

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

3
4 LOGAN RAMSEY,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 91-215
10 CITY OF PORTLAND,)
11) FINAL OPINION
12 Respondent,)
13) AND ORDER
14 and)
15)
16 FRIENDS OF FOREST PARK,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from City of Portland.

22
23 Logan Ramsey, Portland, filed the petition for review
24 and argued on his own behalf.

25
26 Adrienne Brockman, Portland, filed the response brief
27 and argued on behalf of respondent.

28
29 James Molloy, Portland, represented intervenor-
30 respondent.

31
32 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
33 Referee, participated in the decision.

34
35 REMANDED 05/22/92

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city ordinance amending the
4 Portland City Code (PCC) to adopt "an interim review
5 procedure for activities which disturb forests pending
6 acknowledgment of permanent regulations." PCC 33.453.010.

7 **MOTION TO INTERVENE**

8 Friends of Forest Park move to intervene on the side of
9 respondent. There is no opposition to the motion, and it is
10 allowed.

11 **MOTION TO STRIKE AMENDED PETITION FOR REVIEW**

12 Two days after filing an objection to the record,
13 petitioner filed a petition for review. Thereafter the city
14 filed a response brief. We subsequently issued an order
15 sustaining petitioner's record objection, in part. Ramsey
16 v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-215, Order
17 on Record Objection, February 21, 1992). That order states
18 the local record would be settled when LUBA receives a
19 supplemental record from respondent, and that "[p]etitioner
20 shall have 21 days from the date the supplemental record is
21 received to file an amended petition for review." Id.,
22 slip op at 3. The supplemental record was received on
23 March 3, 1992. Petitioner filed an amended petition for
24 review on March 24, 1992.

25 The city moves to strike petitioner's amended petition
26 for review. The city argues the amended petition for review

1 contains new and expanded arguments which do not rely on
2 facts in the supplemental record and responses to arguments
3 in the city's response brief. According to the city, under
4 OAR 661-10-030(4), amendments to a petition for review may
5 be allowed only for the purpose of correcting technical
6 mistakes.

7 OAR 661-04-026(5) provides:

8 "If an objection to the record is filed, the time
9 limits for all further procedures under these
10 rules shall be suspended. When the objection is
11 resolved, the Board shall issue [an] order
12 declaring the record settled and setting forth the
13 schedule for subsequent events. * * *

14 Our February 21, 1992 order set out the briefing schedule
15 for this appeal. Because the parties filed briefs before
16 the record was settled, the order refers to the briefs to be
17 filed after the record is settled as "amended" briefs.
18 However, the order imposes no limitations on the contents of
19 those briefs. Therefore, the inclusion of new and expanded
20 arguments in the amended petition for review is consistent
21 with our rules and with our February 21, 1992 order.

22 The motion to strike the amended petition for review is
23 denied.

24 **MOTION TO TAKE OFFICIAL NOTICE**

25 The city requests that pursuant to Oregon Evidence Code
26 (OEC) 202(7), this Board take official notice of the
27 following documents:

- 28 1. Northwest Hills Natural Area Protection Plan
29 (NWHPP), adopted by Ordinance 164517.

- 1 2. Southwest Hills Resource Protection Plan
2 (SWHPP), adopted by Ordinance 165002.
- 3 3. Scenic Views, Sites, and Corridors Scenic
4 Resources Protection Plan, adopted by
5 Ordinance 163957.
- 6 4. Mineral and Aggregate Resources Inventory,
7 dated August 1988.¹
- 8 5. "The Proposed Local Review Order and DCCO
9 [sic] response adopted by Resolution No.
10 34523." Id.

11 Petitioner agrees that the Board may take official
12 notice of city enactments under OEC 202(7), but objects to
13 the above listed documents being considered part of the
14 local evidentiary record.

15 While we have often stated that LUBA has authority to
16 take official notice of judicially cognizable law, as
17 defined in OEC 202, we have never held that LUBA has
18 authority to take official notice of adjudicative facts, as
19 set out in OEC 201. Blatt v. City of Portland, ___ Or LUBA
20 ___ (LUBA No. 90-152, June 28, 1991), slip op 7, aff'd 109
21 Or App 259 (1991). With regard to adjudicative facts,
22 LUBA's review is limited by ORS 197.830(13)(a) to the record
23 of the proceeding below, except in instances where an
24 evidentiary hearing is authorized by ORS 197.830(13)(b).
25 Therefore, we agree with petitioner that any city enactments
26 of which we take official notice under OEC 202 do not

¹According to the city, this document "was not formally adopted since it was an inventory and the conclusion was that there are no resources within the city to be protected." Motion Requesting Judicial Notice 1.

