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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTHWEST AGGREGATES CO., an)
Oregon corporation, fka OREGON)
CITY LEASING COMPANY,)
)
Petitioner,)
)
vs.)
)
CITY OF SCAPPOOSE,)
)
Respondent.)

LUBA No. 97-259

FINAL OPINION
AND ORDER

Appeal from City of Scappoose.

Steven W. Abel and Jeannette M. Launer, Portland, filed the petition for review on behalf of petitioner. With them on the brief was Stoel Rives. Steven W. Abel argued on behalf of petitioner.

Jeffrey J. Bennett, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Tarlow, Jordan & Schrader.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 08/11/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's adoption of legislative
4 amendments to its comprehensive plan and municipal code.

5 **FACTS**

6 Petitioner operates an aggregate mining facility outside
7 the city's urban growth boundary, near the Scappoose
8 Industrial Airpark (Airpark). The city recently annexed the
9 Airpark, bringing it within the city limits.¹ The Airpark is
10 operated by the St. Helens Port Authority, which in 1991
11 adopted the Scappoose Industrial Airpark Master Plan (Airpark
12 Plan). The Airpark Plan was approved by the Columbia County
13 planning commission in August 1991, and updated in 1995. The
14 Airpark Plan requires "Safety Compatibility Zones" oriented
15 along the approach and takeoff paths for aircraft.

16 In 1997 the city drafted a comprehensive Transportation
17 System Plan (TSP) in order to comply with the Transportation
18 Planning Rule (TPR) at OAR chapter 660, division 12. The TPR
19 requires the city to include an air transportation plan for
20 any airports within its jurisdiction, and permits one
21 jurisdiction to incorporate by reference the transportation
22 plan of another jurisdiction. By reference, the city's TSP

¹See Northwest Aggregates Co. v. City of Scappoose, ___ Or LUBA ___
(LUBA No. 97-162, May 29, 1998) (affirming the city's decision annexing the
Airpark).

1 incorporates, unchanged, the 1991 Airpark Plan developed by
2 the St. Helens Port Authority.

3 The city planning commission conducted two public
4 hearings and forwarded the TSP to the city council with a
5 recommendation to approve. The city council conducted three
6 public hearings, and on December 1, 1997, adopted Ordinance
7 658, which, in relevant part, adopts the TSP and incorporates
8 it into the Scappoose Comprehensive Plan (SCP).

9 This appeal followed.

10 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

11 Petitioner argues, in the first assignment of error, that
12 the city improperly failed to consider the requirements of ORS
13 836.600 to 836.635 and its implementing rule at OAR chapter
14 660, division 13 (the Airport Planning Rule or APR). In the
15 second assignment of error, petitioner argues that the city
16 improperly construed OAR 660-13-0160 in finding that the city
17 was not required to apply the Airport Planning Rule.

18 SB 1113 (Oregon Laws 1995, chapter 285), codified at ORS
19 836.600 to 836.635, requires the Land Conservation and
20 Development Commission (LCDC) to adopt rules establishing
21 airport uses and activities, consistent with the provisions of
22 SB 1113, and requires local governments to amend their
23 comprehensive plans and land use regulations to comply with
24 the LCDC rules not later than the first periodic review
25 following adoption of the rules. ORS 836.610(1),(3).

26

1 Pursuant to ORS 836.615, LCDC developed and adopted the
2 Airport Planning Rule in December 1996. The APR generally
3 requires local governments that have airports within their
4 planning jurisdictions to develop, as part of periodic review,
5 plans that comply with specific standards stated in the APR.
6 The APR also contain provisions for existing airport plans,
7 and for amendments to plan and land use regulations in advance
8 of periodic review. Pursuant to OAR 660-013-0160(2),

9 "[a]mendments to plan and land use regulations may
10 be accomplished through plan amendment requirements
11 of ORS 197.610 to 197.625 in advance of periodic
12 review where such amendments include coordination
13 with and adoption by all local governments with
14 responsibility for areas of the airport subject to
15 the requirements of this division."

16 However, OAR 660-013-0160(6) requires that amendments to
17 acknowledged plans and land use regulations must still comply
18 with the APR:

19 "Notwithstanding the provisions of OAR 660-013-0140
20 [the safe harbor provisions], amendments to
21 acknowledged comprehensive plans and land use
22 regulations, including map amendments and zone
23 changes, require full compliance with the provisions
24 of this division, except where the requirements of
25 the new regulation or designation are the same as
26 the requirements they replace."

