BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALICE P. BLATT, Petitioner, and MYRON L. SCOTT, EAST PORTLAND DISTRICT COALITION, and EAST COUNTY COORDINATING COMMITTEE, Intervenors-Petitioner, vs. CITY OF PORTLAND, Respondent, and COLUMBIA CORRIDOR ASSOCIATION, and COMMON GROUND: THE URBAN LAND COUNCIL OF OREGON, Intervenors-Respondent.	LUBA No. 90-152 FINAL OPINION AND ORDER

Appeal from City of Portland.

James R. Jennings, Gresham, filed a petition for review on behalf of petitioner and intervenors-petitioner East Portland District Coalition and East County Coordinating Committee. With him on the brief was Jennings & Vanagas. J. Richard Forester, Portland, filed a reply brief and argued on behalf of petitioner and intervenors-petitioner East Portland District Coalition and East County Coordinating Committee.

Myron L. Scott, Portland, filed a petition for review and reply brief and argued on his own behalf.

Kathryn Beaumont Imperati, Portland, filed a response

brief and argued on behalf of respondent.

Steven R. Schell, Portland, filed a response brief and argued on behalf of intervenor-respondent Columbia Corridor Association. With him on the brief was Black Helterline.

Jon A. Chandler, Lake Oswego, filed a response brief and argued on behalf of intervenor-respondent Common Ground: The Urban Land Council of Oregon.

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

REMANDED 06/28/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a City of Portland ordinance adopting a Natural Resource Management Plan (NRMP) for the Columbia South Shore area.

MOTIONS

A. Motions to Intervene

Myron L. Scott, East Portland District Coalition and East County Coordinating Committee move to intervene in this proceeding on the side of petitioner. There is no opposition to the motions, and they are allowed.

Columbia Corridor Association and Common Ground: The Urban Land Council of Oregon move to intervene in this proceeding on the side of respondent. There is no opposition to the motions, and they are allowed.

B. Motion to File Reply Brief

Petitioner and intervenors-petitioner (petitioners) moved for permission to file a joint reply brief addressing (1) the standing of intervenor-petitioner East Portland District Coalition (EPDC), (2) the relationship of the "takings" issue to the challenged decision, and (3) the applicability of Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources). Petitioners contended these issues were raised for the first time in the response briefs of respondent and intervenors-respondent (respondents).

Respondents did not object to petitioners' request to file a reply brief with regard to the first two issues described above. However, respondents did object with regard to the third issue. Respondents argued they raised the issue of Goal 5 applicability prior to the filing of the petitions for review, by arguing the inapplicability of Goal 5 in responses to petitioners' earlier motions to stay, dismiss and consolidate this appeal proceeding. Therefore, according to respondents, petitioners could have addressed the Goal 5 applicability issue in their petitions for review.

In a telephone conference on May 14, 1991, we granted petitioners' motion to file a reply brief with regard to all three issues described above. While we recognized that the issue of the applicability of Goal 5 had been mentioned tangentially in respondents' earlier responses to petitioners' motions to stay, dismiss and consolidate, that issue was not material to our consideration of those motions. Under these circumstances, we concluded respondents' focussed arguments in their response briefs asserting the inapplicability of Goal 5 constitute "new matters raised in the respondent's brief" justifying the filing of a reply brief. OAR 661-10-039.

C. Motions to Strike Appendices to Reply Brief

Respondent moves to strike Appendix 4 to petitioners' reply brief. Intervenor-respondent Columbia Corridor

Association (intervenor CCA) joins in that motion, and also moves to strike Appendices 2 and 3 of the reply brief.

1. Appendix 2

Appendix 2 includes OAR 141-95-000 ("State Agency Coordination Program"), an administrative rule promulgated by the Division of State Lands (DSL) on February 1, 1991, and excerpts from a document entitled "Division of State Lands State Agency Coordination Program, September 1990" (Coordination Program). Section (1) of the rule adopts Sections III and IV of the Coordination Program by reference. The excerpts of the Coordination Program in Appendix 2 include a portion of Section III and the entire Section V. Section III.B.3 of the Coordination Program includes a reference to Section V.[1]

Intervenor CCA argues that Appendix 2 should be stricken because the administrative rule therein was adopted after the appealed decision was made and, therefore, cannot be part of the record reviewed by LUBA. In the alternative, intervenor CCA argues that Section V of the Coordination Program should be stricken, because it was not adopted by

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[1]Coordination Program Section III.B.3 provides as relevant:

"* * * * *

"* * * (The wetlands inventory and wetland conservation planning functions of the Division are discussed in greater detail in Section V., relating to technical assistance and cooperation with local government.)

