

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 REST-HAVEN MEMORIAL PARK and

4 CHARLES WIPER III,

5 *Petitioners,*

6 vs.

7 CITY OF EUGENE,

8 *Respondent.*

9 LUBA No. 2000-094/104

10 FINAL OPINION

11 AND ORDER

12 Appeal from City of Eugene.

13 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.

14 Glenn Klein, Eugene and Emily N. Jerome, Eugene, filed the response brief. With
15 them on the brief was Harrang, Long, Gary and Rudnick. Emily N. Jerome argued on behalf
16 of respondent.

17 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
18 participated in the decision.

19 REMANDED

20 1/11/2001

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

NATURE OF THE DECISION

Petitioners appeal a city ordinance that adopts new prohibitions, with certain exceptions, against placing pipes or fill in the city’s open waterways (hereafter the ordinance or open waterways ordinance). Petitioners also appeal a city temporary rule that was adopted to implement the ordinance.

FACTS

The open waterways ordinance and rule are the product of a public process that extended over approximately one year. That public process included city staff and a 14-member Public Works Stormwater Department Advisory Committee. On November 22, 1999, the city council held a hearing on a draft ordinance that, if adopted, would have prohibited filling and pipes in “Key Storm Waterways.” The draft ordinance identified 18 key storm waterways and included criteria for identifying and mapping additional key storm waterways.

In response to objections that the proposal had proceeded too quickly and that it would have effects on land use planning, the city council directed that the ordinance be processed through the city planning commission. Record 827-29. Thereafter the planning commission recommended that the city council adopt a modified ordinance. As modified by the planning commission, the ordinance proposed a no-fill/no-pipe policy for *all* open waterways. The ordinance challenged in this appeal was adopted by the city council on April 24, 2000. As provided in the ordinance, it is adopted as part of Chapter 6 of the Eugene Code (EC), which is titled “Environment and Health.” The open waterways ordinance was not adopted as part of the city’s zoning ordinance.

On June 9, 2000, the city manager adopted a temporary rule to implement the open waterways ordinance. Although the open waterways ordinance remains in effect, pursuant to EC 2.019(5), the June 9, 2000 temporary rule expired 180 days later on December 6, 2000.

1 **JURISDICTION**

2 The city argues that the city’s decisions to adopt the open waterways ordinance and
3 temporary rule are not land use decisions. For that reason, the city argues these appeals
4 should be dismissed. The city also argues that because the challenged rule has expired and
5 has not been readopted, the appeal challenging the rule is also moot.

6 **A. LUBA No. 2000-094**

7 According to the city, the June 9, 2000 temporary rule has expired, and the city has
8 no plans to readopt the rule. The city explained at oral argument that it believes the open
9 waterways ordinance can be implemented without additional rulemaking.

10 In this circumstance, we agree with the city that our review of the temporary rule
11 would be without practical effect. Accordingly, the appeal in LUBA No. 2000-094 is moot.
12 *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993); *Davis v. City of Bandon*, 19 Or
13 LUBA 523, 524 (1990); *Struve v. Umatilla County*, 12 Or LUBA 54, 59 (1984). LUBA No.
14 2000-094 is dismissed.

15 **B. LUBA No. 2000-104**

16 If the open waterways ordinance establishes “standards for implementing a
17 comprehensive plan,” it is a land use regulation and its adoption is a land use decision over
18 which LUBA has jurisdiction.¹ Petitioners argue the open waterways ordinance includes
19 standards to implement a number of comprehensive plan provisions.

20 **1. Comprehensive Plan Provisions**

21 The Metropolitan Area General Plan (Metro Plan) has been adopted by the cities of
22 Springfield and Eugene and Lane County, and it is an acknowledged “comprehensive plan”
23 as that term is defined by ORS 197.015(5). *Stotter v. City of Eugene*, 18 Or LUBA 135, 138

¹As defined by ORS 197.015(11), land use regulations include “general ordinance[s] establishing standards for implementing a comprehensive plan.” As defined by ORS 197.015(10)(a), land use decisions include local government decisions that adopt “new land use regulation[s].” LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1).