1 thereby become part of the local record which may provide
2 evidentiary support for the challenged decision. Adkins v.
3 Heceta Water District, ___ Or LUBA ___ (LUBA No. 91-139,
4 May 1, 1992), slip op 5.

5 OEC 202(7) provides that judicially cognizable law
6 includes "[a]n ordinance, comprehensive plan or enactment of
7 any county or incorporated city in this state * * *." We
8 therefore have authority to take official notice of the
9 plans adopted by ordinance and proposed local review order
10 adopted by resolution listed as items 1-3 and 5 above.
11 However, with regard to item 5, we note that the city has
12 not submitted a copy of the entire Proposed Local Review
13 Order and, therefore, we take official notice of only those
14 portions of the Proposed Local Review Order attached to the
15 city's response brief. We do not take official notice of
16 item 4, because it has not been adopted by any city
17 enactment.

18 The city's motion to take official notice is granted
19 with regard to items 1-3 and 5 (in part), and is denied with
20 regard to item 4.

21 **FACTS**

22 On May 15, 1981, the city's comprehensive plan and land
23 use regulations were acknowledged by the Land Conservation
24 and Development Commission (LCDC) under ORS 197.251 as
25 complying with the Statewide Planning Goals, including
26 Goal 5 (Open Space, Scenic and Historic Areas, and Natural

1 Resources). OAR Chapter 660, Division 16, "Requirements and
2 Application Procedures for Complying with Statewide Goal 5"
3 (Goal 5 rule) was adopted by LCDC on May 8, 1981. The city
4 was not required to comply with the Goal 5 rule prior to
5 obtaining acknowledgment. The Goal 5 rule sets out a
6 detailed process for complying with Goal 5 which includes
7 (1) inventorying the location, quality and quantity of
8 Goal 5 resources; (2) identifying conflicting uses for such
9 resources; (3) analyzing the economic, social, environmental
10 and energy (ESEE) consequences of such conflicts; and
11 (4) adopting a program to achieve the goal of resource
12 protection. The city has undertaken the process of bringing
13 its plan and land use regulations into compliance with the
14 Goal 5 rule as part of the periodic review process initiated
15 under former ORS 197.640.

16 On July 15, 1988, the city amended Title 33 of the PCC
17 to add a new chapter entitled "Environmental Concern Zone"
18 (E-zone).² The E-zone is an overlay zone which includes two
19 subdistricts, Environmental Conservation (EC) and
20 Environmental Protection (EP). Among the stated purposes of
21 the E-zone is to "[p]rotect the City's inventoried
22 significant natural resources and their functional values,
23 as identified in the Comprehensive Plan." PCC 33.430.010.

²Effective January 1, 1991, the city repealed the existing PCC Title 33, including the E-zone, and replaced it with a revised Title 33, including a revised E-zone at PCC chapter 33.430. All references in this opinion are to the revised E-zone currently found at PCC chapter 33.430.

1 The ordinance which added the E-zone to the PCC also added
2 several new policies to comprehensive plan chapter 8
3 (Environment), including policy 8.14 (Natural Resources),
4 discussed in some detail, infra.

5 The city has subsequently adopted resource protection
6 plans covering certain Goal 5 resources in particular
7 portions of the city. These resource protection plans
8 include the site-specific resource inventory, conflicting
9 use identification, ESEE consequence analysis and protection
10 program development required by the Goal 5 rule. The city
11 ordinances adopting such resource protection plans also
12 amend the city's zoning map to apply the EC and EP overlay
13 districts where called for by the resource protection plans.
14 Such adopted resource protection plans include, as relevant
15 to this appeal, the NWHPP, SWHPP and Columbia Corridor Plan
16 (CCP). If an ordinance adopting such a resource protection
17 plan is not appealed to this Board, or is affirmed on
18 appeal, it is considered acknowledged. ORS 197.625.