"* * * * *"

reference as part of OAR 141-95-000.

Pursuant to the legislative policy of ORS 197.805 that LUBA's decisions be made consistent with sound principles governing judicial review, LUBA has authority to take official notice of judicially cognizable law, as defined in Oregon Evidence Code (OEC) 202. McCaw Communications, Inc. v. Marion County, 17 Or LUBA 206, 209 (1988), rev'd on other grounds 96 Or App 552 (1989); Faye Wright Neighborhood Planning Council v. Salem, 6 Or LUBA 167, 170 (1982). OEC 202(4) authorizes LUBA to take official notice of state regulations. Therefore, we take official notice of OAR 141-95-000, which includes Section III of the Coordination Program. In addition, we believe the reference to Section V in Section III, quoted supra at n 1, effectively makes Section V an appendix to the rule. Accordingly, we take official notice of Section V as well.

Intervenor CCA's motion to strike is denied with regard to Appendix 2.

2. Appendix 3

Appendix 3 is a DSL "Public Notice of Wetland Conservation Plan Review," dated December 24, 1990. The notice includes a statement that the director of the DSL is proposing to approve the Columbia South Shore NRMP as a wetland conservation plan (WCP).[2] Petitioners ask that we

[2]ORS 196.678 to 196.686, adopted by Oregon Laws 1989, chapter 837, sections 10 to 14, establishes a process and standards for joint adoption

take official notice of the DSL notice pursuant to OEC 201(b)(2).[3]

Intervenor CCA argues that Appendix 3 should be excluded either because it was not created until after the appealed decision was made and, therefore, cannot be part of the record reviewed by LUBA, or because it pertains to the development of a WCP pursuant to ORS 196.678 et seq, an entirely different proceeding than the one at issue in this appeal.

Although LUBA has held it has authority to take official notice of judicially cognizable law, as described in OEC 202, LUBA has never held it has authority to take official notice of adjudicative facts, as set out in OEC 201. With regard to adjudicative facts, LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b). LUBA has also

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by the DSL and local governments of WCP's. Once a WCP is so adopted, DSL will approve a fill or removal permit within the area covered by the WCP if the proposed fill or removal is consistent with the WCP or can be conditioned to be consistent with the WCP. ORS 196.682(1). The criteria generally applicable to issuance of fill and removal permits found in ORS 196.815(1) and 196.825(1)-(3) do not apply to issuance of a permit governed by a WCP.

[3]OEC 201(b)(2) provides:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is * * *:
>
> "* * * * *
>
> "(b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

held that pursuant to the directive of ORS 197.805 that its proceedings be conducted consistently with sound principles of judicial review, it will consider facts outside the record where they are essential to determining whether it has jurisdiction or whether an appeal is moot. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 630, 632 (1988); Century 21 Properties v. City of Tigard, 17 Or LUBA 1298, rev'd on other grounds 99 Or App 435 (1989).

In this instance, the DSL notice is not judicially cognizable law and petitioners do not argue that an evidentiary hearing is warranted under ORS 197.835(13)(b). Petitioners do argue that the DSL notice has some relation to the question of whether we have jurisdiction over this appeal.[4] However, the only fact in the DSL notice identified as essential to petitioners' argument in this regard is that the appealed NRMP has been submitted to DSL for review and approval as a WCP under ORS 196.678 et seq. Respondents do not dispute that fact, and findings in the challenged ordinance state the NRMP has been incorporated into an application for approval by DSL as a WCP. Record 23. Therefore, it is not necessary for us to consider the DSL notice to decide whether we have jurisdiction.

Intervenor CCA's motion to strike is granted with

[4]The issue of our jurisdiction is discussed infra, in a separate section of this opinion.

regard to Appendix 3.

3. Appendix 4

Appendix 4 consists of notices, letters and other materials from the city to the Department of Land Conservation and Development (DLCD), found in DLCD postacknowledgment amendment file # 002-90. Petitioners ask that we take official notice of these DLCD materials pursuant to OEC 201(b)(2). Petitioners also argue the DLCD materials are relevant to the issue raised in the petition for review concerning whether the appealed decision is a postacknowledgment plan or land use regulation amendment to which the Statewide Planning Goals are applicable.

Respondent moves to strike Appendix 4 on the ground that the DLCD materials are not part of the local record, have not been offered or accepted through an evidentiary hearing pursuant to ORS 197.835(13)(b), and are not subject to official notice as cognizable law or adjudicative facts. Intervenor CCA concurs, and adds that Appendix 4 should be stricken because the DLCD materials are irrelevant and confusing.