27 As petitioner states, Ordinance 658 amends the SCP by
28 adopting and incorporating the TSP, which itself incorporates
29 by reference the 1991 Airpark Plan. Petitioner contends that
30 the Airpark Plan has thus been incorporated into the SCP, and
31 therefore, pursuant to OAR 660-013-0160(6), the Airpark Plan
32 must comply with the requirements of the APR. Petitioner

1 contends that the city failed to apply the APR, and, even if
2 it had, the Airpark Plan would not comply with that rule.

3 The city makes a number of responses why it was not
4 required to apply the Airport Planning Rule or, if it was, why
5 the decision complies with that rule. The city argues first
6 that the APR was superseded in its entirety in 1997 when the
7 legislature enacted Oregon Laws 1997, chapter 859 (HB 2605),
8 which repeals some of the statutes requiring LCDC to adopt
9 rules implementing SB 1113 and enacts other sections in lieu
10 of the repealed sections.² The city contends that the 1997
11 legislation requires adoption of new rules and compliance with
12 those new rules, which, according to the city, effectively
13 removes the legislative predicate for the APR and thus
14 supersedes it. The city's argument requires us to examine
15 both SB 1113 and HB 2605 in some detail.

²The city frames its argument as whether the legislature "impliedly repealed" the APR by repealing the statutes authorizing LCDC to adopt rules implementing SB 1113. Response Brief at 5. However, we question whether the doctrine of implied repeal supplies the correct framework when the two enactments at issue are administrative rules and subsequent legislative amendments to statutes. Any legislative attempt to directly repeal administrative rules might run afoul of the separation of powers clause, Article III, Section 1 of the Oregon Constitution.

Where the legislature is dissatisfied with rules adopted by an agency, it has two usual recourses. First, it may withdraw from the agency's scope of rule-making authority a specific subject area. See e.g. ORS 215.304(1) (prohibiting LCDC from implementing rules regarding secondary lands). Second, it may pass legislation that contradicts provisions in an administrative rule and thus supersedes those provisions. See State v. Lewis, 150 Or App 257, 261, 945 P2d 661 (1997) (analyzing whether a statutory enactment supersedes parts of an administrative rule). We understand the city to make a variant of the latter argument: that the legislative changes in HB 2605 reflect a revamping of airport land use standards so comprehensive that it effectively supersedes the entirety of the APR.

1 As described above, SB 1113 requires LCDC to adopt rules
2 governing airport uses and activities consistent with certain
3 requirements stated in SB 1113. Those requirements list
4 permissible airport uses, and limit compatibility safety
5 standards to specified parameters. ORS 836.615(2); ORS
6 836.620. Local governments are required to amend their
7 comprehensive plans and land use regulations to comply with
8 those LCDC rules not later than the first periodic review
9 following adoption of the rules.

10 HB 2605 makes a number of significant changes to this
11 framework. Section 4 of HB 2605 repeals ORS 836.615 and
12 enacts in lieu of that section a new section, codified at ORS
13 836.616. ORS 836.616 requires LCDC to adopt rules for uses
14 and activities allowed within airports identified in section 2
15 of HB 2605, and provides that certain specified uses are
16 authorized as a matter of law.

17 Section 7 of HB 2605 repeals ORS 836.620 and enacts in
18 lieu thereof a new section, codified at ORS 836.619, that
19 requires LCDC to adopt rules establishing minimum
20 compatibility and safety standards for uses of land near
21 airports, and allows local governments to enact more stringent
22 local compatibility and safety standards, with certain
23 exceptions related to water impoundments, which must comply
24 with standards set forth in section 8.

25 Section 2 of HB 2605 amends ORS 836.610 to require the
26 Department of Transportation (ODOT) to develop a list of

1 airports that meet the description set forth in section 2.
2 Section 2 also amends ORS 836.610(1) to require local
3 governments to conform their plans and regulations to rules
4 adopted pursuant to section 4 [ORS 836.616] and section 7 [ORS
5 836.619], deleting references to ORS 836.615 and 836.620.
6 Finally, section 2 changes the date by which local governments
7 must conform their plans and land use regulations to the rules
8 LCDC adopts pursuant to ORS 836.616 and 836.619 to the first
9 periodic review after ODOT adopts its list of airports.

