

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 AMY WELCH, STEVE POSEY, CONNIE)
5 PLUCHOS, STANLEY PICKARD, LOTUS)
6 ISLE HOMES and HAYDEN BAY)
7 CONDOMINIUMS,)

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vs.

LUBA Nos. 94-133 and 94-183

CITY OF PORTLAND,

FINAL OPINION
AND ORDER

Respondent,

and

WINMAR OF JANTZEN BEACH,

Intervenor-Respondent.

Appeal from City of Portland.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Preston Gates & Ellis.

Ruth Spetter, Senior Deputy City Attorney, Portland, filed a response brief on behalf of respondents.

Larry Epstein, Portland, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED

12/21/94

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving an
4 application for (1) a comprehensive plan map amendment and
5 zone change, (2) removal of a Buffer overlay zone (B
6 overlay), (3) an adjustment to a city code provision to
7 allow a parking lot, and (4) "environmental review."

8 **MOTION TO INTERVENE**

9 Winmar of Jantzen Beach, the applicant below, moves to
10 intervene in this proceeding on the side of respondent.
11 There is no opposition to the motion, and it is allowed.

12 **FACTS**

13 The subject property consists of two upland parcels
14 adjoining, and submerged lands underlying, the Oregon
15 Slough. The two upland parcels are separated by Lotus Isle
16 Park, a public park.¹ A 15-foot easement across Lotus Isle
17 Park connects the two upland parcels. The eastern upland
18 parcel is referred to in this opinion as the "sand lot" and
19 consists of a 1.33-acre area.

20 Intervenor plans to reconfigure and renovate the
21 existing floating home/boat moorage facility located on the
22 subject property. Specifically, intervenor proposes a
23 phased development reducing the number of boat slips from

¹Calling these parcels upland parcels is not strictly correct, as a small portion of these parcels extends into the Oregon Slough abutting the uplands.

1 600 to 480 and relocating 56 of the 74 floating homes to a
2 new moorage, with access from a new ramp and a pathway
3 across Lotus Isle Park to a new parking lot proposed to be
4 constructed on the sand lot. Intervenor proposes to change
5 the plan designation and zone of the sand lot from General
6 Industrial (IG2) to Multi-Family Residential (R3) and to
7 eliminate the B overlay currently applied to a portion of
8 the sand lot.

9 The proposed plan amendment and zone change, removal of
10 the B overlay and adjustment are required to facilitate the
11 construction of the parking lot on the sand lot. In
12 addition, under the EC overlay, environmental review
13 approval is required for the landscaping around the proposed
14 parking lot, the proposed moorage reconfiguration and the
15 proposal to remove a launching ramp.

16 Although the sand lot is zoned IG2,² its use for
17 purposes otherwise allowed in the IG2 zone is limited,
18 because of the application of the B overlay to a portion of
19 the sand lot. This overlay effectively prohibits access
20 from the street to the sand lot, and as a result, the sand
21 lot is accessible only from the slough. Therefore,

²The IG2 zoning district allows for a wide range of industrial activities outright, including manufacture and production, warehouse and freight movement, wholesale sales, industrial services, and railroad yards. Waste-related industrial development is also allowed on a conditional use basis. Additionally, commercial uses such as quick vehicle servicing, vehicle repair, and self-service storage are allowed outright, and other commercial uses are allowed on a conditional use basis. Household living, including floating home moorages, is allowed as a conditional use.

1 industrial use of the sand lot is severely restricted.

2 The Portland International Airport Noise overlay zone
3 (X overlay) also applies to the all of the properties
4 affected by the challenged decision. The X overlay limits
5 residential densities and imposes certain requirements, such
6 as residential noise insulation, noise disclosure
7 statements, and noise easements.³ Specifically, under the X
8 overlay, residential development in residential zones is
9 limited to a maximum density of one unit for every 10,000
10 square feet of site area (R10 density). Residential
11 development in commercial zones subject to the X overlay is
12 similarly limited.