We agree with respondent that Appendix 4 contains material which is not part of the local record, the subject of a motion for evidentiary hearing, or law of which we may take official notice. In addition, even if the DLCD materials did contain cognizable adjudicative facts, which we do not decide, we could not take official notice of them,

for the reasons stated in the preceding section.[5]

Respondent's and intervenor CCA's motions to strike are granted with regard to Appendix 4.

FACTS

On July 15, 1988, the city adopted Ordinance No. 160890 (E-zone Ordinance) amending Title 33 of the Portland City Code (PCC) to add a new chapter 33.635 entitled "Environmental Concern Zone" (E-zone).[6] The stated purpose of the E-zone is "to implement the Comprehensive Plan policies and objectives and to protect natural resources and their natural resource values." PCC 33.635.010. The E-Zone is implemented through application of the Environmental Concern (EC) or Environmental Natural (EN) overlay zone. PCC 33.635.020.

On May 4, 1989, the city adopted Ordinance No. 161896 (Mapping Ordinance), amending the city's plan and zoning map designations to apply the EC and EN overlay zones to certain

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[5]Petitioners do not argue that facts contained in Appendix 4 are relevant to determining whether we have review jurisdiction.

[6]The E-zone Ordinance was not appealed. However, City of Portland Ordinance No. 163608, effective January 1, 1991, 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. The ordinance appealed in this proceeding was adopted prior to the effective date of Ordinance No. 163608. Therefore, unless otherwise stated, all references to provisions of Title 33 of the PCC in this opinion are to the Title 33 which existed prior to January 1, 1991.

land within the Columbia River Corridor.[7] The Mapping Ordinance was appealed, and was affirmed by this Board in Columbia Steel Castings Co. v. City of Portland, ___ Or LUBA ___ (LUBA No. 89-058, July 18, 1990) (Columbia Steel I). Our decision was reversed and remanded by the Court of Appeals in Columbia Steel Castings Co. v. City of Portland, 104 Or App 244, 799 P2d 1142 (1990), rev allowed 311 Or 261 (1991) (Columbia Steel II). Review of the Court of Appeals decision is pending before the Supreme Court.

On November 7, 1990, the city adopted Ordinance No. 163609 (NRMP Ordinance), adopting a NRMP for the Columbia South Shore. The Columbia South Shore is an approximately 2,800 acre industrially-zoned area bordering the south shore of the Columbia River between N.E. 82nd Avenue and N.E. 185th Avenue. Record 43. The Columbia South Shore is part of the Columbia Corridor area that is the subject of the Mapping Ordinance. The NRMP was adopted pursuant to E-zone provisions for the adoption of such NRMP's to "* * * provide an alternative approach to individual environmental reviews for conservation of significant natural resources and preservation of the[ir] resource values." PCC 33.635.100.A. Development in compliance with an approved NRMP is exempt from the

[7]The Columbia River Corridor is an area of approximately 14,300 acres extending along the south shore of the Columbia River from the Willamette River to N.E. 185th Avenue. Columbia Steel, supra, slip op at 2.

requirement for individual environmental reviews otherwise applicable in areas where the EC or EN overlay zone is applied. PCC 33.635.060.C.7. This appeal of the NRMP Ordinance followed.

JURISDICTION

In our March 29, 1991, Order on Motions to Dismiss and to Continue and Consolidate Proceedings, we denied intervenor-petitioner (intervenor) Scott's motion to dismiss for lack of jurisdiction. Intervenor Scott argued the appealed decision is not a "final" decision because, under Portland Comprehensive Plan (plan) policy 8.18, DSL approval of a plan as a WCP is a condition precedent to final adoption of that plan as a NRMP. We determined that plan policy 8.18 does not require that an adopted NRMP also be approved as a WCP in order to be final and, therefore, concluded the challenged ordinance is a final decision adopting a NRMP.

In his petition for review, intervenor Scott renews his jurisdictional argument with regard to the effect of plan policy 8.18, and also contends the appealed ordinance is not a "final" decision adopting a NRMP because findings in the ordinance itself "expressly conditioned NRMP adoption on DSL approval of the NRMP as a [WCP]." Scott Petition for Review 10.