10 The city does not argue that HB 2605 supersedes any
11 particular provision of the APR; rather, it argues that HB
12 2605 supersedes the APR in its entirety and thus the city is
13 no longer required to apply the APR to decisions otherwise
14 implicating it. Although it is readily inferable from the
15 foregoing that the legislature desired LCDC to adopt rules
16 responsive to the requirements of HB 2605 and have local
17 governments comply with rules based on those requirements
18 rather than conflicting requirements based on SB 1113, we do
19 not agree with the city that the legislature intended HB 2605
20 to supersede the entirety of the Airport Planning Rule.

21 Although HB 2605 expressly repeals two sections of SB
22 1113, and substitutes provisions that are different in certain
23 respects from the repealed provisions and may conflict with
24 portions of the APR, HB 2605 does not evince an intent to
25 invalidate the entirety of OAR 660, Division 13. The APR
26 contains a number of sections and requirements on diverse

1 topics related to airport planning, implementing not only SB
2 1113 but also statewide planning Goal 12 (Transportation).
3 See OAR 660-013-0010(1). LCDC does not rely for its statutory
4 authority in adopting the APR on the two sections of SB 1113
5 deleted by HB 2605, but rather on its general authority under
6 ORS 197.040. Further, each section of the APR states that it
7 implements SB 1113 as a whole rather than any particular
8 provision of that legislation. While the scope of LCDC's
9 rulemaking authority is confined by statute, it is clear that
10 LCDC has authority to adopt rules regarding airport land use
11 issues, regardless of the specific directive in SB 1113.

12 Because the APR is based on SB 1113 as a whole as well as
13 Goal 12, and HB 2605 repeals only two provisions of SB 1113,
14 it is implausible to read HB 2605 as superseding LCDC's
15 authority to adopt rules regarding airport planning and hence
16 the entirety of the APR. It is possible, and indeed more
17 plausible, to understand HB 2605 as directing LCDC to adopt
18 rules responsive to the specific changes made in HB 2605.
19 Some of those changes may conflict with specific provisions of
20 the APR, in which case the statutory changes control until
21 LCDC amends the APR or adopts new rules consistent with the
22 statute.

23 In our view, whether a legislative enactment supersedes
24 all or portions of an administrative rule must be determined
25 through a provision by provision analysis. Only if the
26 legislative enactment specifically and comprehensively

1 contradicts all or nearly all of the critical components of an
2 administrative rule may we conclude that the statute
3 supersedes the entirety of the rule, as opposed to individual
4 provisions. In other words, we will not find the type of
5 implied, comprehensive supersedence the city argues for here
6 unless there is no plausible construction of the statute that
7 avoids complete supersedence. See Friends of Neabeack Hill v.
8 City of Philomath, 139 Or App 39, 49, 911 P2d 350 (1996) (the
9 court will not resort to the doctrine of implied repeal if it
10 is possible to harmonize apparent conflicts within a statutory
11 scheme). Although the city cites a few examples of how the
12 provisions of HB 2605 conflict with certain provisions in SB
13 1113 and by extension the APR, the city has not demonstrated
14 that HB 2605 specifically and comprehensively contradicts the
15 critical components of the APR, allowing us to conclude that
16 HB 2605 is intended to supersede the APR in its entirety.

17 We repeat that the issue raised in these assignments of
18 error is the validity and applicability of the APR itself, not
19 whether specific provisions of the APR conflict with
20 provisions of HB 2605. Nonetheless, we address the city's
21 further suggestion that section 2 of HB 2605 (requiring ODOT
22 to develop a list of airports and local governments to amend
23 their plans and regulations to conform with LCDC rules not
24 later than the first periodic review after ODOT adopts its
25 list of airports) supersedes the specific requirement at OAR
26 660-013-0160(2) and (6) that local government amendments prior

1 to periodic review must comply with the APR. However, we are
2 not persuaded that the schedule stated in HB 2605 is
3 inconsistent with or necessarily supersedes OAR 660-013-
4 0160(2) and (6). SB 1113 contained a similar schedule,
5 requiring LCDC to adopt rules and local governments to conform
6 their plans and regulations not later than the first periodic
7 review following their adoption. Nothing in SB 1113
8 prohibited LCDC from adopting rules requiring that certain
9 plan amendments prior to periodic review comply with the APR,
10 and we see nothing in the similar provisions of HB 2605
11 evincing a contrary legislative intent.

