court found that federal law preempted a local airport curfew, adopted by a  
16 city that did not own the airport. *Burbank*, 411 U.S. at 633-640; *see also San Diego Unified*  
17 *Port Dist. v. Gianturco*, 651 F.2d 1306, 1316 (9<sup>th</sup> Cir. 1981) (federal law preempted  
18 nonproprietor city’s imposed curfew). However, nondiscriminatory noise controls imposed  
19 by a local or state government entity that owns the airport, acting in its proprietary capacity  
20 rather than using police powers, are not preempted. *See Alaska Airlines, Inc. v. Long Beach*,  
21 951 F.2d 977 (9<sup>th</sup> Cir. 1992); *Santa Monica Airport Assoc., v. Santa Monica*, 659 F.2d 100  
22 (9<sup>th</sup> Cir. 1981). The rationale is that airport proprietors bear liability for claims (such as  
23 takings) that arise from airport noise and they need the ability to insulate themselves from  
24 such liability. *Alaska Airlines, Inc.*, 951 F.2d at 982. Even so, federal law places restrictions



on how airport proprietors may restrict noise and access. *See* Airport Noise and Capacity Act of 1990, 49 U.S.C. § 47524 (*former* 49 U.S.C. § 2153(c)); *see also* Aircraft Noise Abatement Act of 1968, 49 U.S.C. § 44715 *et seq.*

Federal law has also been found to preempt a city ordinance that requires city approval for development of airport land used exclusively for airport landings and takeoffs. *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992). There, the Ninth Circuit found:

The proper placement of taxiways and runways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace. The regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law. *Id.* at 1341. The Ninth Circuit held that cities cannot, through regulations, “prohibit, delay, or otherwise condition the construction of runways and taxiways.” *Id.* But other circuits appear to have construed federal preemption of the on-the-ground land use regulations more narrowly. *See Gustafson v. City of Lake Angelus*, 76 F.3d 778, 786 (6<sup>th</sup> Cir. 1996) (the Act does not preempt city ordinance prohibiting seaplane operations on city lake because the FAA “does not concern itself with land or water use zoning issues”); *City of Cleveland v. City of Brook Park*, 893 F. Supp. 742 (ND Ohio 1995) (court found that the Act and the AAIA did not preempt city ordinance that required conditional-use permits before construction of runway).

Finally, local and state governments can regulate the use of land surrounding existing airports to mitigate the impacts of airports. For example, local governments may impose height restrictions on structures near runways and may regulate the types of uses that may be established near airports. *See generally San Diego Unified Port Dist.*, 651 F.2d at 1313-1314 & n. 20. However, local governments can be liable for takings claims based on such restrictions. *Vacation Vill., Inc. v. Clark County*, 497 F.3d 902 (9<sup>th</sup> Cir. 2007); *see also*

1 *Barnes v. City of Hillsboro*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2010-011, June 3, 2010), *Barnes v.*  
2 *City of Hillsboro*, 239 Or App 73 (2010).

3 2. Exceptions to Federal Aviation Preemption  
4

5 Though many aspects of state and local regulation may be preempted, federal aviation  
6 preemption is not without its exceptions. Respondent's fundamental failing is that it does not  
7 account for these exceptions; instead, passing Ordinance No. 6037 and painting with a broad  
8 brush. Two exceptions are relevant here: (1) the express exception provided for in the  
9 FAA's code of federal regulations; and (2) intrastate aviation activity.

10 i. Express Exception  
11

12 State and local governments have authority to regulate future use of land for aviation  
13 related uses. *See* 14 C.F.R. § 157.7(a).<sup>13</sup> Though, pursuant to 14 C.F.R. § 157.7(a), the FAA  
14 engages in studies and makes determinations on proposed construction or alteration of  
15 airports, it also explicitly permits local authorities to regulate the future use of land for  
16 aviation related uses. For example, FAA regulation 14 C.F.R. § 157.7(a), which was  
17 apparently overlooked by the City in its legal analysis, sets out what the FAA will study with  
18 regard to proposed airports, but it explicitly states that any recommendation is *advisory*, and  
19 not binding on a local government:

20 The FAA will conduct an aeronautical study of an airport proposal and, after  
21 consultations with interested persons, as appropriate, issue a determination to the  
22 proponent and advise those concerned of the FAA determination. The FAA will  
23 consider matters such as the effects the proposed action would have on existing or  
24 contemplated traffic patterns of neighboring airports; the effects the proposed action  
25 would have on the existing airspace structure and projected programs of the FAA;  
26 and the effects that existing or proposed manmade objects (on file with the FAA) and

---

<sup>13</sup> Furthermore, local governments are not preempted from limiting the location and conditions under which a personal-use airport may be developed. *Portland City Temple, Inc. v. Clackamas County*, 11 Or LUBA 70, 79-80 (1984). Local governments may also regulate ground activities such as the use of land for recreational parachuting "even if it has a bearing on where federally regulated aeronautical activities may be conducted." *Skydive Or., Inc. v. Clackamas County*, 122 Or App 342, 345 (1993).

1 natural objects within the affected area would have on the airport proposal. While  
2 determinations consider the effects of the proposed action on the safe and efficient  
3 use of airspace by aircraft and the safety of persons and property on the ground, *the*  
4 *determinations are only advisory*. Except for an objectionable determination, each  
5 determination will contain a determination-void date to facilitate efficient planning of  
6 the use of the navigable airspace. *A determination does not relieve the proponent of*  
7 *responsibility for compliance with any local law, ordinance or regulation, or state or*  
8 *other Federal regulation*. Aeronautical studies and determinations will not consider  
9 environmental or land use compatibility impacts.

10  
11 14 C.F.R. §157.7(a) (emphasis added). Thus, the FAA’s determination is purely advisory,  
12 and the proponent must still comply with local regulations.

13 ii. Exception for Intrastate Aviation Activity

14  
15 An “air carrier” is defined as an entity which provides “air transportation,” 49 U.S.C.  
16 § 40102(a)(2). “Air transportation, in turn, is defined as “foreign air transportation, interstate  
17 air transportation, or the transportation of mail by aircraft.” 49 U.S.C. § 40102(a)(5).  
18 Assuming the aviation activity is not transporting mail or traveling to a foreign country, to be  
19 preempted, aviation activity must constitute “interstate air transportation.” The definition of  
20 “interstate air transportation” states:

21 The transportation of passengers by aircraft as a common carrier for compensation ...  
22 (A) between a place in – (i) a State, territory, or possession of the United States and a  
23 place in the District of Columbia or another State, territory, or possession of the  
24 United States.<sup>14</sup>

---

<sup>14</sup> 49 U.S.C. § 40102(a)(25) states, in full:

“interstate air transportation” means the transportation of passengers or property by  
aircraft as a common carrier for compensation, or the transportation or mail by aircraft –

(A) Between a place in –

- (i) a State, territory, or possession of the United States and a place in the  
District of Columbia or another State, territory, or possession of the  
United States;
- (ii) Hawaii and another place in Hawaii through the airspace over a place  
outside Hawaii;
- (iii) the District of Columbia and another place in the District of Columbia; or
- (iv) a territory or possession of the United State and another place in the same  
territory or possession; and

(B) when any part of the transportation is by aircraft.