19 On November 6, 1991, the city adopted the challenged
20 ordinance, replacing former PCC chapter 33.299 (Temporary
21 Prohibition on the Disturbance of Forests) with current
22 chapter 33.453 (Interim Forest Review). PCC 33.453.030
23 provides that herbicide application and burning, cutting,
24 damaging or removing vegetation "in forests^[3] within the

³PCC 33.453.020 defines "forest" as:

1 Columbia South Shore Plan District, the Skyline Plan
2 District, and the Southwest Hills Study Area are subject to
3 Type II review for compliance with Comprehensive Plan
4 Goal 8." However, PCC 33.453.060 provides:

5 "This Chapter shall cease to have force and effect
6 in areas for which environmental zone maps have
7 been acknowledged as in compliance with the
8 Statewide Planning Goals. * * *"

9 There is no dispute that acknowledgment of the ordinance
10 adopting the SWHPP has removed the Southwest Hills Study
11 Area from the operation of PCC chapter 33.453. There is
12 also no dispute that acknowledgment of the ordinance
13 adopting the NWHPP has removed the Skyline Plan District
14 (SPD) from the operation of PCC chapter 33.453, except for
15 SPD areas on the west side of Skyline Blvd., which are not
16 covered by the NWHPP. Petitioner owns property in one of
17 these SPD areas to which PCC chapter 33.453 still applies.
18 PCC chapter 33.453 also continues to apply to the Columbia
19 South Shore Plan District, as the CCP for that area of the
20 city has not yet been acknowledged.⁴

"[A]ny grove or stand of 100 or more trees, more than five feet high, predominated by tree species native to the Pacific Northwest, in which the average size of the 25 largest native trees is greater than nine inches in diameter at five feet above the ground, and in which the tree cover extends over an area larger than two acres."

⁴The city ordinance adopting the CCP was appealed to this Board. We affirmed the city's decision, but our decision was appealed to the Court of Appeals, which issued an opinion reversing and remanding our decision. The case is currently pending before the Supreme Court. Columbia Steel

1 The Type II review process includes a decision made by
2 the planning director, after notice to neighboring property
3 owners, and the opportunity to appeal to, and have a public
4 hearing before, a hearings officer. PCC 33.730.020. Plan
5 Goal 8 provides:

6 "Maintain and improve the quality of Portland's
7 air, water, and land resources and protect
8 neighborhoods and business centers from
9 detrimental noise pollution."

10 Plan Goal 8 is followed by 26 policies, covering topics such
11 as groundwater, open space, soil erosion, wetlands, riparian
12 areas and wildlife. The city's findings on compliance of
13 the challenged ordinance with plan Goal 8 indicate that
14 requests for interim forest review approval under
15 PCC 33.453.030 will be reviewed against relevant plan Goal 8
16 policies, as well as plan Goal 8 itself. Record 8, 17-18.

17 **FIRST THROUGH THIRD ASSIGNMENTS OF ERROR**

18 Petitioner contends the city's adoption of the
19 challenged ordinance does not comply with Goal 5 and the
20 Goal 5 rule with regard to the portions of the SPD west of
21 Skyline Blvd. Petitioner argues the only "inventory" of
22 significant forest resources referred to in the ordinance is
23 a set of infrared aerial photographs which are not part of
24 the record. According to petitioner, the city improperly
25 failed to determine the location, quality and quantity of

Castings Co. v. City of Portland, 19 Or LUBA 338, rev'd 104 Or App 244
(1990), rev allowed 311 Or 261 (1991).

1 each resource site, as required by OAR 661-16-000.
2 Petitioner further argues the city failed to determine the
3 ESEE consequences of conflicts with identified resource
4 sites, including both impacts on the resource and impacts on
5 conflicting uses, as required by OAR 661-16-005. Panner v.
6 Deschutes County, 14 Or LUBA 1, 11, aff'd 76 Or App 59
7 (1985). Finally, petitioner argues that under
8 OAR 660-16-010(3), plan Goal 8 and the plan Goal 8 policies
9 are not clear and objective enough to be used as permit
10 approval standards to limit uses conflicting with Goal 5
11 resources.

