BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTHWEST AGGREGATES CO., an Oregon corporation, fka OREGON LEASING COMPANY, Petitioner, vs. CITY OF SCAPPOOSE, Respondent, and PORT OF ST. HELENS, Intervenor-Respondent.	LUBA No. 97-162/163 FINAL OPINION AND ORDER

Appeal from City of Scappoose.

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

Jeff Bennett, Portland, filed a response brief and argued on behalf of respondent City of Scappoose. With him on the brief was Tarlow, Jordan & Schrader.

Mark J. Greenfield, Portland, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 05/29/98

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

Per curiam.

NATURE OF THE DECISION

In this consolidated appeal, petitioner appeals the city's adoption of ordinance 656, which annexes property into the city, and ordinance 657, which amends the city zoning map and applies city zoning to the property annexed by ordinance 656.

MOTION TO INTERVENE

Intervenor-respondent Port of St. Helens (intervenor), one of the applicants below, moves to intervene on the side of the city. There is no opposition, and the motion is allowed.

FACTS

Intervenor owns and operates the Scappoose Industrial Airpark (Airpark), which is located within the city's urban growth boundary (UGB). On May 19, 1997, intervenor petitioned the city to annex approximately 182 acres including the Airpark and West Lane Road, a county right of way that connects the city with the Airpark area. Intervenor later amended its petition to include 3.27 acres of park land owned by Columbia County. All but two of the property owners in the territory included in intervenor's petition consented to the annexation. The two nonconsenting property owners own land underlying West Lane Road.

On May 29, 1997, the city filed a petition for annexation of certain additional properties in the area owned by persons who consented to annexation. The city thereafter treated both

intervenor's petition and its petition as one application. The city council considered both petitions on June 16, 1997, and voted to initiate the annexations and dispense with an election. The petitions were referred to the city planning commission for recommendation on appropriate zoning. The commission recommended Light Industrial (LI) zoning for part of the affected area and Mobile Home (MH) zoning for the remainder. The city council thereafter conducted public hearings and, on August 4, 1997, adopted the challenged ordinances.

These appeals followed.

FIRST ASSIGNMENT OF ERROR (97-162)

Petitioner argues that the city's adoption of ordinance 656, annexing the property including the Airpark, violates statutory provisions governing annexations. Specifically, petitioner argues that the city's decision violates ORS 222.125, 222.170(2) and 222.111(1).

A. ORS 222.125

ORS 222.125 allows annexation of contiguous territory into a city without an election where all of the owners of land in the territory and not less than 50 percent of the electors, if any, residing in the territory consent in writing to the annexation, and file a statement of their consent with the city before the public hearing on the annexation.[1]

[1]ORS 222.125 provides:

Petitioners argue that the city's annexation fails both requirements of ORS 222.125, in that two of the owners of land in the territory did not consent, and less than 50 percent of the electors residing in the territory consented to the annexation.

With respect to the two nonconsenting landowners, the findings in support of ordinance 656 state:

> "The City Council finds that the annexation complies with * * * ORS 222.125. * * * ORS 222.111 and 222.125 are met for the reasons set out in the June 9, 1997 staff report, the June 11, 1997 supplement, and the July 17, 1997 letter from [intervenor]. Regarding ORS 222.125, the City Council agrees with [intervenor] that the consent of the owners of fee interests of the property underlying West Lane Road right of way is not required for determining consent." Record 28.

The June 17, 1997 letter from intervenor, which the city incorporated by reference into its decision, states:

> "With regard to the consent of property owners Meier and Yett, [intervenor] believes their consent is not required because state policy does not require consideration of real property for consent purposes where the property is exempt from ad valorem taxation. ORS 222.170(4). If consent of these owners is not required, then the City indeed has obtained the consent of 100 percent of the owners of land in the territory to be annexed.

> "The legislative body of a city need not call or hold an election in the city or in any contiguous territory proposed to be annexed or hold the hearing otherwise required under ORS 222.120 when all of the owners of land in that territory and not less than 50 percent of the electors, if any, residing in the territory consent in writing to the annexation of the land in the territory and file a statement of their consent with the legislative body. Upon receiving written consent to annexation by owners and electors under this section, the legislative body of the city, by resolution or ordinance, may set the final boundaries of the area to be annexed by a legal description and proclaim the annexation."