1 49 U.S.C. § 40102(a)(25).<sup>15</sup> Thus, if aviation activity at the Hillsboro Airport does not travel  
2 from state to state, then it follows that regulation of the activity is not federally preempted.  
3 In other words, intrastate aviation activity that does not transport mail is not federally  
4 preempted. *See SeaAir v. City of New York*, 250 F.3d 183 (2d Cir. 2001).

5 3. Both Exceptions to Federal Aviation Preemption Apply to HMC  
6 Subchapter 8.32

7  
8 i. HMC 8.32.020 is expressly excepted from Federal Aviation  
9 Preemption

10  
11 As noted above, HMC 8.32.020 specifically provides for the “approval of a proposed  
12 airport,” not regulation or interference with airspace use and management, traffic control,  
13 safety and the regulation of aircraft noise,” Rec. 1. HMC 8.32.020 provides, in full:

14 No person may operate an aircraft in the city other than an approved airport, except  
15 for emergency purposes. *Applications for approval of a proposed airport must be*  
16 *made in writing to the council.* The council may approve with or without any  
17 conditions or restrictions it deems appropriate or deny the application entirely.

18  
19 (emphasis added). This land use regulation falls directly within the purview of 14 C.F.R. §  
20 157.7(a), explained above. The FAA’s determination for new airport proposals is  
21 “advisory,” not binding, and, 14 C.F.R. § 157.7(a), explicitly provides that an FAA  
22 “determination [for an airport proposal] *does not relieve the proponent of responsibility for*  
23 *compliance with any local law, ordinance or regulation, or state or other Federal regulation.*”

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<sup>15</sup> In *Tax Appeal of Ray Kamikawa v. Lynden Air Freight, Inc.*, 89 Hawai’i 51, 968 P2d 653 (1998), the Supreme Court of Hawaii set forth its interpretation of 49 U.S.C. 40102(a)(25)(B):

The final clause [, which states “when any part of the transportation is by aircraft,” merely] indicate[s] Congress’ intent to give the Federal Aviation Agency jurisdiction over the ‘air transportation’ portions of interstate trips whether such trips occur wholly by aircraft, or partly by aircraft and partly by another type of transportation. In this way, the FAA includes intrastate transportation ‘by aircraft’ where the overall transportation involved is of an interstate nature.

(quoting *Tax Appeal of Ray Kamikawa v. United Parcel Service*, 88 Hawai’i 336, 340, 966 P2d 648 (1998)).

(emphasis added). Thus, the City’s authority to regulate future uses of land for airports is not federally preempted,<sup>16</sup> and Respondent, therefore, misconstrued applicable law.

ii. The remaining provisions in HMC subchapter 8.32 are not federally preempted as they relate to intrastate aviation activity that does not transport mail

As explained above, interstate air transportation is a prerequisite for federal preemption, but numerous aviation activities, including pilot training, sightseeing, personal flying, agricultural spraying and seeding, and emergency medical services, are intrastate aviation activities. In *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183 (2d Cir. 2001), the Second Circuit Court of Appeals considered the City of New York’s decision to ban a seaplane touring operation. SeaAir wanted to provide site seeing tours of its leased city-owned water front property. *Id.* at 1185. The city issued a permit under its rules for the seaplane base, but disallowed operations including any commercial air tours in order to minimize the noise impact on the general public. *Id.* at 185. In response to the restriction, SeaAir sued the city, arguing that the city was preempted under the Supremacy Clause.<sup>17</sup> SeaAir’s argument relied on its assertion that it was engaged in “interstate air transportation.”

SeaAir’s preemption argument under the Supremacy Clause relied on its assertion that it was engaged in “interstate air transportation” as defined in 49 U.S.C. § 40102(a)(25).

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<sup>16</sup> Notably, the State of Oregon has significant laws on the books with regard to approval of airport sites, and Respondent does not contend that these statutes are federally preempted. See ORS 836.085 (“the Oregon Department of Aviation as authorized by the State Aviation Board shall provide for the approval of proposed airport sites and the issuance of certificates of such approval.”); 836.090 (Application for site approval; rules); 836.095 (Approval criteria and conditions); 836.105 (Licensing of airports; fees; rules); 836.115 (Public hearing regarding site or license; transcripts).

<sup>17</sup> In addition to the Airline Deregulation Act, SeaAir cited the FAA and the Noise Control Act in its preemption argument. *SeaAir, Inc. v. City of New York*, Brief of Plaintiffs-Appellants, 2000 WL 33988426 at 11 (Nov. 20, 2000). Although the *SeaAir* court focused on the Airline Deregulation Act in its published opinion, its rejection of SeaAir’s arguments supports the conclusion that these other statutes have no remaining power to implicitly preempt local regulation in light of the Airline Deregulation Act’s express preemption provision.

1 *SeaAir*, 250 F.3d at 186. *SeaAir* claimed that its operations fell under the ADA’s provision  
2 shielding air carriers that provide air transportation from state or local regulations affecting  
3 service. *Id.* *SeaAir* argued that because its planes would fly from New York airspace into  
4 New Jersey airspace and back during the course of their site seeing travels, they would travel  
5 between two states and this qualified as interstate air transportation within the statutory  
6 definition. *Id.* The district and circuit courts disagreed: “Despite *SeaAir*’s urgings to the  
7 contrary, we do not live in a world in which a piece of air can serve as a place for the  
8 purposes of creating a ‘between.’” *Id.* Having decided that “the ‘places’ to which the statute  
9 refers are on the ground,” the circuit court affirmed the lower court’s decision that the  
10 plaintiff was not providing air transportation as defined in the federal statute, and *SeaAir*’s  
11 Supremacy Clause argument failed. *Id.* at 186-87.

12 Here, pilot training, sightseeing flights, personal flying, agricultural spraying and  
13 seeding, and emergency medical services, are intrastate aviation activities that occur at the  
14 Hillsboro Airport. As a result, these aviation activities are not federally preempted because  
15 they do not travel between states, but rather begin and end at the Hillsboro airport.

16 Therefore, the City’s regulations can apply to these intrastate aviation activities, and HMC  
17 subchapter 8.32 is not federally preempted.