13 Finally, the Environment Conservation overlay zone
14 (EC overlay) applies to the submerged lands, river banks,
15 and land up to 25 feet landward of the top of the bank of
16 the Oregon Slough. The EC overlay protects identified
17 significant natural resources. As noted above, intervenor
18 requested environmental review under the EC overlay for
19 portions of the proposed moorage renovation and
20 reconfiguration and for related development to occur on the
21 submerged lands as well as within 25 feet of the top of the
22 bank of the slough.

23 The hearings officer approved the proposal.
24 Petitioners appealed to the city council. The city council

³The purpose of the X overlay is to limit the impact of aircraft noise on residential development.

1 affirmed, with modification, the hearings officer's decision
2 and conditionally approved the proposal. This appeal
3 followed.

1

2 **FIRST ASSIGNMENT OF ERROR**

3 **A. Applicability of Statewide Planning Goal 5 (Open**
4 **Spaces, Scenic and Historic Areas, and Natural**
5 **Resources)**

6 Petitioners contend the city erred by determining
7 Goal 5 does not apply to the proposal to change the plan
8 designation and zone of the subject property and to remove
9 the B overlay.

10 The challenged decision determines Goal 5 is
11 inapplicable to the proposal because (1) the EC overlay
12 implements Goal 5 and will continue to apply and protect the
13 inventoried Goal 5 resources on the subject property, and
14 nothing affects the applicability of the EC overlay, (2) no
15 development is proposed within the area subject to the EC
16 overlay except for vegetation planting, which is permitted
17 outright under the EC overlay, and (3) the city is not
18 required to revisit its acknowledged inventory of Goal 5
19 resources in a quasi-judicial proceeding when those Goal 5
20 resources will not be impacted by the development. Urquhart
21 v. Lane Council of Governments, 80 Or App 176, 721 P2d 870
22 (1986).

23 The challenged decision includes a comprehensive plan
24 amendment changing the plan designation of an area with
25 inventoried Goal 5 resources from IG2 to R3 and removing the
26 B overlay. Therefore, the goals, including Goal 5, apply to
27 the proposal. ORS 197.175(2)(a); ODOT v. City of Newport,

1 23 Or LUBA 408 (1992).

2 No party disputes that the city's comprehensive plan
3 inventories the sand lot as containing Goal 5 resources.
4 Therefore, Urquhart does not apply, because there is no
5 contention that such inventory must be revisited.

6 The EC overlay was originally applied to the sand lot
7 as a program to limit conflicting uses, pursuant to
8 OAR 660-16-010(3). The EC overlay was originally applied to
9 the sand lot based on the city's analysis of conflicts
10 between the uses allowed under the IG2 designation and the B
11 overlay, and the inventoried Goal 5 resources on the sand
12 lot. The challenged decision changes the plan designation
13 and allowable uses of the sand lot. Therefore, the
14 challenged decision removes the analytical underpinning for
15 the city's prior decision that the EC overlay is the
16 appropriate Goal 5 resource protection program.

17 To support the challenged decision, the city must
18 identify conflicting, potentially allowable, uses of the
19 sand lot under the R3 designation. Next, the city must
20 determine the economic, social, environmental and energy
21 (ESEE) consequences of the conflicts between the identified
22 conflicting uses and the inventoried Goal 5 resources, as
23 required by OAR 660-16-005. These analyses will provide a
24 basis for selection of a new resource protection program for
25 the sand lot, pursuant to OAR 660-16-010. The city may
26 ultimately decide the EC overlay is the appropriate resource

1 protection program for the sand lot. However, it may not
2 assume the EC overlay as currently applied is adequate to
3 satisfy Goal 5, without following the Goal 5 planning
4 process based on the proposed new plan designation and the
5 consequent allowable uses of the sand lot.