> "However, if [petitioner] is correct that ORS 222.125 requires the consent of owners Meier and Yett, the City still may approve this annexation without holding an election under ORS 222.170." Record 70-71 (emphasis in original).

Thus, the city interprets ORS 222.125 as not requiring the consent of landowners who own lands underlying the county right of way in West Lane Road. Record 27. That interpretation relies on ORS 222.170(4),[2] which authorizes the city to ignore property that is exempt from ad valorem taxes when annexing property pursuant to ORS 222.170(1). ORS 222.170(1) sets out a procedure that allows the city to annex contiguous property without holding an election where there exists a "triple majority" of consenting landowners, that is where "more than half of the owners, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real property in the territory" consent to the annexation. The challenged decision cites ORS 222.170(4) as a policy that is applicable to annexations authorized by ORS 222.125.

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[2]ORS 222.170(4) provides:

> "Real property that is * * * exempt from ad valorem taxation shall not be considered when determining the number of owners, the area of land or the assessed valuation required to grant consent to annexation under this section unless the owner of such property files a statement consenting to or opposing annexation with the legislative body of the city on or before a day described in subsection (1) of this section." (Emphasis added).

Petitioner contends that ORS 222.170(4) applies only to annexations initiated and processed under ORS 222.170(1), not under ORS 222.125. Neither the city nor intervenor respond to this argument, other than to assert, without analysis, that the policy embodied in ORS 222.170(4) applies to annexations conducted pursuant to ORS 222.125.

We agree with petitioners that ORS 222.170(4), by its plain terms and reference to ORS 222.170(1), applies only to annexations conducted under ORS 222.170(1). The focus of ORS 222.170(4) on property exempted from ad valorem taxes is specific to the "triple majority" requirements set out at ORS 222.170(1). We see nothing in the "policy" of ORS 222.170(4) that is applicable to annexations conducted under ORS 222.125.

Because the county has not obtained the consent of all property owners within the contiguous territory, as required by ORS 222.125, the county cannot conduct the annexation pursuant to ORS 222.125. Therefore, we need not address petitioner's further arguments with respect to the elector consent requirement of ORS 222.125.

B. ORS 222.170(2)

The city found, in the alternative, that it may approve the annexation without an election pursuant to ORS 222.170. ORS 222.170(2) permits the city to annex territory without an election where owners of at least 50 percent of territory to

be annexed and at least 50 percent of electors residing in the territory consent to annexation.[3]

Petitioner argues, first, that because the city's notice identified the entirety of ORS Chapter 222 as approval criteria rather than any specific provision such as ORS 222.170, the city's notice is not specific enough to satisfy the requirements of ORS 197.763(3)(b), and hence the city committed a procedural error.

Intervenor responds that, even if the city's notice was not sufficiently specific, the resulting procedural error is not a basis for reversal or remand unless petitioner establishes prejudice to petitioner's substantial rights. ORS 197.835(9)(a)(B). Intervenor states, and petitioner does not dispute, that the city identified ORS 222.170(2) as an approval criterion in its staff report, that petitioner knew that the city intended to apply ORS 222.170(2), and further that petitioner had an opportunity to address ORS 222.170(2) and did address it. We agree with intervenor that petitioner has not established any prejudice to its substantial rights

[3]ORS 222.170(2) provides in relevant part:

> "The legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if a majority of the electors registered in the territory proposed to be annexed consent in writing to annexation and the owners of more than half of the land in that territory consent in writing to the annexation of their land and those owners and electors file a statement of their consent with the legislative body on or before the day [the public hearing is held]."

from the city's alleged failure to specifically identify ORS 222.170(2) in its notice.

Petitioner argues next that the record does not contain the written consent forms of half of the electors in the territory, as required by ORS 222.170(2). The city has separate consent forms for electors and property owners, because not all property owners are electors, and vice versa. The city found that 10 electors resided in the territory, and that nine of the electors submitted written consent forms.