18 D. Fourth Assignment of Error: Ordinance No. 6037 does not Comply with the  
19 City’s Comprehensive Plan  
20

21 Under ORS 197.175(2)(d), a city must make land use decisions and limited land use  
22 decisions “in compliance with the acknowledged plan and land use regulations.” Under ORS  
23 197.835(7)(a), LUBA “shall reverse or remand an amendment to a land use regulation or the  
24 adoption of a new land use regulation if [t]he regulation is not in compliance with the  
25 comprehensive plan.” The City has numerous airport related policies and goals in its

comprehensive plan, and, as stated above, certain policies and goals apply as approval criteria to Ordinance No. 6037:

Section 13 (Transportation), III (Policies), A (Safety), (1) requires that the City “[b]uild, maintain and/or support a well-defined and safe transportation system within the City for pedestrian, bicycle, transit, motor vehicles, air and rail travel.” Appendix 17.

Section 13 (Transportation), III (Policies), (H)(2)(a): “The airport shall be maintained and used as, but not expanded beyond the capability of, a ‘general aviation reliever facility.’ The City shall encourage and work with airport authorities to decrease airport-related problems to a level compatible with surrounding land uses and the urban area. Appendix 19.

Section 13 (Transportation), I, (Goals), A (Safety): “Develop and maintain a safe City transportation system.” Appendix 16.

Section 12 (Public Facilities and Services), I (Goals), C: “Provide a safe and healthy living environment.” Appendix 8.

Section 7 (Air, Water, and Land Resource Quality), I (Goal): “To maintain and improve the quality of the air, water and land resources, the total waste and process discharges from all developments and activities in the planning area shall not degrade resources or threaten resource availability.” Appendix 4.

Petitioners set forth *supra* why Ordinance No. 6037 did not comply with these policies and goals, *see supra*, and Petitioners will not repeat those arguments here. The City failed to address or even interpret potentially applicable comprehensive plan provisions. When no local interpretation is provided, no deference to the local decision-maker is required. *Maxwell*, 178 Or App at 229 (2001), *modified on recons.*, 179 Or App 409 (2002); *Alliance for Responsible Land Use*, 149 Or App at 265.

Because these policies certainly could be interpreted to apply to Ordinance No. 6037 and the City did not set forth its own interpretation or explain why these policies do or do not apply, LUBA should remand this case to the City to allow the City to provide its interpretation and explanation. *See Kaye*, \_\_ Or LUBA \_\_, (slip op 4) (remanding decision to local government when petitioner identified a comprehensive plan provision that

1 “certainly could be interpreted to apply” to the decision at issue and the local government did  
2 not set forth its own interpretation); *Fessler*, \_\_\_ Or LUBA \_\_\_ (slip op 11) (interpretation not  
3 advanced until oral argument; the city is in the best position to determine meaning of local  
4 code); *Brown*, 51 Or LUBA at 693 & n 5 (no interpretation was provided; LUBA found it  
5 was appropriate to allow the local government to provide an initial interpretation). Thus, as  
6 stated *supra*, Ordinance No. 6037 does not comply with the Hillsboro’s comprehensive plan  
7 policies and goals, and, the City’s failure to explain or interpret the comprehensive plan  
8 policies requires remand.

9 E. Fifth Assignment of Error: The City’s decision lacks substantial evidence to  
10 demonstrate compliance with applicable comprehensive plan policies  
11

12 LUBA must reverse or remand a land use decision that is “not supported by  
13 substantial evidence in the whole record.” ORS 197.835(9)(a)(C). There is no specific  
14 requirement that legislative land use decisions be supported by substantial evidence, but there  
15 “must be enough in the way of findings or accessible material in the record of the legislative  
16 act to show that applicable criteria were applied and that required considerations were indeed  
17 considered.” *Oregon Coast Alliance*, \_\_\_ Or \_\_\_ (slip op at 10) (citing *Citizens Against*  
18 *Irresponsible Growth*, 179 Or App at 16 n 6. Substantial evidence is evidence a reasonable  
19 person would rely on in reaching a decision. *Portland v. Bureau of Labor & Industries*, 298  
20 Or 104, 119 (1984). Here, the City has not offered any evidence to support Ordinance No.  
21 6037, and the City has similarly failed to provide any evidence to support compliance with  
22 applicable comprehensive plan policies and goals, including 7(I), 12(I)(C), 13(I)(A),  
23 13(III)(A)(1), 13(III)(H)(2)(a). See Appendix 4, 8, 16, 17, 19. As in *Oregon Coast Alliance*,  
24 “the scope and meaning of at least some of those policies are sufficiently unclear that it is  
25 highly unlikely that a decision” to repeal HMC subchapter 8.32 in its entirety “will be  
26 defensible on appeal without adequate findings.” Thus, the decision should be remanded to



1 allow the City to interpret its policies and make findings in order to defend its Ordinance No.  
2 6037.

3 F. Sixth Assignment of Error: The City’s decision lacks substantial evidence to  
4 demonstrate that all aviation activity at the Hillsboro Airport is interstate  
5 aviation activity  
6

7 As stated *supra*, LUBA must reverse or remand a land use decision that is “not  
8 supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C). There is no  
9 specific requirement that legislative land use decisions be supported by substantial evidence,  
10 but there “must be enough in the way of findings or accessible material in the record of the  
11 legislative act to show that applicable criteria were applied and that required considerations  
12 were indeed considered.” *Oregon Coast Alliance*, \_\_ Or LUBA \_\_ (slip op 10) (citing  
13 *Citizens Against Irresponsible Growth*, 179 Or App 12, 16 n 6 (2002). Substantial evidence  
14 is evidence a reasonable person would rely on in reaching a decision. *Portland*, 298 Or at  
15 119. Here, interstate aviation activity is a prerequisite for federal preemption, *see SeaAir*,  
16 *supra*, but the City has not set forth any evidence or findings to demonstrate that any or all  
17 aviation activity is interstate aviation activity, as opposed to intrastate aviation activity.

18 Therefore, the City’s decision is not supported by substantial evidence.

19 G. Seventh Assignment of Error: The City of Hillsboro failed to comply with  
20 ORS 197.610(1)  
21

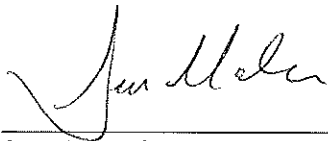
22 Under ORS 197.610(1), “[b]efore a local government adopts a change, including  
23 additions and deletions, to an acknowledged comprehensive plan or a land use regulation, the  
24 local government shall submit the proposed change to the Director of the DLCD.” Here, the  
25 city, through Ordinance No. 6037, changed or deleted all land use regulations contained in  
26 HMC 8.32, but the City failed to notify the DLCD director and failed to hold the necessary  
27 hearings pursuant to ORS 197.610(1).