12 The city concedes the challenged decision amends the
13 city's acknowledged land use regulations. However, the city
14 argues this Board is authorized to reverse or remand a
15 decision amending a land use regulation for failure to
16 comply with a statewide planning goal only if the city's
17 acknowledged comprehensive plan does not contain specific
18 policies providing the basis for the regulation. ORS
19 197.835(5)(b). According to the city, plan policy 8.14
20 (Natural Resources), quoted below, provides such a basis:

21 "Conserve significant natural and scenic resource
22 sites and values through a combination of programs
23 which involve zoning and other land use controls,
24 purchase preservation, intergovernmental
25 coordination, conservation, and mitigation.
26 Balance the conservation of significant natural
27 resources with the need for other urban uses and
28 activities through evaluation of economic, social,
29 environmental, and energy consequences of such
30 actions."

1 In the alternative, the city argues the challenged
2 ordinance complies with Goal 5 and the Goal 5 rule.⁵
3 According to the city, because plan policy 8.14 is worded
4 similarly to Goal 5, it requires the city to perform the
5 equivalent of the Goal 5 planning process in acting on
6 individual interim forest review applications. The city
7 contends that in applying plan policy 8.14, it will in
8 effect be applying Goal 5 quasi-judicially on a case-by-case
9 basis. According to the city, under plan policy 8.14, as
10 applied through PCC 33.453.030, the following will take
11 place for each resource site for which interim forest review
12 approval is sought:

- 13 1. The applicant will prepare an inventory
14 identifying the location, quality and
15 quantity of the resource.
- 16 2. The applicant will identify the proposed use.
- 17 3. The city will identify conflicting uses and
18 prepare an analysis of ESEE consequences.
- 19 4. The proposed use will be balanced against the
20 conflicting uses, using the ESEE consequence
21 analysis.
- 22 5. The city will apply the criteria of

⁵The city also argues that because the challenged decision is legislative in nature, it is not required to be supported by findings demonstrating compliance with Goal 5. Petitioner may be correct that legislative decisions are not required by statute to be supported by findings demonstrating compliance with applicable standards. However, regardless of whether a decision is legislative or quasi-judicial, demonstrating compliance with the terms of Goal 5 and the Goal 5 rule requires the adoption of findings. League of Women Voters v. Klamath County, 16 Or LUBA 909, 913-14 (1988).

1 PCC 33.453.030 (presumably plan Goal 8 and
2 the plan Goal 8 policies) and render a
3 decision on the appropriate degree of
4 protection for the subject resource site.

5 Finally, the city argues that because its plan and land use
6 regulations are acknowledged, the adoption of the challenged
7 regulation is not required for the city to achieve Goal 5
8 compliance and, therefore, the city may choose to adopt the
9 regulation so long as it is not less restrictive than Goal 5
10 allows.

11 **A. Scope of Review**

12 ORS 197.835(5) provides in relevant part:

13 "The board shall reverse or remand an amendment to
14 a land use regulation or the adoption of a new
15 land use regulation if:

16 "* * * * *

17 "(b) The comprehensive plan does not contain
18 specific policies * * * which provide the
19 basis for the regulation, and the regulation
20 is not in compliance with the statewide
21 planning goals." (Emphasis added.)

22 We do not see anything in plan policy 8.14 that
23 provides a basis for requiring a case-by-case application of
24 an equivalent of the Goal 5 planning process to individual
25 development applications.⁶ The first sentence of Goal 5

⁶We agree with the city that where city plan provisions correspond to those in a statewide planning goal, it is appropriate to interpret those plan provisions consistently with available authority for interpreting that goal. Tice v. Josephine County, ___ Or LUBA ___ (LUBA No. 91-043, July 12, 1991), slip op 9; Goracke v. Benton County, 12 Or LUBA 128, 135 (1984). However, even if we assume that plan policy 18.14 is worded sufficiently similar to Goal 5 to make this principle applicable, as we explain below,

1 refers to conserving natural resource sites "through a
2 combination of programs" which include "zoning and other
3 land use controls." The second sentence of plan policy 8.14
4 directs the city to "[b]alance the conservation of
5 significant natural resources with the need for other urban
6 uses * * *." Additionally, plan policy 8.14 was added to
7 the city's comprehensive plan in 1988, by the same ordinance
8 that added the E-zone to the PCC, and at the time when the
9 city was initiating the process of bringing its plan and
10 land use regulations into compliance with the Goal 5 rule,
11 pursuant to periodic review.