Petitioner argues that to prove compliance with ORS 222.170(2) the property owners who are electors must submit both types of written consent, as property owner and as elector. However, petitioner does not explain why separate consent forms are necessary to prove compliance with ORS 222.170(2). We do not understand petitioner to contend that the procedure the city followed fails to accurately identify either the total number of electors in the territory or the number that consented in writing.

Intervenor responds that ORS 222.170(2) does not require separate consent forms and that separate consent forms were not necessary in this case to prove that at least half the electors in the territory consented in writing. We agree with intervenor on both points.

C. ORS 222.111(1)

ORS 222.111(1) limits any annexation under ORS 222.170, among other provisions, to territory that is contiguous to the

city boundaries or separated from it only by a "public right of way."[4] Petitioner argues that the city's annexation is contrary to ORS 222.111(1) because the annexation is "not reasonable," as required by long-standing judicial precedent. DLCD v. City of St. Helens, 138 Or App 222, 225, 907 P2d 259 (1995), citing PGE v. City of Estacada, 194 Or 145 (1952).

In DLCD v. City of St. Helens, the Court of Appeals reversed our determination that "cherry stem" annexations are per se unreasonable.[5] The court held that whether an annexation, including a "cherry stem" annexation, is reasonable depends on a case by case analysis of several factors. The factors the court identified include whether the contiguous territory represents the actual growth of the city beyond its city limits, whether it is valuable by reason of

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[4]ORS 222.111(1) states that

> "[w]hen a proposal containing the terms of annexation is approved in the manner provided by [ORS 222.111 to 222.180], the boundaries of any city may be extended by the annexation of territory that is not within a city and that is contiguous to the city or separated from it only by a public right of way * * *."

[5]A "cherry stem" annexation is a configuration where the annexed territory is connected to the city only by a narrow right of way or corridor perpendicular to the city boundaries. Petitioner argues that the annexation in the present case is a "cherry stem" annexation, with the Airpark (the cherry) connected to the city only by West Lane Road (the stem). However, petitioner does not argue that the "cherry stem" configuration of the annexed territory itself violates either the contiguity or "separated * * * by a public right of way" criteria of ORS 222.111(1). See DCLD v. City of St. Helens, 138 Or App at 228-29 (suggesting, but not deciding, that annexation of both the "stem" and the "cherry" at the same time makes the "cherry" contiguous with the city, rendering the "separated * * * by a public right of way" criterion immaterial). Petitioner confines his argument solely to the contention that the subject annexation is not reasonable as defined by case law. We limit our analysis likewise.

its adaptability for prospective town uses, whether it is needed for the extension of streets or to supply residences or businesses for city residents, and whether the territory and city will mutually benefit from the annexation. Id. at 227-28. The court held that the annexation at issue, which annexed territory at the end of a 1500-foot connecting road to be used for a Walmart store, survives the reasonableness test as a matter of law. Id. at 228.

The challenged decision cites seven reasons why the annexation is reasonable.[6] Petitioner contends that the reasons articulated by the city fail to state any compelling reason why the territory should be annexed now or how either the city or the territory annexed will immediately benefit from the annexation. Petitioner concedes that annexation at some future time will be reasonable, but argues that none of the city's cited reasons compel the conclusion that annexation is reasonable at the present time.

The reasonableness test has a low threshold, as indicated by the discussion and application of the reasonableness test in DLCD v. City of St. Helens. We conclude that the reasons cited by the city in this case easily exceed that threshold.

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[6]The seven reasons cited are: (1) the current existence of urban services at the site, including water and adequate septic systems; (2) the current existence of urban-scale uses at the site; (3) the availability of public sewer at the site within a reasonable time; (4) the location of the Airpark within the UGB; (5) the designation of the Airpark as the focal point of the city's economic development strategy; (6) the current level of interest by businesses in locating or expanding operations at the Airpark; and (7) the terms associated with a pending grant, which require annexation of the Airpark to the city in order to connect to a new water system. Record 269-70.