1 In *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177 (1993), the  
2 Court of Appeals held that a complete failure to provide the notices required by ORS  
3 197.610(1) was not correctly characterized as a “procedural error.” It is also well established  
4 that a “complete failure to comply with ORS 197.610(1) requires remand, without regard to  
5 whether such a complete failure to comply with ORS 197.610(1) results in prejudice to a  
6 petitioner at LUBA. *Employees International Union Local49 v. City of Happy Valley*, LUBA  
7 No. 2008-123 (Or LUBA 1/3/2009) (at page 18-19) (citing *Oregon City Leasing, Inc.*, 121 Or  
8 App 173 (1993). Here, the City failed to provide any notice to DLCD and similarly failed to  
9 hold any hearings. Therefore, the City’s decision must be remanded.

10 V. CONCLUSION

11  
12 For the aforementioned reasons, petitioners request that LUBA reverse or remand the  
13 decision of the City.

14  
15  
16 Respectfully Submitted: February 6, 2013

17  
18  
19  
20  
21  


22 Sean T. Malone, OSB No. 084060  
23 Attorney at Law  
24 259 E. 5<sup>th</sup> Ave, Suite 200-G  
25 Eugene OR 97401  
26 Attorney for Petitioners

Appendix

Hillsboro Comprehensive Plan

Ordinance No. 6037.....1

City of Hillsboro’s Legal Analysis.....2

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Section 7 - Air, Water, and Land Resource Quality.....4

Section 12 – Public Facilities and Services.....8

Section 13 – Transportation (excerpt).....16

**ORDINANCE NO. 6037**

AN ORDINANCE REPEALING SUBCHAPTER 8.32 OF THE HILLSBORO MUNICIPAL CODE, RELATING TO AIRCRAFT.

WHEREAS, the Hillsboro Municipal Code currently includes regulations applicable to the operation of aircraft in Hillsboro in regard to minimum height, low altitude flying and dropping of articles from aircraft; and

WHEREAS, federal law has preempted regulation by local governments with respect to airspace use and management, traffic control, safety and the regulation of aircraft noise.

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

Section 1. Subchapter 8.32 of the Hillsboro Municipal Code comprised of Sections 8.32.010 to 8.32.050 is hereby repealed in its entirety.


Section 2. Section 1.01.020 of the Hillsboro Municipal Code, the definition of "AIRCRAFT" is hereby deleted.

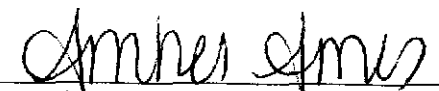
Section 3. This ordinance shall be effective from and after 30 days following its passage and approval by the Mayor.

First approval of the Council on this 20<sup>th</sup> day of November 2012.

Second approval and adoption by the Council on this 4<sup>th</sup> day of December 2012.

Approved by the Mayor this 4<sup>th</sup> day of December 2012.

  
\_\_\_\_\_  
Jerry Willey, Mayor

ATTEST:   
\_\_\_\_\_  
Amber Ames, City Recorder



## MEMORANDUM

**To:** Mayor and City Council  
**From:** Amber Ames, City Recorder  
**Date:** November 6, 2012  
**Subject:** Repeal of Hillsboro Municipal Code (HMC) Subchapter 8.32 related to Aircraft

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**Requested Council Action:**

Approve an ordinance repealing HMC 8.32.

**Background:**

The review of this subchapter was on the code housekeeping list as a follow up to the code audit project that was completed in 2011. A citizen inquiry prompted staff to request the City Attorney's office to review HMC Subchapter 8.32 to interpret the City's legal authority over helicopter low altitude flying. It was discovered that the Code language is obsolete as the use of aircraft in regard to minimum height, low altitude flying and dropping of articles is now controlled by the Federal Aviation Administration. Consequently, a repeal of HMC Subchapter 8.32 is necessary.

*Legal Analysis:*

The Federal Aviation Act provides that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C.A. section 40103(a)(1). In short, the federal government has preempted the areas of airspace use and management, traffic control, safety and the regulations of aircraft noise. *See San Diego Unified Port Dist. V. Gianturco*, 651 F. 2d 1306, FN21 (9<sup>th</sup> Cir. 1981). Case law and Federal Aviation Administration (FAA) policies have distinguished federal control from local control of aircraft; specifically, state and local governments may "protect citizens through land use controls and other police power measures not affecting aircraft operations." *Id.*, citing U.S. Dep't of Transp., Federal Aviation Admin., Aviation Noise Abatement Policy 34 (1976) (emphasis added). In other words, any regulation affecting *how, where* or *when* (i.e. use of airspace) aircraft is operated is preempted. *See also Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 364, 367 (3<sup>rd</sup> Cir. 1999) (preempting state standards of care for air safety); and *Command Helicopters, Inc. v. City of Chicago*, 691 F. Supp. 1148, 1148, 1150 (N.D. Ill. 1988) (preempting ordinance requiring certain equipment for helicopter external-load lifting).

**Recommendation:**

Staff recommends approval of the ordinance repealing HMC Subchapter 8.32 relating to Aircraft.

## **Subchapter 8.32 AIRCRAFT**

### **8.32.010 Minimum height**

### **8.32.020 Airports**

### **8.32.030 Low altitude flying**

### **8.32.040 Dropping articles from aircraft**

### **8.32.050 Appeal**

#### **8.32.010 Minimum height**

No person may operate an aircraft in or over the city at a height less than 1,000 feet above ground level, except when engaged in taking off or landing except under HMC 8.32.030.

#### **8.32.020 Airports**

No person may operate an aircraft in the city other than an approved airport, except for emergency purposes. Applications for approval of a proposed airport must be made in writing to the council. The council may approve with or without any conditions or restrictions it deems appropriate or deny the application entirely.

#### **8.32.030 Low altitude flying**

A. Acrobatic flying over the city is prohibited except when an acrobatic flying permit has been issued for the purposes of a public show, demonstration or advertising and must specify if operation less than 1,000 feet above ground level is allowed.

B. A person intending to operate an aircraft less than 1,000 feet above ground level for the purposes of aerial photography, pesticide spraying, search and rescue operations or other similar use deemed to be in the public interest, must first obtain an altitude variance permit from the manager. The manager may issue the permit only upon a finding that the low altitude flying will not present an unreasonable risk to the lives or property of the public within the city and would provide some public benefit.

#### **8.32.040 Dropping articles from aircraft**

No person operating an aircraft in or over the city may drop, cause or allow to be dropped, any article or material from the aircraft, except in the case of manager approved operation of aircraft for the purpose of aerial dusting or spraying under HMC 8.32.030(B).

#### **8.32.050 Appeal**

A person may appeal a decision by the manager under this subchapter to the council by filing written notice of appeal with the city within 15 days of receipt of the manager's decision.

