

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals an amendment to the City of Portland
4 Comprehensive Plan and Zoning Code. The city's decision,
5 Ordinance 158055, adds a new policy to the Portland
6 Comprehensive Plan and amends portions of the Portland City
7 Code (PCC) controlling noise levels near the Portland Airport.
8 Petitioner asks us to remand the amendment to the comprehensive
9 plan and reverse the changes to the city's code.

10 FACTS

11 The ordinance under review is part of the noise control
12 scheme for the Portland Airport. The ordinance sets the
13 boundary of noise regulations by means of a "Ldn day/night
14 sound level" contour line. The contour line encloses those
15 lands where the average day/night sound level is 65 decibels or
16 higher. This line is known as the "1983 Ldn 65 noise
17 contour."¹ The ordinance requires new construction within
18 the 1983 Ldn 65 line to include sound insulation. It also
19 requires disclosure statements for new residential construction
20 within the Ldn 65 noise contour line.

21 The new regulations represent an expansion of the city's
22 noise regulation boundary. The former boundary (the 1977 Ldn
23 68 noise contour line) enclosed an area where the average noise
24 level is 68 decibels or greater.

25 The city's noise regulations are based, in part, on
26 standards established by the State Environmental Quality

1 Commission (EQC) and the Department of Environmental Quality
2 (DEQ). In 1983, EQC adopted a noise control program for the
3 Port of Portland. See Record at 122-123. The program provided
4 that no new residences should be allowed within the Ldn 65
5 contour line, unless "currently permitted under existing
6 residential zoning." Record at 127. The city's provisions,
7 however, were more permissive, controlling residential
8 development within the Ldn 68 contour line rather than within
9 the Ldn 65 contour line. Noting the discrepancy, EQC concluded
10 that amendments to the city's program were necessary. The
11 ordinance on appeal is a result of the amendment process
12 undertaken in 1983.

13 FIRST ASSIGNMENT OF ERROR

14 "Ordinance 158055 violates Goal 6 by allowing high
15 density residential development in derogation of DEQ's
noise abatement standards."

16 Petitioner argues that the city's ordinance violates
17 Statewide Goal 6. The goal requires, in pertinent part, that
18 "all waste and process discharges...shall not threaten to
19 violate, or violate applicable state or federal environmental
20 quality statutes, rules and standards." Waste and process
21 discharges are defined to include noise.² Petitioner argues
22 the goal was intended to govern not only "discharges" but also
23 uses affected by discharges. Petitioner points to Guideline 3
24 which provides

25 "Plans should buffer and separate those land uses
26 which create or lead to conflicting requirements and
impacts upon the air, water and land resources."

1 Statewide Planning Goal 6, Guideline 3.

2 In support of its argument, petitioner states that EQC
3 noise regulations implement Goal 6; and that EQC has adopted
4 noise regulations in the form of the Portland International
5 Noise Abatement Program.³ The program provides in part

6 "[n]o residences should be allowed within the 65 dBA
7 contour unless currently permitted under existing
8 residential zoning." Record at 127.

8 In petitioner's view, the city's new ordinance allows
9 construction of residences within the 65 dBA contour in
10 violation of the adopted program. Petitioner also says the
11 city's regulations do not limit construction of residences to
12 those areas already zoned for residential use, but rather
13 permit residences in nonresidential zones. The "C" zone is a
14 commercial zone that permits certain residential uses. Under
15 the EQC program, residences would not be allowed in the C zone
16 because it is not a "residential" zone.⁴ Petitioner argues
17 that because the ordinance violates EQC's Noise Abatement
18 Program, a state "environmental quality" standard, the
19 ordinance violates Goal 6.

20 Respondents meet petitioner's challenge in several ways.
21 First, the Port of Portland argues there is no EQC order in the
22 record, and, therefore, there is no standard against which to
23 measure the city's ordinance. The record allegedly contains
24 only a memorandum from the director of DEQ to EQC recommending
25 approval of the Port's Noise Abatement Program. This
26 memorandum is not an agency order, according to respondent.

1 The record shows that EQC adopted a memorandum recommending
2 the Port's Noise Abatement Program. The adopted memorandum
3 states "approval of this program and these conditions is an
4 order of the commission and is enforceable pursuant to OAR
5 34-12-052." Record at 136 (emphasis added). We understand
6 this language to mean that when approved by EQC, the memorandum
7 became an EQC order. The action is not as clear in form as
8 might be desired. However, we believe the agency's intent was
9 to adopt the program as a regulatory device.