The gist of those reasons is that the territory is suitable for annexation and represents the city's current and future direction for commercial growth. That showing exceeds the demonstration made in DCLD v. City of St. Helens, which the court found reasonable as a matter of law.

Based on the foregoing, we conclude that the annexation was reasonable and that the city committed no error in conducting the annexation without an election, as permitted by ORS 222.170(2).

Because we affirm the city's alternative basis for conducting the annexation without an election, the city's error in attempting to conduct the annexation without an election pursuant to ORS 222.125 does not provide a basis for reversal or remand in this case.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (97-162)

Petitioner argues that the city failed to involve the county in the annexation decision, as required by the city's comprehensive plan, Urban Grown Boundary Policy No. 4.A. Policy 4.A requires that the city

> "[c]ooperate with Columbia [County] in establishing a process to manage the Urban Growth Boundary area by:
>
> "(A) Establishing a joint review procedure for all quasi-judicial decisions, as well as for annexations and service extensions."

Petitioner acknowledges that the city sent notice of the annexation petitions to the county, that the county consented

in writing to annexation of a parcel of county-owned land, and that the decision considered the city's effort to involve the county and the county's choice to minimally participate sufficient to satisfy Policy No. 4.A. Nonetheless, petitioner contends that Policy No. 4.A. requires the city to do more, citing to DLCD v. City of St. Helens, 29 Or LUBA 485, 499, aff'd 138 Or App 222 (1995).

Petitioner misreads our decision in DLCD v. City of St. Helens, which involved a similarly worded provision of the city's comprehensive plan. In that case, the city did not involve the county or other public bodies at any stage of the annexation. We stated that the plan provision contemplates "involving these public bodies somehow in city decisions regarding annexations." 29 Or LUBA at 499. We remanded the decision to the city to determine in the first instance the appropriate type or degree of county involvement required by Policy No. 4.A. 29 Or LUBA at 499, n18. Nothing in our decision determined what type of procedure or degree of involvement was necessary to satisfy Policy No. 4.A.

The challenged decision determines that the city's efforts to involve the county in the proceeding, and the county's choice to minimally participate, satisfies Policy No. 4.A. That determination constitutes an implicit interpretation of Policy No. 4.A. that is adequate for our review. Petitioner has not established or even attempted to establish that the city's interpretation of Policy No. 4.A. is

inconsistent with the text, purpose or policy of the city's comprehensive plan. ORS 197.829(1)(a)-(c). Accordingly, we affirm that interpretation.

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR (97-162)

Petitioner argues, in the third assignment of error, that the city misconstrued Scappoose City Code (SCO) 17.136.040(A)(1) in finding that sewer service is "available" to the annexed area.[7] Petitioner contends that sewer service must be present on or adjacent to property being annexed in order to be "available" within the meaning of SCO 17.136.040(A)(1). In the fourth assignment of error, petitioner contends that the city's finding that sewer service is "available" to the annexed area is not supported by substantial evidence.

The city interpreted the term "available" for purposes of SCO 17.136.040(A)(1) to indicate there is adequate sewer capacity to serve the subject property, and means exist to facilitate the extension of services and facilities to the property over the planning period. Petitioner concedes that the city's interpretation is entitled to deference under ORS

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[7]SCO 17.136.040(A)(1) provides that

> "[t]he decision to approve, approve with modifications or deny an application to annex property to the City shall be based on the following criteria:
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> "(1) All services and facilities are available to the area and have sufficient capacity to provide service for the proposed annexation area[.]"

197.829(1), but argues that the city's interpretation is inconsistent with the text and purposes of SCO 17.136.040(A)(1), and is "clearly wrong." Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992).