6 This subassignment of error is sustained.

7 **B. Application of Goal 5 to the Subject Property**

8 In the alternative, the challenged decision determines
9 that if Goal 5 applies to the subject property, the proposal
10 is in compliance with it. Nevertheless, petitioners contend
11 the Goal 5 analysis contained in the challenged decision is
12 inadequate. Petitioners argue the city failed to
13 specifically identify, analyze the ESEE consequences of and
14 resolve conflicting uses as required by OAR 660-16-005 and
15 660-16-010.

16 The challenged decision does not identify potentially
17 conflicting uses of the subject property under the proposed
18 R3 designation. Rather, the challenged decision determines
19 the proposal complies with Goal 5, because the industrial
20 uses allowable under the existing IG2 plan designation have
21 a greater potential impact on identified Goal 5 resources
22 than would the residential uses allowable under the proposed
23 R3 designation. However, this determination in the
24 challenged decision assumes that all of the uses allowed
25 under the IG2 designation are potentially allowable on the
26 subject property. The determination ignores the severe

1 limitations on potential uses of the subject sand lot
2 property imposed under the currently applicable B overlay.
3 As stated previously, the B overlay prohibits access to the
4 sand lot from the street, effectively preventing most or all
5 of the uses otherwise allowable under the IG2 designation.
6 Without an identification of conflicting uses, as required
7 by OAR 660-16-005, the city cannot determine the ESEE
8 consequences of those conflicts or develop a program to
9 achieve the goal. Gonzalez v. Lane County, 24 Or LUBA 251,
10 267 (1992). Therefore, the city's Goal 5 analysis is
11 inadequate.

12 This subassignment of error is sustained.

13 The first assignment of error is sustained.

14 **SECOND ASSIGNMENT OF ERROR**

15 City plan Goal 8 (Environment) provides as follows:

16 "Maintain and improve the quality of [the city's]
17 air, water and land resources and protect
18 neighborhood and business centers from detrimental
19 noise pollution."

20 The challenged decision contains the following findings
21 of compliance with Goal 8:

22 "Development that follows the approval of the plan
23 amendment will be subject to City, State and
24 federal laws that ensure the development and use
25 of the site do not adversely affect air, water or
26 land resources. The plan amendment reduces the
27 chance that development might nevertheless have an
28 adverse effect, because an industrial use is more
29 likely to have an effect on the environment than
30 the permitted density of residential use on the
31 site or a relatively passive storage use such as
32 proposed for the site in this case. * * *"

1 Record 26.

2 The challenged decision does not identify any plan Goal
3 8 policy as applicable to the proposal other than
4 Policy 8.21 relating to noise, addressed under the third
5 assignment of error, infra. Petitioners state that plan
6 Goal 8 has numerous relevant policies which should have been
7 addressed in the challenged decision.⁴

8 The challenged decision was adopted by the city
9 council. The policies cited by petitioners are not clearly
10 inapplicable to the proposal. It is for the city council to
11 decide which plan policies apply, and how they apply, to the
12 proposal. It is well settled that this Board cannot, in the
13 first instance, interpret the city's plan policies to
14 determine their applicability. See Weeks v. City of
15 Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992). Rather,
16 this Board may only review the city council's interpretation
17 of its code. Gage v. City of Portland, 319 Or 308, ___ P2d
18 ___ (1994). The city council must determine the
19 applicability of the plan policies noted supra, in the first
20 instance. If the city council determines some or all of
21 those policies to be applicable, it must determine whether

⁴Petitioners cite plan Policies 8.1 to 8.4 (regarding air quality), Policies 8.5 and 8.6 (regarding water quality), Policy 8.7 (regarding stormwater runoff), Policy 8.8 (regarding groundwater protection), Policy 8.10 (regarding water quality, stormwater runoff, and wildlife), Policy 8.15 (regarding wetlands and water bodies), Policies 8.16 and 8.17 (regarding uplands and wildlife protection), and Policies 8.19 to 8.20 (regarding noise regulation).

1 the proposal complies with them.