We adhere to the position expressed in our March 29, 1991 order with regard to the interpretation and effect of

plan policy 8.18. The findings additionally relied on by intervenor Scott provide:

> "Policy 8.18, Natural Resource Management Plans, provides expressly that **the development of natural resource management plans for large areas or parcels is encouraged.** As a condition of adopting such a plan, **overlapping plan and permit requirements for natural resource management and development shall be minimized.** By adoption of the NRMP, this policy is implemented through the subsequent adoption of the NRMP as a § 404 General Permit by the U.S. Army Corpse [sic] of Engineers and a [WCP] by the [DSL]. Under this process, wetland permitting [and] corresponding mitigation requirements at the state, federal and city levels will be consolidated through the administration of the NRMP by the City of Portland." (Plan policy 8.18 text in bold.) Record 17.

Intervenor Scott argues that the only interpretation of the second and third sentences quoted above which harmonizes these sentences is that the city's adoption of the Columbia South Shore NRMP is contingent upon its approval by DSL as a WCP. Therefore, according to intervenor Scott, the appealed ordinance is merely a contingent, rather than a final, decision. See Sensible Transportation v. Metro Service Dist., 100 Or App 564, 566, 787 P2d 498 (1990) (adoption of transportation plan update not a final decision because contingent on future determination of consistency with Statewide Planning Goals or adoption of plan amendments/goal exceptions necessary to achieve consistency).[8]

[8]Intervenor Scott also cites Citizens for Better Transit v. City of Portland, 15 Or LUBA 278 (1987), Kasch's Gardens v. City of Milwaukie, 14

We disagree with intervenor Scott's interpretation of the above quoted findings. The first two sentences paraphrase the requirements of plan policy 8.18. The third sentence simply states that adoption of the Columbia South Shore NRMP will implement plan policy 8.18's requirement that overlapping plan and permit requirements for natural resource management and development be minimized, through subsequent adoption of the NRMP as a § 404 general permit and a WCP. It does not state there will be no adopted NRMP unless the plan is also approved as a WCP and § 404 general permit. In contrast to the situation in Sensible Transportation v. Metro Service Dist., supra, where the challenged decision provided the adopted plan update would not finally become part of Metro's regional transportation plan until a condition precedent was met, here the findings do not state that adoption of the NRMP, as a NRMP implementing the city's E-zone, is not final until future decisions are made by the DSL and U.S. Army Corps of Engineers.

We conclude the appealed ordinance is a final decision

Or LUBA 406 (1986), and Collins Foods v. City of Oregon City, 14 Or LUBA 311 (1986). These opinions determine that city decisions endorsing or recommending approval of programs, the final adoption of which is the responsibility of another unit of government, are not final land use decisions. They would be applicable to this case if the appealed decision were solely to adopt a proposed WCP, which could finally be approved only by the DSL. However, here the appealed decision also adopts a NRMP, pursuant to the city's E-Zone, the final adoption of which is solely within the city's authority. Therefore, while the appealed decision is not a final decision adopting a WCP, it is a final decision adopting a NRMP.

adopting a NRMP, over which we have review jurisdiction.

FIRST ASSIGNMENT OF ERROR (SCOTT)

> "The City of Portland acted ultra vires and inconsistently with the amended comprehensive plan by adopting the NRMP prior to adopting a DSL-approved wetland conservation plan."

In this assignment of error, intervenor Scott contends the city exceeded its authority and violated plan policy 8.18 by adopting a NRMP for the Columbia South Shore without first obtaining DSL approval of the NRMP as a WCP.

This assignment of error relies on the same arguments regarding interpretation of plan policy 8.18 which we rejected in our March 29, 1991 order and the preceding section of this opinion, in which we determined the challenged ordinance is a final decision adopting a NRMP which we have jurisdiction to review.

Intervenor Scott's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (SCOTT)

> "The City acted ultra vires in adopting the NRMP in light of the Columbia [Steel] Castings decision."

Intervenor Scott points out the Court of Appeals issued an opinion in Columbia Steel II, supra, reversing and remanding our decision affirming the Mapping Ordinance on the same day that the city adopted the appealed NRMP Ordinance. Intervenor Scott argues it is the Mapping Ordinance which applies the city's EC and EN overlay zone regulations to significant natural resources in the Columbia

South Shore and adopts a resource inventory and ESEE analysis for that area. Therefore, intervenor Scott contends the Mapping Ordinance provides the express authority for the city to adopt a NRMP for the resources in the Columbia South Shore. Intervenor Scott contends the decision of the Court of Appeals determines the validity of the application of the E-zone to the subject area and, according to that decision, the E-zone is not validly applied. Intervenor Scott further argues that in these circumstances, the city lacks authority to adopt a NRMP for the subject area.