Intervenor defends the city's interpretation, noting that the criterion of "availability" of services has been held to be, in a similar context, "a very flexible concept." Dunning v. Corrections Facility Siting Authority, 325 Or 269, 277, 935 P2d 1209 (1997). Intervenor argues that SCO 17.136.040(A)(1) does not require that services be "adjacent" or "immediately available." The consequence of petitioner's interpretation, intervenor argues, is that territory could seldom be annexed into a city because urban services are seldom immediately extendable into rural areas, but must be phased in as the annexed area develops over a particular planning period. Finally, intervenor cites to evidence that the existing septic systems in the annexed territory are adequate and that means exist to extend sewer lines to the territory within five years, which intervenor argues constitutes substantial evidence that sewer services are "available" as the city interprets that term.

We agree with intervenor that it is unreasonable to construe SCO 17.136.040(A)(1) as requiring that sewer facilities be already constructed on or built up to the boundary of the annexed area, ready to be extended. It is not

unreasonable, or at least not "clearly wrong," to construe SCO 17.136.040(A)(1), as the city has done, to require only a finding that extension of sewer services is feasible within the current planning period. We therefore affirm the city's interpretation. We also agree with intervenor that substantial evidence supports the city's finding that sewer services are "available," as the city interprets that term.

The third and fourth assignments of error are denied.

FIFTH AND SIXTH ASSIGNMENT OF ERROR (97-163)

Petitioner argues that the city was required to find that rezoning the annexed territory to LI and MH complies with the Columbia County's comprehensive plan, rather than the city's comprehensive plan, and that the city made no such findings.

Petitioner states that in 1992 the city adopted an ordinance designating the Airpark Industrial (I) in the city's comprehensive plan, at a time when the territory including the Airpark was beyond the city boundaries, and hence subject to the county's comprehensive plan. Petitioner argues that, pursuant to ORS 221.720(2),[8] the city had no authority or jurisdiction to designate property beyond its boundaries, and hence that the 1992 designation was ultra vires and invalid. Petitioner reasons from this premise that, pursuant to ORS

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[8]ORS 221.720(2) provides:

> "Notwithstanding any other provision of law the jurisdiction and application of government of cities shall be coextensive with the exterior boundaries of such cities, regardless of county lines."

215.130(2)(a),[9] the only applicable plan provisions are the county's, and hence the city is required to find that the challenged rezoning conforms with the county's designation and plan.

Intervenor responds, first, that petitioner's argument is a collateral attack on the 1992 ordinance, and that it is now too late to challenge the validity of the 1992 ordinance. If the validity of the 1992 ordinance is at issue, intervenor argues that that the city expressly interpreted its plan and the terms of the Urban Growth Area Management Agreement (UGAMA) to grant it authority in 1992 to designate the territory in its comprehensive plan, and that, after annexation, the city has authority to enforce that plan designation in zoning the newly annexed territory.

We need not reach the merits of intervenor's second response, or petitioner's arguments in anticipation thereof, because we agree with intervenor that petitioner's argument is a collateral attack on the 1992 ordinance. The time to appeal that decision is long past. Our jurisdiction extends only to

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[9]ORS 215.130(2) states:

> "An ordinance designed to carry out a county comprehensive plan and a county comprehensive plan shall apply to:
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> "(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise * * *[.]
>
> "* * * * *"

the decision challenged and appealed to us within the period described in ORS 197.830(8). Petitioner asks us to "find that the city's adoption and implementation of the [1992] plan map designation for the Airpark property is invalid." Petition for Review 21. We lack jurisdiction now to determine the validity of the 1992 ordinance. Petitioner's arguments under the fifth and sixth assignments of error provide no basis to reverse or remand the city's decision adopting ordinance 657.

The fifth and sixth assignments of error are denied.

SEVENTH ASSIGNMENT OF ERROR (97-163)

Petitioner argues that the city erred in finding OAR 660-13-100, the Airport Planning Rule, not applicable to its decision to rezone the Airpark LI. OAR Chapter 660, Division 13 is a rule adopted by the Land Conservation and Development Commission (LCDC) to implement recent statutory provisions codified at ORS 836.600 to 836.635. OAR 660-13-160(6) states that

> "[n]otwithstanding the provisions of OAR 660-013-140, amendments to acknowledged comprehensive plans and land use regulations, including map amendments and zone changes, require full compliance with the provisions of this division[.]"