2 Petitioners also argue the findings concerning plan
3 Goal 8 are inadequate for other reasons. Petitioners
4 contend the city failed to identify and describe potential
5 uses of the sand lot allowable under the proposed plan
6 designation, or analyze the impact of such allowable uses on
7 the environmental values protected by plan Goal 8.
8 Petitioners contend the city's failure to do so made it
9 impossible for the city to determine whether the proposal
10 satisfies plan Goal 8. In this regard, petitioners also
11 argue the city erroneously considered the full range of
12 potentially allowable uses under the existing IG2
13 designation in determining residential uses are not as
14 intensive. Petitioners contend the city should have
15 analyzed the uses allowable under the current IG2
16 designation, as affected by the existing B overlay.
17 Petitioners argue that a comparison between uses allowable
18 under the IG2 designation, with a B overlay, and the R3
19 designation shows the industrial uses are far less intensive
20 than the uses allowable under the proposed R3 designation.
21 Petitioners also maintain the city erred by determining the
22 proposed parking lot use is "passive" and, therefore, will
23 not have a severe impact. Petitioners argue creating an
24 impervious surface capable of supporting 125 automobiles, as
25 proposed, has a number of impacts that should have been
26 considered by the city.

1 We agree with petitioners that the city may not simply
2 assume unlimited IG2 uses may be made of the property and
3 conclude that any use allowed under the R3 designation will
4 be less intensive.⁵ The city must take into account that
5 the existing IG2 designation is burdened with the B overlay.
6 Further, in determining compliance with plan Goal 8, the
7 city must identify allowable uses under the proposed R3
8 designation, and determine the impacts of such uses on the
9 values protected by plan Goal 8.⁶ In addition, we agree
10 with petitioners that a 125-space parking lot is not a de
11 minimus use of the subject property, and requires analysis
12 under plan Goal 8.⁷

13 Finally, petitioners contend the statement in the
14 challenged findings that the proposal is consistent with
15 plan Goal 8 because various federal, state, and local
16 environmental laws apply to the subject property, is
17 erroneous. Petitioners argue the city must determine the

⁵The city did not identify the range of uses allowed by the R3 designation. Rather, it concluded that a parking lot use was a passive, presumably less intrusive use than uses allowable under the IG2 designation.

⁶Nothing in the challenged decision suggests that the city limited the use that may be made of the sand lot to the proposed parking lot use. Specifically, as far as we can tell, nothing in the challenged decision prevents petitioners from converting the proposed parking lot use to any of the other uses permitted under the R3 designation.

⁷It does not matter whether a parking lot is more accurately described as passive or active. Plan Goal 8 does not use such labels and such labels are not legally significant in the context of determining plan Goal 8 compliance.

1 proposal's compliance with city regulations and not leave
2 such determinations to other authorities.

3 We agree with petitioners. Plan Goal 8 is written as a
4 directive to the city. This requires the city to adopt
5 independent determinations of the proposal's compliance with
6 the environmental standards of plan Goal 8. It may not
7 defer such determinations to other jurisdictions. See
8 Moorefield v. City of Corvallis, 18 Or LUBA 95, 108-09
9 (1989).

10 The second assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 Plan policy 8.21 states it is the city's policy to:

13 "[e]nsure compatible land use designations and
14 development within the noise impacted area of the
15 Portland International Airport."

16 Objective A of plan Policy 8.21 provides:

17 "Promote land use compatibility within the noise
18 impacted area by * * * limiting the maximum
19 residential zoning and Comprehensive Plan Map
20 designations to R10 in R designated areas * * *
21 between the 1983 Ldn 65 and the 1977 Ldn 68 noise
22 contours."

23 The subject property is between the Ldn 65 and Ldn 68 noise
24 contours and, therefore, is within the noise impacted area
25 of the Portland International Airport (airport) subject to
26 plan Policy 8.21 and its objectives.⁸

⁸As stated above, the proposal is to designate the subject property R3, which is more intensive than the R10 designation referred to in plan Policy 8.21, Objective A.