10 We conclude the memorandum constitutes an order of the
11 commission.⁵

12 More persuasive is the city's argument that Petitioner
13 misreads Goal 6 by relying on it to enforce a control on the
14 siting of noise-sensitive uses rather than as a control over
15 noise sources. Goal 6, by its terms, is directed at "waste
16 and process discharges," barring local government actions that
17 violate or threaten to violate environmental controls on such
18 discharges. We agree that the EQC order relied on by
19 Petitioner is not enforceable under the terms of Goal 6. The
20 city's ordinance does not authorize any waste or process
21 discharges.

22 We conclude that Goal 6 does not limit county ordinance
23 provisions permitting noise sensitive uses near noise
24 generating facilities.⁶

25 The First Assignment of Error is denied.
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1 SECOND ASSIGNMENT OF ERROR

2 "Ordinance 158055 violates Goal 6 by permitting land
3 uses which will violate the carrying capacity of the
 land resources of the PDX noise impact zone."

4 Goal 6 requires that comprehensive plans maintain and
5 improve air, water and land resource quality. Under the goal,
6 discharges shall not "exceed the capacity" of "air, water, and
7 land resources." Petitioner argues the city's ordinance does
8 not adequately protect land resources vital to the airport from
9 encroachment by incompatible, noise sensitive (residential)
10 uses. Petitioner cites evidence in the record showing that
11 construction of residences within the Ldn 65 noise contour line
12 will cause an increase in stress and have other negative health
13 impacts. See Record 12-14. In support, petitioner points out
14 that DEQ rules for airports identify Ldn 55 contour line as the
15 location where noise impacts begin to adversely affect human
16 activities, such as speech, communication, concentration, rest
17 and sleep. Record at 62. Additionally, the federal Department
18 of Housing and Urban Development finds Ldn 65 to 75 contour
19 lines normally unacceptable for residential uses. Record at
20 63. See also Record 428. Petitioner complains that the city's
21 decision ignores these factors and fails, therefore, to
22 demonstrate compliance with Goal 6.

23 Petitioner's point relies on its view that the goal calls
24 for restrictions on air, water, and land resources and not just
25 the discharges that threaten these resources. We disagree.
26 The goal protects the resources by limiting discharges, not by

1 restricting land uses subject to discharges.

2 Part of Petitioner's argument suggests the airport itself
3 is a land resource needing protection. That is, the goal
4 protects the airport resource by limiting noise sensitive uses
5 nearby which might limit airport use, according to Petitioner.

6 Again, we do not agree. Goal 6 seeks to "maintain and
7 improve the quality of the air, water and land resources of the
8 state." We do not agree this goal may be achieved by
9 restricting uses incompatible with waste and process discharges
10 whether occurring on airports or elsewhere.

11 The Second Assignment of Error is denied.

12 THIRD ASSIGNMENT OF ERROR

13 "Ordinance 158055 violates Goal 12 by failing to
14 minimize adverse social, economic and environmental
15 impacts and costs of a vital link in Portland's
16 transportation plan."

17 Goal 12 requires "a safe, convenient and economic
18 transportation system." It also requires that transportation
19 plans "minimize adverse social, economic and environmental
20 impacts and costs." Because the challenged noise overlay zone
21 fails to protect the public from noise, the zone violates Goal
22 12, according to petitioner.

23 The Port and the city argue the city's findings clearly
24 show that the conditions of development and the extension of
25 noise controls around the airport meet Goal 12. Both
26 respondents remind us that Goal 12 provides that transportation
plans shall "minimize adverse social, economic and

1 environmental impacts and costs." The goal does not require
2 elimination of adverse impacts.

3 We agree with respondents. The goal requires that adverse
4 impacts be minimized, and the city's ordinance does take steps
5 to minimize noise impacts on the area around the airport.

6 The Third Assignment of Error is denied.

7 FOURTH AND FIFTH ASSIGNMENTS OF ERROR

8 "The ordinance violates Policy 10.1 of Portland's
9 acknowledged plan by precluding amendment of PCC
Chapter 33.640 until December 1990.

10 "The ordinance violates ORS 197.640(1) by precluding
11 amendment of PCC Chapter 33.640 until December 1990."