**HILLSBORO COMPREHENSIVE PLAN**  
**Ordinance No. 2793-4-77**

**Section 7. Air, Water and Land Resource Quality.**

**(I) Goal.**

To maintain and improve the quality of the air, water and land resources, the total waste and process discharges from all developments and activities in the planning area shall not degrade resources or threaten resource availability.

**(II) Definitions.**

(A) Waste and process discharges. Refers to solid waste, thermal, noise, atmosphere, or water pollutants, contaminants, or products therefrom. Included here also are indirect sources of air pollution which result in emissions of air contaminants for which the state has established standards.

**(III) Policies.**

(A) The City shall discourage total dependence on auto transportation by promoting and encouraging less polluting transportation including, but not limited to, local transit, bicycling and walking, and by providing for convenience commercial and service centers in or near residential areas.

(B) The City shall design a storm sewer and sanitary sewer master plan and develop implementation measures necessary to assure that a storm sewer and sanitary system are provided to areas designated urban. The plan shall be designed to accommodate the growth anticipated in undeveloped portions of the Hillsboro Planning Area. (Amended by Ord. No. 3433/12-83.)

(C) The City shall promote and encourage the maintenance of Dawson, Dairy, Rock, Beaverton and McKay Creek channels in the planning area to maintain water flow, lower flood potential and improve the quality of the water and surrounding greenway. (Added by Ord. No. 3130/6-80.)

(D) Industrial and commercial activities in the planning area shall operate within all applicable state and federal environmental standards regarding waste and process discharges.

(E) (Deleted by Ord. No. 3130/6-80.)

(F) Land use activities which result in conflicting impacts on the air, land, or water should be separated and/or buffered to minimize the negative effects of the conflicting activities.

(G) New development shall be allowed only if urban services such as water, sewer, and streets, are available, and only in accord with the Urban Planning Area Agreement. (Amended by Ord. No. 3433/12-83.)

(H) All government agencies responsible for assuring air, water and land resource quality in the planning area shall be contacted when plans affecting waste and process discharges are proposed. These proposals should be coordinated with other plans affecting waste and process discharges within the air shed and river basin encompassing the planning area, and respective roles and responsibilities of the government agencies determined.

(I) Implementation measures designed to maintain and improve the air, land and water resources and manage land use and development shall be consistent with, and reflective of, the community's desires for a quality living environment, state and federal environmental quality statutes, rules, standards and implementation plans.

(J) The City may use the following or similar implementation measures to encourage achievement of the air, water and land resources goal, tax incentives and disincentives, land use controls and ordinances multiple-use and joint development practices, capital facility programming, and enforcement of local health and safety ordinances.

(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. (Added by Ord. No. 5925/10-09)

**(IV) Implementation Measures.** (Added by Ord. No. 3130/6-80.)

(1) Hillsboro lies within the Portland-Vancouver Interstate Air Quality Maintenance Area (AQMA). This area is described in the draft State Implementation Plan (SIP) for air quality, published jointly by the Department of Environmental Quality and the Metropolitan Service District in April, 1979. The draft SIP shows that the entire AQMA is in non-attainment for meeting the recently revised federal ambient air quality standards for ozone and is predicted to remain in non-attainment to at least 1987 unless additional control measures are undertaken. MSD and DEQ are developing a regional control strategy to bring the metropolitan area into attainment by 1987. Hillsboro will cooperate and work with these agencies to realize this goal.

Until such time as control strategies are realized, Hillsboro will use measures described in the DEQ Handbook for "Environmental Quality Elements of Oregon



Local Comprehensive Land Use Plans" when planning any development activities having the potential to directly (by direct emissions) or indirectly (by increasing vehicular travel) affect air quality. (Added by Ord. No. 3130/6-80.)

(2) The City shall strive to implement the bike path and public transit portions of the Transportation Plan. (Added by Ord. No. 3130/6-80.)

(3) The City shall strive to continue operating its chipping service so as to reduce the amount of backyard burning. (Added by Ord. No. 3130/6-80.)

(4) Hillsboro recognizes and assumes its responsibility for operating, planning and regulating waste water systems as designated in Metro's Waste Treatment Management Component. (Added by Ord. No. 3130/6-80.)

(5) During development of a storm sewer master plan (see Public Facilities and Services element) the issue of water quality aspects of urban storm runoff shall be addressed. (Added by Ord. No. 3130/6-80.)

(6) The City shall maintain or improve, within funding available, its program for cleaning city streets. (Added by Ord. No. 3130/6-80.)

(7) Regulations regarding the cleaning of private commercial and residential parking lots shall be addressed during development of the storm sewer master plan. (Added by Ord. No. 3130/6-80.)

(8) The City shall cooperate with and offer assistance to the Metropolitan Service District during the process of siting new solid waste disposal facilities. (Added by Ord. No. 3130/6-80.)

(9) Prior to the next update, the existing nuisance ordinance shall be evaluated to determine its effectiveness in resolving noise complaints. (Added by Ord. No. 3130/6-80.)

(10) (Deleted by Ord. No. 3344/7-82.)

(11) (Deleted by Ord. No. 3344/7-82.)

(12) (Deleted by Ord. No. 3344/7-82.)

(13) (Deleted by Ord. No. 5925/10-09.)

(14) (Deleted by Ord. No. 5925/10-09.)

(15) (Deleted by Ord. No. 5925/10-09.)

(16) (Deleted by Ord. No. 5925/10-09.)

(17) (Deleted by Ord. No. 5925/10-09.)

(18) (Deleted by 3433/12-83.)

(19) 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.

(Added by Ord. NO. 5925/10-09)

**HILLSBORO COMPREHENSIVE PLAN**  
Ordinance No. 2793-4-77

**Section 12. Public Facilities and Services.**

The Statewide Planning Goal 11 requires the City to prepare a Public Facilities Plan. The purpose of the plan is to help assure that urban development in and around Hillsboro is guided and supported by urban facilities and services that are appropriate for the needs of the area and to provide a framework for future improvement and maintenance of the City's transportation, water, sanitary sewer, storm drainage, and parks and recreation facilities. The Public Facilities Plan is a supporting plan and implementing document of the Comprehensive Plan. It includes a list and description for each type of facility, short and long-range capital improvement plans, a financing plan and policies related to public facilities. This section of the HCP also addresses general government, police services, fire protection, libraries, schools, and energy and communications. (Added by Ord. No. 5102/1-02.)

**(I) Goals.**

- (A) Provide public facilities and services in an orderly and efficient manner consistent with the expansion of urbanization into rural areas.
- (B) Utilize the availability of public facilities and services as a tool for guiding urbanization with the Hillsboro Planning Area. (Amended by Ord. No. 3433/12-83.)
- (C) Provide a safe and healthy living environment.
- (D) Provide that existing land uses are and will continue to be supported by needed public facilities and services. (Added by Ord. No. 5102/1-02.)
- (E) Provide that future development is appropriately guided and supported by the provision of public facilities and services in a timely, orderly, and efficient manner. (Added by Ord. No. 5102/1-02.)