The city argues that until a final appellate judgment reversing or remanding the Mapping Ordinance is issued in Columbia Steel, the Mapping Ordinance and its supporting resource inventory and ESEE analysis remain valid and effective. The city argues that no such appellate judgment will be issued until at least 21 days after the Supreme Court issues its decision in Columbia Steel. Oregon Rules of Appellate Procedure (ORAP) 14.05(3)(b)(i). The city also points out that no stay of the Mapping Ordinance challenged in Columbia Steel has ever been issued. According to the city, absent a stay or an adverse appellate judgment, the Mapping Ordinance remains in effect and the Court of Appeals decision in Columbia Steel II has no effect on the validity of the NRMP Ordinance.

Intervenor Scott's argument under this assignment of

error is based on the premise that the Court of Appeals decision in Columbia Steel II has the effect of invalidating the Mapping Ordinance. However, a decision of the Court of Appeals reviewing an administrative agency decision becomes effective "on the date that the [Court] Administrator sends a copy of the appellate judgment to the administrative agency." ORAP 14.04(2)(b). As the Court of Appeals decision in Columbia Steel II is being reviewed by the Supreme Court, no appellate judgment has issued, and the Court of Appeals decision is not effective. Therefore, we agree with the city that the Mapping Ordinance is currently valid and effective. Accordingly, intervenor Scott's argument provides no basis for determining the city lacked authority to adopt a NRMP for the subject area.

Intervenor Scott's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (SCOTT)

> "The NRMP lacks sufficient site-specific [ESEE] analysis to comply with Goal 5."

FOURTH ASSIGNMENT OF ERROR (SCOTT)

> "The NRMP does not adequately identify and inventory wetland resources."

FOURTH ASSIGNMENT OF ERROR (BLATT)

> "The NRMP does not adequately address the resolution of conflicts by ESEE analysis on a site-by-site basis."

FIFTH ASSIGNMENT OF ERROR (BLATT)

> "The NRMP is in violation of Goal 5 in that it

fails to provide for open space."

SIXTH ASSIGNMENT OF ERROR (BLATT)

"The NRMP fails to address unique wildlife habitat in violation of Goal 5."

Petitioners argue under these assignments of error that the adoption of the NRMP does not comply with requirements of Statewide Planning Goal 5 regarding inventorying of natural resources, analyzing economic, social, environmental and energy (ESEE) consequences of conflicting uses, and developing programs to protect the inventoried natural resources.[9] We first examine the interrelationship between Goal 5 and the E-zone regulations and then consider whether, under the circumstances in this case, Goal 5 is applicable to the adoption of a NRMP.

A. Goal 5/E-zone Relationship

Goal 5 requires that open space, historic sites and certain listed natural resources be protected. Goal 5 establishes a comprehensive planning process whereby local governments are required to (1) inventory the location, quality and quantity of the listed resources within their

[9]Intervenor Scott also contends under his fourth assignment of error that the challenged NRMP Ordinance fails to comply with inventory requirements of the E-zone itself. Although intervenor Scott does not identify any particular E-zone provision as allegedly violated, we note there are references to an "inventory" of resources in PCC chapter 33.635. However, for reasons explained in the following section, we believe these references to an "inventory" of resources are to the inventory required by Goal 5. We, therefore, need not address separately intervenor Scott's contention of failure to comply with E-zone inventory requirements.

jurisdiction; (2) identify conflicting uses for the inventoried resources; (3) determine the ESEE consequences of the conflicting uses; and (4) develop programs to achieve the goal of resource protection. See OAR Chapter 660, Division 16; Knapp v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-064, October 31, 1990), slip op 10.

PCC 33.635.010 ("Purpose of the Environmental Regulations") provides that the purpose of the E-zone is, in relevant part:

> "* * * to implement the Comprehensive Plan policies and objectives and to protect natural resources and their natural resource values. These resources and their values have been identified by the City in the inventory and the economic, social, environmental and energy (ESEE) analysis as important for the benefit of the public. * * *
>
> "* * * * *
>
> "The regulations of this Chapter are an important element in the City's compliance with Statewide Land Use [Planning] Goal 5. The regulations also encourage coordination between City, State, and Federal agencies that are concerned with regulatory programs, especially with wetlands and water bodies." (Emphasis added.)

It is clear from the above emphasized provisions, and not seriously disputed by any party, that the resource inventory and ESEE analysis referred to in PCC 33.635.010 as the basis for application of the E-zone regulations to specific resource sites are also the inventory and ESEE analysis required by Goal 5.