The city determined that rezoning the Airpark did not require compliance with OAR 660-13-160, adopting intervenor's reasoning, which states

> "OAR 660, Division 13 is [not] intended to apply to a proceeding where the zone change is in accordance with and directed by acknowledged provisions of the City's Comprehensive Plan and zoning ordinance. Consequently, it may be that this rule does not apply at all to this rezoning action." Record 81

On appeal, intervenor cites to ORS 197.835(7) for the proposition that LCDC rules do not apply to amendments to land use regulations such as the zoning map amendment here, except where the comprehensive plan does not contain specific policies or other provisions that provide a basis for the regulation.[10] Intervenor states that the rezoning is pursuant to specific policies and provisions in the city's comprehensive plan and zoning ordinance.

However, ORS 197.835(7) does not, as intervenor suggests, exempt amendments to land use regulations from compliance with applicable administrative rules that implement statutory provisions. Statutes and administrative rules implementing statutes are directly applicable according to their terms to land use decisions, and are not subject to the rule that certain land use decisions are exempt under some circumstances from review for compliance with the statewide planning goals. See Friends of Neabeack Hill v. City of Philomath, 139 Or App 39, 46 n3, 911 P2d 350 (1996). We agree with petitioner that

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[10]ORS 197.835(7) states:

> "The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
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> "(a) The regulation is not in compliance with the comprehensive plan; or
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> "(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance the statewide planning goals."

the city is required to apply OAR 660-13-160 to its decision rezoning the Airpark.

The challenged decision finds, in case OAR 660-13-160 does apply, that the rezoning decision complies with the rule's requirements. OAR 660-13-100 requires that certain airport uses, including the airport itself, flight instruction, aircraft maintenance, refueling, sales, etc., be authorized within lawfully established airport boundaries. The city determined that the LI zone allows all the uses listed in the Airport Planning Rule:

> "The City Council finds that the LI district allows the commercial and recreational uses required by OAR 660-13-100 and concludes that the rezoning is fully in compliance with the Airport Planning Rule. Moreover, the City Council interprets "Transportation Terminal" in [SCO] 17.70.030(22) to include not only airport terminals but also uses accessory to airport terminals, including those uses so identified on page 14 of [intervenor's] letter.
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> "Accordingly, * * * [t]he City Council finds that the broad categories of uses permitted outright in the City's Light Industrial zone reasonably may be interpreted to include these aircraft and airport related uses." Record 20.

Petitioner argues that the city's interpretation of SCO 17.70.030 is inconsistent with the overall scheme of its zoning ordinance in general and SCO 17.43 in particular, which prohibits authorizing an unlisted use in a zoning district if the use is specifically listed in another zone as either a permitted use or a conditional use. Petitioner points out that the Airpark is subject to the city's Airport Overlay zone, which is a zone designed specifically for airports.

Because airports are a listed use in the Airport Overlay zone, petitioner contends that SCO 17.43 prohibits adding airports and uses accessory to airports to the list of uses allowed in the LI zone.

The city rejected petitioner's argument below by interpreting SCO 17.43 as not prohibiting a broad interpretation of a listed use in the LI zone, transportation terminal, to include airports and airport-related uses, even though airports are a listed use in the Airport Overlay Zone. On appeal, intervenor argues that the city's interpretations of both SCO 17.70.030 and SCO 17.43 are not inconsistent with the text, purpose or policy of the city's zoning ordinance, and thus we must defer to the city's interpretation. In addition, intervenor contends that petitioner's argument fails to recognize the difference between a base zoning district such as the LI district and an overlay zone such as the Airport Overlay zone.

We agree with intervenor on both points. The city's interpretations of SCO 17.70.030 and SCO 17.43 are not inconsistent with the text, purpose or policy of the zoning ordinance. ORS 197.829(1)(a)-(c). Petitioner's arguments directed at the preclusive effect of SCO 17.43 fail to recognize that an overlay zone must, by its nature, overlay a base zoning district, which must, perforce, permit uses consistent with those allowed by the overlay district.

The seventh assignment of error is denied.

The city's decisions are affirmed.