12 We believe that plan policy 8.14 is applicable to the
13 development of the city's resource protection plans and
14 other resource conservation programs, and does not provide
15 the basis for a case-by-case system of carrying out the
16 Goal 5 planning process in conjunction with individual
17 development applications. Therefore, under
18 ORS 197.835(5)(b), the challenged ordinance is subject to
19 reversal or remand if it does not comply with Goal 5 and the
20 Goal 5 rule.

21 **B. Compliance with Goal 5 and Goal 5 Rule**

22 The findings adopted by the city in support of the
23 challenged ordinance explain that "certain City zoning
24 designations do not provide the degree of protection

the adoption of plan and regulation provisions which provide for application of the Goal 5 planning process on a case-by-case basis to individual development applications is not consistent with Goal 5.

1 required by the Statewide Planning Goal 5 administrative
2 rule for natural resources." Record 6. The findings
3 further state the city's process of bringing its plan and
4 land use regulations into compliance with the Goal 5 rule is
5 nearing completion. Id. The findings explain the
6 "contingency protection" provided by the challenged
7 ordinance is needed because numerous appeals of city
8 ordinances applying the E-zone have been filed, and reversal
9 or remand of any of these appealed ordinances "might result
10 in the absence of protection for identified important forest
11 resources," "during the time required to correct any Goal 5
12 deficiencies." Record 6, 8. It is clear from these
13 findings that the city adopted the interim forest review
14 process to ensure compliance with Goal 5 in circumstances
15 where the city's Goal 5 planning process has yet to be
16 completed, or where it has been reversed or remanded on
17 appeal.

18 With regard to the portions of the SPD west of Skyline
19 Blvd., the city has not adopted, either in the challenged
20 ordinance or in any other plan or land use regulation, an
21 inventory of the location, quality and quantity of relevant
22 resource sites,⁷ or the site-specific identification of

⁷The city's findings state that color infrared aerial photographs were used "to exempt areas of the City without significant forest resources from regulation, and to establish the general location, quantity, and quality of forests believe[d] to be significant." Record 7. However, these photographs are not in the record, and the parties do not identify anything

1 conflicting uses and analysis of ESEE consequences required
2 by Goal 5 and OAR 660-16-000 and 660-16-005. See Columbia
3 Steel Castings Co. v. City of Portland, 104 Or App 244, 799
4 P2d 1142 (1990), rev allowed 311 Or 261 (1991). Rather, the
5 findings state the challenged ordinance complies with Goal 5
6 because:

7 "It provides processes to determine the exact
8 location, quantity, and quality of identified
9 forests; to examine the [ESEE] consequences of
10 allowing development and protecting forests, and
11 to make a decision on appropriate degrees of
12 protection for individual forests on a
13 case-by-case basis." Record 7.

14 In Collins v. LCDC, 75 Or App 517, 707 P2d 599 (1985),
15 the Court of Appeals reviewed an LCDC order acknowledging a
16 local government comprehensive plan and land use regulations
17 that deferred the identification of uses conflicting with
18 inventoried historical resources, analysis of ESEE
19 consequences and decision on resource protection to a
20 case-by-case review of development applications by a
21 Historic and Architectural Review Commission. The court
22 found that Goal 5 and the Goal 5 rule require these
23 determinations and analyses to be made during the local
24 government planning process, not on a case-by-case basis in
25 conjunction with individual permit applications. The court
26 concluded the local government's plan and regulations did
27 not comply with Goal 5. Id. at 522-24.

else in the record establishing the location, quantity and quality of the forest resources the city believes are significant.

1 This case is different from Collins only in that the
2 city's plan and land use regulations have already been
3 acknowledged, albeit prior to compliance with the Goal 5
4 rule being required. However, as explained above, this
5 amendment to the city's land use regulations is required to
6 comply with Goal 5 and the Goal 5 rule. We conclude, as the
7 Court of Appeals did in Collins, that establishing a process
8 for case-by-case application of the Goal 5 planning process
9 in conjunction with individual development requests does not
10 comply with Goal 5 and the Goal 5 rule.

11 The first through third assignments of error are
12 sustained.

13 The city's decision is remanded.