The E-zone is implemented by application of the EC or

EN overlay zone to identified resource areas. When the city must adopt the resource inventory and ESEE analysis referred to above is not specified by PCC chapter 33.635, but it is not disputed that the resource inventory and ESEE analysis for the Columbia South Shore were adopted by the Mapping Ordinance, which also applied the EC and EN overlay zones to various resource sites within the Columbia South Shore.[10]

Development and activities in the EC or EN zones is subject to individual environmental reviews "to provide adequate protection for the identified natural resources." PCC 33.635.060.A. The E-zone sets out procedures and standards for such environmental reviews. PCC 33.635.070 and 33.635.080. Among the standards for development in an EC zone is a requirement that the proposal have "as few adverse impacts on resource values as is practical," as determined by case-by-case impact evaluations which take into consideration the ESEE analysis for the site. PCC 33.635.080.B.1. The section on such impact evaluations states that the "adopted inventory of natural resources and the ESEE analysis contain additional information about the significant resources at individual sites." (Emphasis added.) PCC 33.635.120. Any adverse impacts on resource values in the EC zone must be compensated for through a mitigation plan. PCC 33.635.080.B.2. A "mitigation plan"

[10]However, the parties do dispute whether the ESEE analysis adopted by the Mapping Ordinance is adequate to comply with Goal 5.

is defined in part as "a plan to compensate for adverse impacts on natural resource values identified in the ESEE analysis as being of public benefit." (Emphasis added.) PCC 33.635.130.A.

The E-zone also provides for the adoption of NRMP's. A NRMP provides an "alternative [to the above described] individual environmental reviews for [achieving] conservation of significant natural resources and preservation of the resource values." PCC 33.635.100. Development in compliance with an approved NRMP is exempt from the requirement for individual environmental review. PCC 33.635.060.C.7. A NRMP is intended to cover large areas of natural resources, and "must cover all significant natural resources protected by the environmental zone(s) within the [NRMP] boundaries which are relevant to the scope of the [NRMP]." PCC 33.635.100.B.1. A NRMP may be adopted if the city finds:

> "1. The [NRMP] is consistent with the purpose of the E zone; and
>
> "2. The [NRMP] meets the approval criteria contained in [PCC] 33.635.080, Environmental Review Approval Criteria * * *." PCC 33.635.100.E.

Thus, the PCC 33.635.080 provisions described above, requiring impact analyses and mitigation plans which consider the adopted resource inventory and ESEE analysis, apply to the adoption of NRMP's as well as to individual environmental reviews.

B. Applicability of Goal 5

Petitioners contend Goal 5 applies to the adoption of the NRMP because the NRMP replaces the E-zone regulations as the standards controlling development in the Columbia South Shore.[11] According to petitioners, just as the application of the E-zone regulations to the subject area by the Mapping Ordinance was required to comply with Goal 5, as shown by Columbia Steel I and II, so the application of a replacement or alternative to the E-zone regulations to the subject area must also comply with Goal 5. Petitioners argue that in the area subject to the NRMP, the E-zone effectively no longer exists. Significant natural resources in the subject area are now subject to the standards established by the NRMP, not those of the E-zone.

Respondents argue that Goal 5 is not applicable to the adoption of the NRMP because the NRMP was adopted pursuant to provisions of the E-zone regulations which are acknowledged as being in compliance with the statewide planning goals. According to respondents, the city's only obligation was to adopt the NRMP in compliance with the city's acknowledged E-zone regulations and acknowledged comprehensive plan.

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[11]Petitioners also argue Goal 5 applies to the adoption of the NRMP because it is a proposed WCP, and ORS 196.678(3) requires that a proposed WCP be adopted by the city "according to the procedures set forth in ORS 197.610 to 197.625." However, the decision appealed here is the adoption of a NRMP, not the adoption of a WCP, and ORS 197.678(3) is not applicable to the adoption of a NRMP.

Respondents also contend city adoption of the NRMP pursuant to its acknowledged E-zone regulations is similar to the county modification of its "Map of Areas Excluded from the Goal 8 Resort Siting Process" pursuant to a "refinement clause" in its acknowledged comprehensive plan, which was the decision at issue in Foland v. Jackson County, 311 Or 167, ___ P2d ___ (1991). Respondents point out that with regard to the county map modification decision, the Supreme Court stated:

> "* * * If the local government's action is merely an action under its acknowledged comprehensive plan, then that action only need comply with the plan. * * *" (Emphasis in original; footnote omitted.) Foland v. Jackson County, supra, 311 Or at 180.