12 In these two assignments of error, petitioner notes that
13 the ordinance amends Chapter 33 of the city's code to provide
14 that there will be no amendment of the Ldn noise contour lines
15 or other provisions of the applicable chapter for five years
16 after date of adoption. The ordinance further provides for a
17 review not later than September 30, 1990.⁷ According to
18 petitioner, this provision violates Policy 10.1 of the city's
19 acknowledged comprehensive plan, providing for a complete
20 review of the plan on a five year basis. Petitioner argues the
21 ordinance violates ORS 197.640 to 197.649 by preventing the
22 city from pursuing review of the noise zone at the time of the
23 city's mandated periodic review of its comprehensive plan.⁸
24 Petitioner notes in addition to the statutory requirement for
25 periodic review, LCDC adopted OAR 660-19-045(2) which mandates
26 periodic review within five years of acknowledgement. The

1 city's plan was adopted in May of 1981, and petitioner argues
2 the city must undertake a review and update its plans within
3 the next year or so and certainly before 1990.

4 We agree with the city. Notwithstanding the prohibition
5 against amendment, the ordinance can not bind the city should
6 it later decide to amend the ordinance. The council is free to
7 change its mind and amend this ordinance by another ordinance.
8 The city council, in other words, cannot divest itself of its
9 legislative authority in the manner alleged by Petitioner. See
10 6 E. McQuillan, Municipal Corporations Sec. 21.02 (3d Ed, 1980).

11 The Fourth and Fifth Assignments of Error are denied.

12 Ordinance 158055 is affirmed.

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FOOTNOTES

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1983 was the year the line was established.

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The goal provides:

7 "To maintain and improve the quality of the air, water and
8 land resources of the state.

9 "All waste and process discharges from future development,
10 when combined with such discharges from existing
11 developments shall not threaten to violate, or violate
12 applicable state or federal environmental quality status,
13 rules and standards. With respect to the air, water and
14 land resources of the applicable air sheds and river basins
15 described or included in state environmental quality
16 statues, rules, standards, and implementation plan, such
17 discharges shall not (1) exceed the carrying capacity of
18 such resources, considering long range needs; (2) degrade
19 such resources; or (3) threaten the availability of such
20 resources.

21 "Waste and Process Discharges - refers to solid waste,
22 thermal, noise, atmospheric or water pollutants,
23 contaminants, or products therefrom. Included here also
24 are indirect sources of air pollution which result in
25 emissions of air contaminants for which the state has
26 established standards."

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DEQ goes on to argue that the program provision referring to "existing residential" zoning should not be read to include the limited residential uses permitted under commercial zoning (which did exist in the area at the time the regulations were adopted). The corresponding city noise control measure at PCC 33.69.030 prohibited residential uses in the 1977 Ldn 68 noise contour line "except where such uses are located in any currently zoned area of R10, R20, FF or County Residential." Record at 110. All of the zones mentioned in the city code are residential zones. We agree with petitioner's assessment.

5

Use of a memo form order was before us in Swenson v. DEQ, 9 Or LUBA 10 (1983).

6

Other goals may limit pollution sensitive uses. Goal 10, for example, requires that comprehensive plans provide for the housing needs of the citizens of the state. An argument could be constructed that housing units near noise sensitive or polluting sources may not meet the goal. We express no view as to the validity of such an argument.

Further, our view that Goal 6 does not apply to this decision need not mean that EQC is without a remedy. As EQC has the authority to adopt noise regulations, it also has enforcement power under ORS 467.030, 467.990. Therefore, EQC may have other means to challenge the city's regulations.

7

PCC 33.640.060(A) provides, in pertinent part, that

"The location of the Ldn noise contour lines and other provisions of this chapter shall not be subject to amendment for a period of five years from the date of their adoption. At the conclusion of that period, there shall be a review [which] shall be initiated no later than September 30, 1990."

8

ORS 197.640(1) requires periodic review of the comprehensive plan. LCDC is required to review the plans

"to ensure that they are in compliance with the goals and are coordinated with the plans and programs of state agencies. Periodic review shall be conducted in accordance with a schedule to be established by the

1 commission, but unless requested at an earlier date by
2 the local government:

3 "

4 "(c) The first periodic review shall be two to five
5 years after acknowledgement under ORS 197.251; and

6 "(d) All subsequent reviews shall be three to five
7 years after the previous review.

8 "(2) When feasible, the schedule for periodic review
9 shall be based upon the date contained in
10 acknowledged comprehensive plans." ORS
11 197.640(1), (2), as amended by 1983 Oregon Laws,
12 ch 827, sec 11.
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