1 n 1 (1989). The Metro Plan includes the following provisions in its Environmental
2 Resources Element:

3 “20. In order to improve water quality and quantity in the metropolitan
4 area, local governments shall consider developing regulations or
5 instituting programs to:

6 “* * * * *

7 “c. regulate site planning for new development and construction to
8 better control drainage and erosion and to manage storm
9 runoff;

10 “d. increase storage and retention of storm runoff to lower and
11 delay peak storm flows;

12 “e. utilize natural and simple mechanical treatment systems to
13 provide treatment for contaminated runoff waters[.]” Metro
14 Plan III-C-9-10.

15 The city’s Comprehensive Stormwater Management Plan (CSWMP) is a Metro Plan
16 refinement plan and is therefore part of the city’s comprehensive plan. The CSWMP
17 includes the following policies:

18 “Policy 1.1: Incorporate the beneficial functions (flood control, conveyance,
19 water quality treatment) of natural resources into the City’s storm drainage
20 system.

21 “Policy 1.2: Maintain flood control, drainage, and water quality treatment
22 capacities along the city’s stormwater conveyance corridors while protecting
23 and enhancing the health, diversity and continuity for wildlife habitat, native
24 vegetation, and endangered species.” Record 1040.

25 **2. Open Waterways Ordinance**

26 The stated purpose of the open waterways ordinance is as follows:

27 “Open Waterways – Purpose. It is the intent of [the open waterways
28 ordinance] to establish interim protection for constructed and natural open
29 waterways that provide multiple stormwater benefits to the entire community.
30 The protection established in [the ordinance] shall remain in effect until the
31 city completes its [Statewide Planning] Goal 5 process for wildlife habitat
32 values and incorporates the results, along with the stormwater conveyance and
33 water quality treatment functions, into a comprehensive set of open waterway
34 protection measures. Open waterways provide such benefits as storm

1 drainage and flood control, filtration and treatment of stormwater pollutants,
2 and habitat for aquatic and other wildlife species.” Record 18.

3 As previously noted, the open waterways ordinance accomplishes its stated purpose by
4 requiring that all open waterways remain open and prohibiting, with certain stated
5 exceptions, the placement of “foreign materials” and any “construction” “in or over the
6 channel of an open waterway.” Record 18-21.

7 We agree with petitioners that it is clear that the open waterways ordinance
8 establishes standards for implementing the above-quoted comprehensive plan provisions.
9 Therefore, the open waterways ordinance is a new land use regulation.

10 3. *Ramsey v. City of Portland*

11 The city relies on our decision in *Ramsey v. City of Portland*, 30 Or LUBA 212
12 (1995), to argue that the open waterways ordinance does not adopt standards for
13 implementing the Metro Plan and CSWMP. There are some similarities between the open
14 waterways ordinance and the ordinance at issue in *Ramsey*.² However, there is one
15 significant and dispositive difference.

16 In *Ramsey*, we concluded a City of Portland ordinance that was adopted to regulate
17 tree cutting on undeveloped property was not a land use decision. In reaching that
18 conclusion we first rejected arguments that the challenged decision was a land use decision
19 because Statewide Planning Goals 4 (Forest Lands) and 5 (Open Spaces, Scenic and Historic
20 Areas, and Natural Resources) applied.³ In *Ramsey* the petitioner did not argue that the
21 challenged ordinance was adopted to implement the city’s comprehensive plan. We noted,

²For example, in both cases the ordinances were not codified in the portions of the cities’ codes that are expressly identified as land use regulations. *Ramsey*, 30 Or LUBA at 218; Respondent’s Brief 6.

³The ORS 197.015(10)(a) definition of “land use decision” includes decisions that apply the statewide planning goals. Petitioners in this appeal also argue here that the statewide planning goals apply to the open waterways ordinance. We agree, but we need not reach that question in resolving respondent’s jurisdictional challenge, because it is clear that the open waterways ordinance implements the Metro Plan and CSWMP and is a land use decision for that reason.

1 however, that “the connection between the [comprehensive] plan and the [tree-cutting
2 ordinance] is not sufficiently clear to justify the inference that the regulation implements the
3 plan.” *Ramsey*, 30 Or LUBA at 217.