12 In sum, we conclude that the APR is effective and its
13 provisions are applicable to the challenged decision according
14 to its terms, at least those provisions of the APR not in
15 conflict with and thus superseded by HB 2605. We turn then to
16 the city's alternative argument that the APR is not applicable
17 by its terms.

18 The city argues that, even if the APR remains effective
19 after HB 2605, it is not applicable to the challenged decision
20 because the plan amendments made by the decision fall within
21 the exception at OAR 660-013-0160(6), that is, the amendments
22 are the same as the requirements they replace. The city
23 argues that the city's plan and zoning ordinance refer to and
24 contain requirements based on the Airpark Plan. The city
25 contends that amending the city's plan to incorporate the

1 Airpark Plan essentially "replaces" those existing provisions,
2 and thus invokes the exception at OAR 660-013-0160(6).

3 We agree with petitioner that the city's incorporation of
4 the Airpark Plan into its plan does not fall within the
5 exception at OAR 660-013-0160(6): however similar some of the
6 city's existing provisions may be to some of the provisions in
7 the Airpark Plan, it is manifest that incorporating the
8 Airpark Plan into the city's plan is not an instance where the
9 "requirements of the new regulation or designation are the
10 same as the requirements they replace."

11 Petitioner's final point is that the Airpark Plan so
12 conflicts with the Airport Planning Rule that LUBA must find
13 it prohibited as a matter of law and thus reverse, rather than
14 remand, the challenged decision. The city responds that the
15 Airpark Plan is in substantial compliance with the APR, and
16 that any deficiencies can easily be corrected on remand. We
17 agree with the city that its failure to apply the requirements
18 of the APR to the Airpark Plan and the challenged decision is
19 not a basis for reversal. See OAR 661-10-071(2)(LUBA will
20 remand a land use decision where the decision violates a
21 provision of applicable law but is not prohibited as a matter
22 of law).

23 The first and second assignments of error are sustained.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner argues that the challenged decision is
3 prohibited by law because it purports to implement land use
4 plans outside the city's jurisdiction.

5 Petitioner's argument is built upon a provision of
6 Ordinance 658 that amends Transportation Policy 7 of the
7 city's plan to state: "[a]dopt and comprehensibly implement
8 the Scappoose Transportation System Plan recommended road
9 improvements at the time of approval of each development
10 application." Petitioner reasons that the city's TSP
11 incorporates the Airpark Plan, the Airpark Plan has zones and
12 requirements that extend outside the city's current
13 jurisdictional boundaries into unincorporated areas of the
14 county, and therefore the provision requiring the city to
15 "comprehensively implement" the TSP necessarily requires the
16 city to enforce the Airpark Plan outside its jurisdictional
17 boundaries. Petitioner contends that the challenged decision
18 thus violates ORS 221.720(2), which provides:

19 "Notwithstanding any other provision of law the
20 jurisdiction and application of government of cities
21 shall be co-extensive with the external boundaries
22 of such cities, regardless of county lines."

23 The city responds that Ordinance 658 does not require the
24 city to enforce the Airpark Plan outside its territorial
25 boundaries. The city argues that both the TPR and APR require
26 a local government to adopt airport plans for airports within
27 its jurisdiction, even where the airport or the approaches and
28 zones associated with the airport extend over multiple

1 jurisdictions. The city cites to OAR 660-012-0015(3), which
2 requires cities to adopt TSPs "for lands within their planning
3 jurisdiction," and OAR 660-012-0020(2)(e), which provides
4 that, "[f]or airports, the planning area shall include all
5 areas within airport imaginary surfaces and other areas
6 covered by state or federal regulations[.]"³ In addition, the
7 APR contemplates that, where airports affect more than one
8 local government, the local governments coordinate their
9 planning efforts, the result of which is adopted by each
10 affected local government. OAR 660-013-0160(1),(2).

11 In short, the city contends that its "planning
12 jurisdiction" for purposes of the TPR and APR is broader than
13 its territorial jurisdiction, and that, even though it is
14 required to adopt plans for all areas within its "planning
15 jurisdiction," nothing in Ordinance 658 or elsewhere requires
16 or authorizes the city to enforce those plans outside its
17 territorial jurisdiction. The city notes that the county has
18 adopted the Airpark Plan as a basis for evaluating
19 applications within the county's jurisdiction that affect the
20 Airpark. Accordingly, the city posits that, should a
21 development application arise regarding property outside the
22 city's territorial jurisdiction in a manner that implicates
23 the Airpark Plan, the county, and not the city, will have

³We are informed that an airport's "imaginary surfaces" include parts of the flight paths of approaching and departing aircraft. See OAR 660-013-0070 and Exhibit 1 to OAR Chapter 660, Division 13.