**(II) Definitions.**

(A) **Public facilities, utilities and services.** Facilities, utilities and services provided by government agencies, public service facilities and public utilities to meet the health, safety and welfare needs of the public and include: police and fire protection, water, sanitary and storm sewer, health and education services, zoning and subdivision control, recreation facilities and services, transportation system and services, energy and communication services and local government services.

(B) **Planning Area.** In this section planning area corresponds to the Hillsboro Urban Service Boundary Area (HUSBA), which is the study area for the Public Facilities Plan. The HUSBA is defined to the north, south, and west of Hillsboro by

the Metro Urban Growth Boundary. To the east, SW/SE 185th Avenue is generally treated as the study area boundary for the Public Facility Plan. (Added by Ord. No. 5102/1-02.)

### **(III) Policies.**

- (A) The extension of a public facility, utility or service outside the urban area shall occur only in conjunction with an expansion of the Urban Growth Boundary and shall be provided at a level consistent with the intended density and designated land use for the area. (Amended by Ord. No. 5102/1-02.)
- (B) (Deleted by Ord. No. 3433/12-83.)
- (C) (Deleted by Ord. No. 3433/12-83.)
- (D) Public facilities and services shall be provided at a level sufficient to create and maintain an adequate supply of housing and service an increasing level of commercial and industrial activity.
- (E) The ability of residents to pay for public facilities and services at varying densities of development should be a prime consideration in determining appropriate densities and land uses in the planning area.
- (F) (Deleted by Ord. No. 5102/1-02.)
- (G) The location of schools should be used as a tool in directing future growth within the planning area.
- (H) (Deleted by Ord. No. 5102/1-02.)
- (I) When possible, government offices should locate in the vicinity of the County courthouse to form over time a public buildings complex and civic center.
- (J) The City shall work with the school districts to develop a facilities plan designed to meet enrollment increases and population growth.
- (K) Utilization of schools and other public facilities as multi-purpose facilities should be encouraged to help meet the education, recreation and civic needs of the community.
- (L) Citizens' should assist in the development of funding methods and programs for public facility and service projects. (Amended by Ord. No. 5102/1-02.)
- (M) The City shall promote coordination among the City and other governmental and interested parties including special districts to facilitate the most effective uses of public facilities serving the planning area. (Added by Ord. No. 5102/1-02.)

### **(IV) Airport.** (Deleted by Ord. No. 5102/1-02.)

### **(V) Implementation Measures.** (Added by Ord. No. 3107/4-80 and Amended by Ord. No. 5102/1-02.)

#### **(A) COORDINATION OF SERVICES.**

- (1) The City of Hillsboro shall coordinate with applicable special districts and other intergovernmental entities and enter into agreements to facilitate the most effective uses of public facilities serving the planning area.
- (2) Intergovernmental agreements to which the City of Hillsboro is a party shall acknowledge the City as coordinator for the Hillsboro Public Facilities Plan.
- (3) The City's Public Facilities Plan shall be updated at each Periodic Review and as needed to reflect major changes in service provision. As a supporting document to the Comprehensive Plan, updates to the Public Facilities Plan are not Comprehensive Plan amendments.
- (4) The future urban service boundary has not been finalized between Hillsboro and Beaverton. When the boundary is determined it may lie to the west of 185th Avenue, but will not lie to the east. Using 185th as a study area boundary ensures that the PFP contains an analysis of all areas between Hillsboro and Beaverton that could become part of the Hillsboro urban service area.

(Added by Ord. No.5102/1-02.)

**(B) TRANSPORTATION.**

- (1) Comprehensive Plan goals, definitions, policies, and implementation measures related to transportation are provided in Section 13, Transportation, of the Hillsboro Comprehensive Plan.

(Added by Ord. No. 5102/1-02.)

**(C) WATER SYSTEM.**

- (1) The water system shall be coordinated with the Land Use Map in the provision of public facilities, especially sanitary sewers and fire protection.

- (a) The City shall coordinate with applicable special districts and other intergovernmental entities and enter into agreements to ensure adequate water for planned growth.

- (b) The City and water related districts and entities shall coordinate master planning for the water systems in the planning area. Master Plans shall include deficiencies and needed improvements. Master Plans may require changes to the City's Public Facilities Plan.

(Added by Ord. No. 5102/1-02.)

- (2) Consistent with the adopted UPAA and other agreements with service providers the City shall require properties in the urban area to annex to the City prior to the provision of water service by the City or Tualatin Valley Water District (TVWD). (Amended by Ord. No. 5102/1-02.)

- (3) Territory within the TVWD service boundary, when annexed to the City, shall maintain TVWD as the full service provider unless otherwise agreed by TVWD. (Amended by Ord. No. 5102/1-02.)

(4) Regarding areas presently within both the Hillsboro city limits and the TVWD service boundary and that are served by the TVWD, except for the territory served by the TVWD north of Oregon Highway 26 and east of Cornelius Pass Road, Hillsboro may annex the territory within the planning area and withdraw retail water distribution services as provided by law, including assumption of debts and liabilities, and become the retail service provider within that area. (Amended by Ord. No. 5102/1-02.)

(5) (Deleted by Ord. No. 5102/1-02.)

**(D) SANITARY SEWER.**

(1) The City shall cooperate with Clean Water Services (CWS) for the provision of service in the urban area consistent with the Comprehensive Plan policies and maps.

(a) The City and CWS will maintain an intergovernmental agreement, for approving the installation of sewage collection lines, approving and inspecting new service connections, and for operation and maintenance of the collection system. CWS is responsible for the construction and operation on the conveyance system (pipes over 24 inches and force mains) and the sewage treatment plants. CWS is responsible for adhering to CWS construction and design standards for private development. While interconnected, each entity owns its components. (Added by Ord. No. 351 1/12-84 and Amended by Ord. No. 5102/1-02.)

(b) Consistent with the adopted UPAA and other agreements with service providers within Urban Area "A" the City shall require properties to annex to the City prior to the provision of sanitary sewer service. (Added by Ord. No. 3511/12-84 and Amended by Ord. No. 5102/1-02.)

(c) Within Urban Area "B" as defined by the Urban Planning Area Agreement, the City may require properties to annex to the City prior to the provision of sanitary sewer service. The City shall negotiate with service districts currently providing urban services to properties in Area B, and will address service provision issues on an individual basis upon receipt of petitions for annexation. (Added by Ord. No. 3511/12-84 and Amended by Ord. No. 5102/1-02.)

(d) The City and CWS shall coordinate Master Plans for the sanitary sewage system. Master Plans shall identify deficiencies and needed improvements. Master Plans may require changes to the City's Public Facilities Plan. (Amended by Ord. No. 5102/1-02.)