The city's comprehensive plan and land use regulations were acknowledged by the Land Conservation and Development Commission (LCDC) as being in compliance with the statewide planning goals on May 15, 1981. ORS 197.251; LCDC Acknowledgment Order (May 15, 1981). Under ORS 197.625, amendments to the acknowledged comprehensive plan and land use regulations, and new land use regulations adopted to implement the acknowledged comprehensive plan, are considered acknowledged when the 21-day period to appeal to LUBA has expired or, if appealed, when an appellate decision affirming the amendment or new land use regulation becomes final. Thus, the text of the E-zone is acknowledged, because the E-zone ordinance was not appealed to LUBA. On

the other hand, the Mapping Ordinance applying the E-zone to property in the Columbia South Shore, and adopting a resource inventory and ESEE analysis for the Columbia South Shore, is not acknowledged, because the Mapping Ordinance was appealed to LUBA and the appellate review process has not been concluded.

ORS 197.175(2)(c) provides:

> "If its comprehensive plan and land use regulations have not been acknowledged by [LCDC], [a local government shall] make land use decisions in compliance with the goals[.]"

Furthermore, ORS 197.835(3) provides in relevant part:

> "The board shall reverse or remand a land use decision not subject to an acknowledged comprehensive plan and land use regulations if the decision does not comply with the goals. * * *"

Although the text of the E-zone itself has been acknowledged as complying with Goal 5, its application to the Columbia South Shore and the resource inventory and ESEE analysis for the Columbia South Shore have not been acknowledged as complying with Goal 5. Therefore, there can be no question that under the above quoted statutory provisions, a decision to adopt a NRMP for the Columbia South Shore pursuant to the provisions of the E-zone must comply with Goal 5.[12]

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[12]The adoption of the NRMP is clearly distinguishable from the plan map modification at issue in Foland v. Jackson County, supra. In Foland, the map modification was adopted pursuant to a "refinement clause" in an acknowledged plan and land use regulations. We express no opinion on whether the adoption of a NRMP for the Columbia South Shore would have to comply with the goals if the Mapping Ordinance were acknowledged and,

C. Compliance with Goal 5

The findings in support of the challenged ordinance state "the Statewide Planning Goals do not apply." Record 12. No findings in the NRMP ordinance or the NRMP itself address the requirements of Goal 5. Neither the NRMP Ordinance nor the NRMP itself incorporates by reference the resource inventory or ESEE analysis adopted by the Mapping Ordinance for the Columbia South Shore, or explains how the adopted inventory or ESEE analysis may demonstrate compliance of the NRMP with Goal 5.

Intervenor Scott's third and fourth assignments of error and petitioner Blatt's fourth, fifth and sixth assignments of error are sustained.

FIFTH ASSIGNMENT OF ERROR (SCOTT)

> "The NRMP mitigation provisions are not supported by substantial evidence in the whole record."

SIXTH ASSIGNMENT OF ERROR (SCOTT)

> "The NRMP fails to mitigate adequately for planned wetland losses."

THIRD ASSIGNMENT OF ERROR (BLATT)

> "The NRMP mitigation plan and assessment of wetland functions and values is not supported by substantial evidence in the record as a whole."

In these assignments of error, petitioners argue that the mitigation plan adopted as part of the NRMP (see Record 163-208) does not comply with Goal 5 or the requirements of

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therefore, the NRMP was adopted pursuant to an acknowledged plan and land use regulations.

the E-zone for such mitigation plans.[13]

With regard to Goal 5 compliance, we must sustain these assignments of error, for the reasons stated in the preceding section.

However, as explained in n 6, supra, the PCC chapter 33.635 E-zone provisions applicable to the appealed decision have been replaced by a new E-zone chapter, effective January 1, 1991. Because we sustain petitioners' assignments of error concerning Goal 5 compliance, the challenged NRMP Ordinance must be remanded to the city. Any new decision to adopt an NRMP made by the city on remand will have to comply with the new E-zone chapter, which includes different wording with regard to requirements for mitigation plans. Therefore, no purpose would be served by reviewing these assignments of error with regard to compliance with provisions of PCC chapter 33.635.[14]

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[13]A portion of petitioner Blatt's second assignment of error (at Petition for Review 14-16) also challenges the NRMP's mitigation plan. That portion of petitioner Blatt's second assignment of error is addressed by this section of the Board's opinion.