1 exclusive jurisdiction over that application and would
2 presumably enforce the Airpark Plan as part of its land use
3 regulations.

4 A city may generally exercise authority only within its
5 corporate limits, except where a jurisdiction from which it
6 draws its power to act, a county or the state, grants the city
7 that authority. City of Eugene v. Nalven, 152 Or App 720,
8 724, ___ P2d ___, rev den 327 Or 431 (1998). We do not
9 understand petitioner to argue that the city cannot adopt
10 plans with respect to land contiguous with its corporate
11 boundaries. See Cummings v. Lawson, 28 Or App 573, 559 P2d
12 1316 (1977)(although city has jurisdiction only over land
13 within city boundaries, rational planning dictates that city
14 consider an entire project including land lying outside its
15 boundary). Rather, petitioner argues that Ordinance 658
16 requires the city to enforce the Airpark Plan beyond its
17 corporate boundaries, and that such enforcement would violate
18 ORS 221.720 and the rule expressed in Nalven. However, we
19 agree with the city that Ordinance 658 does not require
20 extraterritorial enforcement or, if it does, such a
21 requirement would have no legal effect. See Cummings, 28 Or
22 App at 575 (an act of approval by the city beyond its
23 jurisdiction has no effect, and does not preclude the
24 governmental body with jurisdiction from exercising that
25 jurisdiction).

1 In addition, as the city points out, the TPR requires a
2 local government to adopt plans for all areas within airport
3 imaginary surfaces and other areas covered by state and
4 federal regulations, while the APR requires coordination and
5 adoption of common plans for airports that affect more than
6 one local government. Both rules recognize and indeed mandate
7 that local government planning must include broadly defined
8 areas of an airport, even if parts of those areas extend
9 beyond the local government's jurisdiction. We agree with the
10 city that the TPR and APR provide authority for the city to
11 adopt plans for the Airpark, even if those plans extend, as a
12 requirement of state and federal law, to areas affected by the
13 airport outside the city's territory. For the foregoing
14 reasons, we conclude that Ordinance 658 does not violate ORS
15 221.720.

16 The third assignment of error is denied.

17 **FOURTH ASSIGNMENT OF ERROR**

18 Petitioner argues that the challenged decision is
19 inconsistent with Statewide Land Use Planning Goal 5 and is
20 not supported by adequate findings related to that goal.
21 Petitioner contends that its aggregate mining operation, which
22 is near the Airpark on land outside the city's jurisdiction,
23 is an inventoried Goal 5 resource in the county's
24 comprehensive plan. Petitioner argues that the city's
25 adoption of the Airpark Plan creates potential conflicts with
26 its mining operation, and thus the city was required to make

1 findings regarding Goal 5 pursuant to the rules implementing
2 Goal 5 at OAR chapter 660, division 23.

3 The city responds that Goal 5 is not applicable to the
4 city's adoption of its TSP, and thus the city did not err in
5 failing to make findings regarding Goal 5. OAR 660-012-
6 0025(2) (in adopting a TSP, a local government must make
7 findings of compliance with applicable statewide planning
8 goals).

9 We have difficulty seeing how Goal 5 is implicated by the
10 challenged decision. To the extent the Airpark Plan conflicts
11 with or affects petitioner's aggregate site, that conflict has
12 existed since 1991, when the county adopted the Airpark Plan.
13 Petitioner has not explained how the city's adoption of the
14 Airpark Plan could possibly create a conflict with or affect
15 petitioner's aggregate operation. We determined in the third
16 assignment of error that the challenged decision does not
17 allow the city to enforce the Airpark Plan outside its
18 jurisdiction. Thus, to the extent enforcement of the Airpark
19 Plan affects petitioner's site, that enforcement must come
20 from the county. Because the Airpark Plan is an acknowledged
21 part of the county's plan, petitioner's Goal 5 argument is
22 something in the nature of a collateral attack on acknowledged
23 provisions of the county's plan. Petitioner has not
24 established that the city's adoption of its TSP implicates
25 Goal 5 and thus requires findings of compliance with Goal 5.

26

- 1 The fourth assignment of error is denied.
- 2 The city's decision is remanded.