(2) (Deleted by Ord. No. 5102/1-02.)

(3) The City shall continue its program of sealing, repairing and replacement of sewer lines to further reduce infiltration. Most projects in the City's Capital Improvement Plan (CIP) involve the repair and/or replacement of installed components to address one of these conditions. (Amended by Ord. No. 5102/1-02.)

(4) (Deleted by Ord. No. 5102/1-02.)

(5) (Deleted by Ord. No. 5102/1-02.)

**(E) STORM DRAINAGE.**

(1) The City and CWS shall coordinate Master Planning for the stormwater system. Studies shall also develop lists of needed improvements for the Urban Area. Master Plans may require changes to the City's Public Facilities Plan. (Amended by Ord. No. 5102/1-02.)

(2) CWS plans significant investment in the stormwater management system to address both conveyance and water quality needs. A portion of this investment will address drainage deficiencies in areas where drainage elements are undersized for meeting the area's design storm service standard. Other improvements will serve a combination of new and existing residents. The most significant improvements are for water quality enhancement facilities. The drainage system includes a network of pipes, culverts, open channel stormwater facilities, and other natural drainage channels and stormwater facilities that eventually discharge into the Tualatin River. (Amended by Ord. No. 5102/1-02 and 5728/3-07.)

(3) By intergovernmental agreement the City of Hillsboro assumes ownership and maintenance of public drainage facilities that are part of the City street system, natural waterways located in public easements and public water quality facilities. A separate intergovernmental agreement between the City and Washington County Land Use and Transportation Department establishes guidelines for transfer of ownership of county roads to the City after annexation of adjoining properties. (Amended by Ord. No. 5102/1-02.)

(4) By intergovernmental agreement, the City of Hillsboro is responsible for inspection and approval of constructed drainage improvements, and for inspection and maintenance of the collection system within the Hillsboro Urban Service Boundary Area. CWS is responsible for planning and designing the regional conveyance system and regional storm water quality projects. The City and CWS are responsible for adhering to CWS construction and design standards for public and certain private improvements. (Amended by Ord. No. 5102/1-02.)

(5) The City shall follow and enforce the Orders, Standards, specifications, work programs, and performance criteria promulgated by CWS, subject to program funding and to the extent the City may be lawfully authorized to act. (Added by Ord. No. 5102/1-02.)

(6) All major land use actions shall provide for adequate storm drainage conveyance and treatment per adopted standards. (Amended by Ord 5102/1-02 and 5728/3-07.)

(7) Storm sewer improvements shall be coordinated with the implementation of the Transportation Plan where appropriate.

**(F) GENERAL GOVERNMENT.**

(1) Prior to the first major Comprehensive Plan revision, the City shall study general government services and assess the adequacy of existing facilities and project future facility requirements. (Amended by Ord. No. 5102/1-02.)

(2) Prior to the first major Comprehensive Plan revision, the City shall review the Zoning Ordinance and determine if the existing zones adequately address the location of such public facilities as: churches, schools, utilities, and government agencies. (Amended by Ord. No. 5102/1-02.)

(3) The City shall periodically convene a Technical Advisory Committee consisting of representatives from the Public Works, Water, Finance and Planning and the appropriate service provider districts to coordinate long term public facilities and to plan for public facilities. (Added by Ord. No. 5102/1-02.)

**(G) POLICE SERVICES.**

(1) The City shall maintain, within the funding available, the current level of police protection in relation to the crime rates and calls for service. The crime rates and calls for service shall be monitored annually, so that the funding level of police services can be evaluated in relation to the needs of the community.

(2) The City shall, within the funding available, continue its efforts to reduce the incidence of reported crime. These efforts include maintaining manpower commensurate with the population, an ongoing training program for police personnel, and pursuing a community-wide program of crime prevention.

**(H) FIRE PROTECTION.**

(1) The City shall maintain, within the funding available, the current level of fire protection, emergency medical and fire related services.

(2) Prior to the first major revision, the City shall study future fire station locations and major equipment needs. The study shall establish station locations or locational criteria and identify the needs for major equipment acquisition.

(3) The City shall continue to coordinate fire protection efforts, including station locations, with Washington County RFPD #2, to assure maximum effectiveness and efficiency.

(4) Fire flows should be analyzed to assist in determining the location of new lines to improve water pressures in areas that may be deficient. (Amended by Ord. No. 5102/1-02.)

**(I) LIBRARY FACILITIES.**

(1) Library needs and activities shall be monitored in the future to determine the need and optimum time for physical improvements.

(Amended by Ord. No. 5102/1-02.)

**(J) SCHOOLS.**

(1) Public Facilities planning and projections shall be maintained in five year increments and shall be coordinated with the joint City/County urbanization studies.



(2) The City shall coordinate with the school districts located in the Urban Area to help assure an adequate level of educational services. Areas of coordination shall include:

- (a) Location of school site;
  - (b) Reservation of potential school sites during the development approval process;
  - (c) Provision of adequate pedestrian, bicycle and bus access from residential districts to school sites;
  - (d) Consideration of school capacities, school population, and district assessed value during the development approval process; and
  - (e) Provision of population projections.
- (Amended by Ord. No. 5102/1-02.)

**(K) PARKS AND RECREATION.**

(1) The City of Hillsboro shall complete a Park Master Plan. The plan shall identify park needs based on the level of service standards in the existing Master Plan for the planning area. The City shall also prepare a capital improvement program to address existing service deficiencies and anticipated park and recreation needs for the planning period.

(2) The City shall address long term operation and maintenance of park and recreation facilities within available funding parameters.

(3) The City shall examine strategic partnerships with local, state, and federal partners, especially for acquisition and shared-use facilities.

(Added by Ord. No. 5102/1-02.)

**(L) ENERGY AND COMMUNICATIONS. (Deleted by Ord. No. 5102/1-02.)**

**(M) ALTERNATIVE TRANSPORTATION. (Deleted by Ord. No. 5102/1-02.)**

**(N) HILLSBORO AIRPORT. (Deleted by Ord. No. 5102/1-02.)**

**(VI) Public Facilities Plan**

**(A)** In accordance with Goal 11 and OAR 660-011, the City completed a Public Facilities Plan (PFP) in 2001 which includes the following elements:

- (1) Interagency Coordination and Decision Making;
- (2) Existing Conditions and Future Needs Analysis;
- (3) Capital Improvement Project List and Financing Plan; and
- (4) Maps that identify the Planned Improvements.

(B) The PFP is adopted as a supporting document to the Comprehensive Plan.

- The list of Capital Improvement Projects is a required element of the HCP in accordance with Goal 11. The following project list is an estimate of the infrastructure improvements needed to serve planned urban development in the Hillsboro urban growth boundary for the planning period. Public Facilities Plan [20-Yr. Capital Improvement Projects List](#)

(Added by Ord. No. 5102/1-02.)