1 The challenged decision determines plan Policy 8.21,
2 Objective A is not a mandatory approval standard, but rather
3 a statement guiding the adoption of implementing regulations
4 as part of the city's zoning ordinance. The implementing
5 regulations referred to in the challenged decision are the
6 regulations contained in Portland City Code
7 (PCC) 33.470.050(A)(3) regarding the X overlay.⁹

8 Petitioners argue the city erroneously determined plan
9 Policy 8.21, Objective A is a guideline as the city has
10 previously determined plan objectives are mandatory approval
11 standards. Hess v. City of Portland, 23 Or LUBA 343 (1992)
12 (plan objective is a basis for denial of development
13 proposal). The challenged decision does not explain why the
14 plan objectives at issue in Hess were approval standards,
15 but the disputed plan objective here is a guideline. In
16 these circumstances, it is inappropriate to defer to the
17 city's determination that plan Policy 8.21, Objective A, is
18 not a mandatory standard applicable to the proposal. See
19 Friends of Bryant Woods Park v. City of Lake Oswego, 26 Or
20 LUBA 185, 191 (1993), rev'd on other grounds 126 Or App 205
21 (1994).

22 In the alternative, the challenged decision determines

⁹PCC 33.470.050(A)(3) provides the maximum permitted density in the X overlay is one dwelling per 10,000 square feet of site area. The X overlay lowers the maximum permitted density in the R3 base zone from one dwelling unit per 3,000 square feet to one unit per 10,000 square feet. Thus, under the X overlay, the allowable density may be the same, regardless of whether the designation is R3 or R10.

1 that if plan Policy 8.21, Objective A, is a mandatory
2 approval standard, it conflicts with other plan policies and
3 under PCC 33.810.050,¹⁰ the city must balance conflicting
4 policies:

5 "The Council finds that [plan Policy 8.21,]
6 Objective A conflicts with other policies, because
7 strict compliance with Objective A would preclude
8 use of the site for a parking lot for the floating
9 home moorage. A floating home marina is
10 classified as a multi-family use, and parking for
11 a multi-family use can be provided only on a
12 parcel zoned for multi-dwelling or higher
13 intensity use. If [plan Policy 8.21,] Objective A
14 would preclude such a use, it would conflict with
15 the policies achieved by approval of the plan
16 amendment for that purpose.

17 "* * * * *

18 "[W]hen evaluated in terms of the applicant's
19 actual development proposal and the purpose for
20 which the applicant is requesting an R3
21 designation, that designation allows for a use
22 which more fully complies with [plan] Goal 8 than
23 would any density of residential development.
24 Specifically, the applicant proposed to develop
25 the site of the plan amendment for parking rather
26 than for dwellings. A parking lot is more
27 compatible with [plan] Goal 8, and a less noise
28 sensitive use than would be any residential use.
29 Moreover, the parking will be provided to serve
30 existing dwellings rather than new dwellings. * *
31 *" Record 27.

¹⁰Intervenor points out that PCC 33.810.050(A)(1) specifically authorizes balancing conflicting plan policies when approving a plan map amendment, as follows:

"The requested [plan] designation for the site has been evaluated against relevant Comprehensive Plan policies and on balance has been found to be equally or more supportive of the Comprehensive Plan as a whole than the old designation[.]"

1 The challenged decision does not identify the plan
2 policies that are balanced, and petitioners contend this is
3 error.

4 In Waker Associates, Inc. v. Clackamas County, 111 Or
5 App 189, 194, 826 P2d 20 (1992), the court of appeals
6 determined it was permissible for a local government to
7 balance conflicting plan goals. The court stated:

8 "Although the effect on and consistency of a
9 proposed use with each of the goals must be
10 considered, the weight to be given a goal, and the
11 magnitude of the effects that particular proposed
12 uses will have on the values that the different
13 goals protect, will inevitably vary from case to
14 case. * * * However, the way in which the
15 factors are balanced is a question for the local
16 government to answer initially." Waker, supra,
17 111 Or App at 194-95.