[14]We also note that, as described supra, the E-zone defines the nature and purpose of a mitigation plan in terms of compensation for adverse impacts on natural resource values identified in the ESEE analysis. PCC 33.635.130.A and B. Further, a mitigation plan is required to document the resource values identified in the ESEE analysis. PCC 33.635.130.D.1. As explained in the preceding section, the appealed ordinance neither adopts nor references such an ESEE analysis. Without an explanation in the appealed decision of the relationship between the NRMP's mitigation plan and the natural resource values identified in the ESEE analysis, it is not possible for us to evaluate petitioners' arguments concerning the adequacy of the mitigation plan.

Intervenor Scott's fifth and sixth assignments of error and petitioner Blatt's third assignment of error are sustained in part.

SEVENTH ASSIGNMENT OF ERROR (SCOTT)

> "The NRMP buffer provisions are inadequate and unsupported by substantial evidence."

FIRST ASSIGNMENT OF ERROR (BLATT)

> "The city council's finding that a 25 to 31 foot buffering would be adequate is not based on substantial evidence in the whole record."

In these assignments of error, petitioners argue that the buffer requirements adopted by the NRMP do not comply with Goal 5 or the purpose of the E-zone.

With regard to Goal 5 compliance, we must sustain these assignments of error, for the reasons stated supra. Because we sustain petitioners' assignments of error concerning Goal 5 compliance, the challenged NRMP Ordinance must be remanded to the city. As stated in the preceding section, any new decision to adopt an NRMP on remand will have to comply with the new PCC E-zone, which includes a differently worded purpose statement and NRMP approval standards. Therefore, no purpose would be served by reviewing these assignments of error with regard to compliance with PCC chapter 33.635.[15]

[15]Under PCC 33.635.100.E.1, consistency with the purpose of the E-zone is an approval standard for adoption of a NRMP. As noted supra, the purpose of the E-zone is to protect natural resources and their natural resource values, as identified in the city's natural resource inventory and

Intervenor Scott's seventh assignment of error and petitioner Blatt's first assignment of error are sustained in part.

EIGHTH ASSIGNMENT OF ERROR (SCOTT)

> "The procedures followed by the City of Portland violated the intervenor-petitioner's substantial rights."

Intervenor Scott contends the city "shortcut process as well as analysis." Scott Petition for Review 28. Intervenor Scott argues the city "radically altered the analytical basis for wetland mitigation assessment * * * without adequate analysis or public notice." Id. Intervenor Scott further argues the city "indulged in convoluted processes that effectively frustrated public participation." Scott Petition for Review 29.

All we can tell from the argument under this assignment of error is that intervenor Scott believes his notice of and opportunity to participate in some aspects of the city process leading to adoption of the NRMP Ordinance were inadequate in some unexplained manner. Intervenor Scott's arguments under this assignment of error are not sufficiently developed to explain a legal basis upon which we may grant relief. Deschutes Development v. Deschutes

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ESEE analysis. PCC 33.635.010. As previously stated, the appealed ordinance neither adopts nor refers to such an inventory and ESEE analysis. Without an explanation in the appealed decision of how the NRMP's buffering requirements protect the natural resources and values identified in an inventory and ESEE analysis, we cannot determine whether the NRMP buffering requirements comply with the purpose of the E-zone.

County, 5 Or LUBA 218, 220 (1982).

Intervenor Scott's eighth assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (BLATT)

> "The city council committed a procedural error by reviewing only a small portion of the record in evaluating the appropriate buffering."

Petitioner argues that the findings on the buffering issue supporting the challenged ordinance appear to be based solely on the testimony of Michelle Girts, a CH2M Hill employee. Petitioner contends the city arbitrarily decided not to consider the evidence submitted by state and federal regulatory agencies on the issue of buffering. According to petitioner, the city council ignoring, without explanation or justification, most of the evidence before it on the issue of buffering denied her due process rights to present and rebut evidence.

The city argues the record is clear that the city council considered and debated the voluminous evidence in the record concerning the buffering issue. According to the city, after considering all the evidence, the city council determined the evidence presented by Ms. Girts on this issue was the most credible and persuasive, and found accordingly. The city contends its obligation is to adopt findings explaining the factual basis for its decision, not to describe all of the evidence in the record both for and against the decision made. Kellogg Lake Friends v. City of

Milwaukie, 16 Or LUBA 755 (1988).

We agree with the city that there is no legal requirement that the city address in its findings evidence on which it does not choose to rely. Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA at 765; see Ash Creek Neighborhood Ass'n v. City of Portland, 12 Or LUBA 230, 236-38 (1984). Petitioner cites nothing in the record to support her contention that the city council failed to consider all the relevant evidence before it on the buffering issue.

Petitioner Blatt's second assignment of error is denied.

The city's decision is remanded.