**HILLSBORO COMPREHENSIVE PLAN**  
Ordinance No. 2793-4-77

**Section 13. Transportation.**

**(I) Goals:**

- (A) Safety.** Develop and maintain a safe City transportation system.
- (B) Multi-modal Travel.** Provide a balanced City transportation system.
- (C) Trip Reduction.** Develop a transportation system that helps to reduce the number of motor vehicle trips and contributes to regional goals to reduce per capita vehicle miles of travel.
- (D) Performance.** Provide an efficient transportation system that manages congestion.
- (E) Goods Movement.** Provide for efficient movement of goods and services.
- (F) Livability.** Transportation facilities within the City shall be designed and constructed in a manner that enhances livability of Hillsboro.
- (G) Accessibility.** Develop transportation facilities that are accessible to all members of the community and minimize out-of-direction travel.

(Amended by Ord. No. 4799/7-99 and Ord. No. 4818/9-99.)

**(II) Definitions.**

- (A) Transportation.** Refers to the movement of people and goods.
- (B) Transportation facility.** Any physical facility that moves or assists in the movement of people and goods.
- (C) Transportation system.** One or more transportation facilities that are planned, developed, operated, and maintained in a coordinated manner to supply continuity of movement between geographic and jurisdictional areas.
- (D) Transportation disadvantaged.** Those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.
- (E) Mass transit.** Any form of passenger transit which carries members of the public on a regular and continuing basis, including, but not limited to, bus, rail and air transportation in and between urban areas.

**(F) Green Streets.** Public or private streets designed to allow roadways to better manage stormwater runoff quantity and quality within the right-of-way over the long term. Design elements and facilities that can be used to accomplish this include, but are not limited to, minimizing paving and/or using pervious paving materials, maximizing street tree coverage, using multi-functional open drainage systems in lieu of more conventional curb-and-gutter systems, reducing cul-de-sac radii and using vegetated islands in the center. (Added by Ord. No. 5728/3-07)

**(III) Policies.** The following policies are organized by the seven transportation goals. Actions are listed below appropriate policies that direct the how the policy will be implemented. (Amended by Ord. No. 4818/9-99.)

**(A) Safety.**

(1) Build, maintain and/or support a well-defined and safe transportation system within the City for pedestrian, bicycle, transit, motor vehicles, air and rail travel. (Amended by Ord. No. 4818/9-99.)

*Develop and apply a series of design standards for street, bicycle, pedestrian and transit improvements in Hillsboro. Allocate City road and bikeway maintenance expenditures in a manner that ensures that systems supporting these modes of travel are safe. Minimize conflicts between modes, particularly between motor vehicles, pedestrians, bicycles and transit. Develop City standards for safe pedestrian crossings of roadways. As transportation facilities are built, public involvement as outlined in the Comprehensive Plan will be undertaken.*

(2) Establish a City monitoring system that regularly evaluates, prioritizes and mitigates high accident locations within the City.

*Review traffic accident information regularly to systematically identify, prioritize and remedy safety problems. Develop a list of projects necessary to eliminate such problems. Implement safety improvements through the City Capital Improvement Program and development review process.*

(3) Promote transportation system safety through education and law enforcement.

*This applies to all modes of travel.*

(4) Implement enforceable access management standards for arterial and collector roadways consistent with City, County and State requirements.

*Use Metro Title 6 and Washington County standards as a guide to establish City access spacing guidelines: Arterial (minimum 600 feet, maximum 1,000 feet) and Collector (minimum 200 feet, maximum 400 feet). ODOT Access Management*

*Categories apply to State routes, but are generally less restrictive than the county standards.*

- a) The City of Hillsboro shall coordinate with ODOT in the evaluation of any action (such as a comprehensive plan amendment) that would affect the function of the Cornelius Pass Road Interchange.
- b) The function of the Cornelius Pass Road Interchange is to provide safe and efficient access for long-distance, regional trips (e.g. between Hillsboro and the Portland metropolitan area) as well as for local traffic that originates and terminates within Hillsboro. The interchange has been designed to provide capacity and safe operations to accommodate this function over the 15-year planning period. (Added by Ord. No. 5341/2-04.)
- (5) Provide adequate access to properties for emergency services vehicles throughout the City using the City land use planning and development review procedures
- (6) Do not permit land uses within airport noise corridors that are not noise compatible and avoid the establishment of uses that are physical hazards to air traffic at the Hillsboro Airport.

*The airport is a resource to the community. Coordinate with the Port of Portland on the implementation of the Hillsboro Airport Master Plan and overlay Runway Protection Zone (RPZ) designations on the City zoning map. Work with the Port of Portland to establish a partnership, which addresses impacts. Avoid permitting future uses in the airport noise corridors that would be significantly impacted by allowable airport noise levels, unless such impacts can be effectively mitigated.*

- (7) Coordinate, when applicable and appropriate, federal, state and local safety and compliance standards in the operation, construction and maintenance of the rail and pipeline systems in Hillsboro.
- (8) Encourage grade separations or gate controls at primary railroad crossings.

*Support the upgrade of railroad crossings to current design standards. ODOT/PUC provides grants to improve crossing safety. Current funding sources are not capable of financing all the rail crossing needs within the next 20 years (it could take more than 40 years).*

**(H) Airport.**

**(1) Definitions**

(a) General aviation reliever facility. An airport designed to normally service aircraft up to the executive jet level only and not intended for use by air carrier type equipment.

**(2) Policies**

(a) The airport shall be maintained and used as, but not expanded beyond the capability of, a “general aviation reliever facility.” The City shall encourage and work with airport authorities to decrease airport-related problems to a level compatible with surrounding land uses and the urban area.

(b) Adequate open space and tree planting shall be provided around the airport where necessary to reduce the noise impact of airport operations on surrounding residential areas. Airport open space shall be included in the City’s greenway system.

(c) The City shall encourage the use of properties adjacent to the airport for industrial parks, related commercial activities and community facilities in order to maximize airport services and provide a buffer for surrounding residences.

(d) The height and occupancy of structures within the approach zones to the airport shall be regulated to reduce hazard to aircraft and the public.

(Added by Ord. No. 5102/1-02.)

### CERTIFICATE OF FILING AND SERVICE

I certify that on February 6, 2013, I filed the original of petitioners' Petition for Review along with four copies with the Land Use Board of Appeals, Public Utility Commission Building, 550 Capitol Street, N.E., Suite 235, Salem, OR 97301-2552 by Certified First Class Mail.

I also certify that on February 6, 2013, I served a true and correct copy of this Petition for Review by First Class Mail to the following person(s):

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Dated: February 6, 2013

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