18 We believe Waker requires that a local government not
19 disregard conflicting plan policies. However, under Waker,
20 so long as the record reflects that plan policies were
21 considered and balanced, this is all that is required.
22 Nothing in Waker requires a local government to specifically
23 identify each of the plan policies it balances in this
24 regard. PCC 33.810.050(A)(1) authorizes and requires the
25 balancing of plan policies in adopting a plan amendment.
26 Therefore, we defer to the city council's determination of
27 compliance with plan Policy 8.21, Objective A, based on its
28 balancing of plan policies and objectives.

29 The third assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Under this assignment of error, petitioners argue the
3 adjustment approved by the city from the requirement that
4 parking be on the same site as the residential site it
5 serves, is erroneous. Petitioners argue an accessory use
6 may not be located in a zone that is different from the zone
7 underlying the primary residential use served by the
8 accessory use. However, petitioners do not cite any
9 standard supporting such a prohibition, and we are not aware
10 of any. Although PCC 33.266.100(D) requires accessory
11 parking to be located on the same site as the residential
12 use served by it, we are aware of nothing requiring that
13 such accessory parking be in the same zone as the
14 residential use. It is to the PCC 33.266.100(D) same site
15 requirement that the proposed adjustment is granted, and
16 petitioners do not challenge the "same site" aspect of the
17 disputed adjustment.

18 This assignment of error provides no basis for reversal
19 or remand of the challenged decision.

20 The fourth assignment of error is denied.

21 **FIFTH ASSIGNMENT OF ERROR¹¹**

22 Petitioners contend the challenged decision fails to
23 establish compliance with PCC 33.855.050(b) and

¹¹Under this assignment of error, petitioners also advance arguments we resolve under the second assignment of error, supra. We do not reconsider those arguments here.

1 33.805.040(E), regarding stormwater disposal.

2 As relevant, PCC 33.855.050(b) provides:

3 "[P]roposed sanitary waste disposal and stormwater
4 disposal systems are or will be made acceptable to
5 the Bureau of Environmental Services."

6 The city must adopt findings of compliance with this
7 standard. Further, PCC 33.805.040(E) requires findings that
8 impacts from an adjustment approval decision "are mitigated
9 to the extent practicable." We believe this requires the
10 city to mitigate the stormwater disposal impacts of the
11 adjustment authorizing the proposed parking lot. There is
12 no dispute the challenged decision fails to adopt findings
13 of compliance with PCC 33.855.050(b) and 33.805.040(E)
14 regarding stormwater disposal. Further, the record does not
15 clearly support a determination of compliance with the
16 PCC 33.855.050(b) or 33.805.040(E) provisions regarding
17 stormwater disposal. ORS 197.835(9)(b).

18 Petitioners also argue the city improperly defers
19 determinations of compliance with PCC 33.430.340(e) and
20 (f)(1) through (3) regarding protecting drainage patterns,
21 erosion, sedimentation and generally protecting natural
22 resource areas. The findings concerning compliance with
23 these standards simply state these issues will be addressed
24 at the building permit stage. However, to defer a
25 determination of compliance with PCC 33.430.340(e) and
26 (f)(1) through (3) to a subsequent stage, the city must
27 first determine that compliance with those provisions can be

1 achieved. Simonson v. Marion County, 21 Or LUBA 313 (1991).

2 The challenged decision fails to do so.

3 The fifth assignment of error is sustained.

4 The city's decision is remanded.¹²

¹²Intervenor requests that if we do not sustain assignments of error challenging the environmental review portion of the challenged decision, we affirm that portion of the decision so that part of the phased development may go forward. While we are sympathetic to intervenor's request, the court of appeals has strongly suggested that where an entire decision is appealed to this Board, and we sustain assignments of error, it is inappropriate for LUBA to affirm in part and remand in part. DLCD v. Columbia County, 117 Or App 207, 843 P2d 996 (1992). This would appear to apply regardless of whether portions of an appealed decision are not successfully challenged. Therefore, we decline to affirm in part and remand in part.