4 The principle stated in *Ramsey* is relatively narrow. Where a local government
5 makes it clear that the ordinance it is adopting is not intended to be a land use regulation,
6 LUBA does not have jurisdiction to review such an ordinance, provided there is no clear
7 connection between the ordinance and the comprehensive plan. In that circumstance, and
8 with that limitation, the ordinance is not a land use regulation even though it may arguably
9 further some comprehensive plan provisions in a general or indirect way. However, that
10 principle is simply not applicable to the open waterways ordinance. The connection between
11 the open waterways ordinance and the Metro Plan and CSWMP provisions cited above is
12 direct and clear. The inference that the open waterways ordinance implements the Metro
13 Plan and CSWMP is unavoidable.

14 Because the open waterways ordinance is a new land use regulation, the decision to
15 adopt that ordinance is a land use decision. LUBA has jurisdiction, and the motion to
16 dismiss LUBA No. 2000-104 is denied.

17 **INTRODUCTION**

18 The first through fourth and sixth and seventh assignments of error challenge both the
19 open waterways ordinance and the temporary rule. The fifth assignment of error challenges
20 the temporary rule only. We consider below those portions of the first through fourth and
21 sixth and seventh assignments of error that challenge the open waterways ordinance.

22 The first, second and third assignments of error allege the open waterways ordinance
23 violates certain statutory provisions concerning “permits.” As defined by ORS 227.160(2),
24 “[p]ermit’ means discretionary approval of a proposed development of land[.]” We agree
25 with petitioners that applying the open waterway exemption standards to allow construction
26 and the placement of foreign material in open waterways will involve “discretionary

1 approval of a proposed development of land.” Because those decisions qualify as permits,
2 the statutory requirements for making permit decisions apply. We therefore consider
3 petitioners’ arguments under the first three assignments of error that the open waterways
4 ordinance is inconsistent with some of those statutory requirements.

5 **FIRST ASSIGNMENT OF ERROR**

6 In making a permit decision, the city must follow one of two general procedures.
7 First, the city may provide a public hearing on the application before making its decision.
8 ORS 227.175(3). Alternatively, the city may render a decision without a public hearing if it
9 provides notice of the decision and an opportunity for a local appeal. ORS
10 227.175(10)(a)(A). Where the city’s decision is rendered initially without a public hearing,
11 the statutorily required appeal “shall be to a *de novo* hearing.” ORS 227.175(10)(a)(D).

12 Under the open waterways ordinance, decisions concerning applications for
13 exemptions from the prohibition in the ordinance against construction or placing foreign
14 materials in open waterways are made by the city manager. Those decisions may be
15 appealed to a city hearings official, who must conduct a public hearing. Section 6.670 of the
16 open waterways ordinance provides, in part:

17 “* * * If the hearings official concludes that the city manager made an
18 erroneous decision, the hearings official shall remand the decision to the city
19 manager for a new decision.”

20 Because the hearings official is limited to remanding erroneous decisions to the city manager
21 for a new decision, petitioners argue the open waterways ordinance fails to provide the *de*
22 *novo* hearing on appeal that ORS 227.175(10)(a)(D) requires.

23 The city responds, and we agree, that petitioners misread ORS 227.175(10)(a)(D).
24 That statute addresses the nature of the *hearing* and the nature of the *review* that must be
25 provided; it does not address the *remedies* that must be provided. There is no dispute that
26 under the open waterways ordinance and other applicable city code requirements, an
27 appellant must be allowed to present relevant evidence in a public hearing on appeal to the

1 hearings official. As far as we can tell, an appellant is permitted to raise any relevant issue
2 that he or she wishes to raise. Similarly, it appears that the hearings official is entirely free to
3 conclude based on that evidence and argument that the city manager’s decision, or any part
4 of it, is erroneous. We agree with the city that petitioners fail to demonstrate that such an
5 appeal procedure violates ORS 227.175(10)(a)(D).

6 In arguing that the procedure does violate ORS 227.175(10)(a)(D), petitioners’
7 reliance on *Murray v. City of Beaverton*, 17 Or LUBA 723 (1989) is misplaced. In that case,
8 the city’s facility review committee reviewed the application first, without notice or public
9 hearing. In any appeal of that decision, the city’s design review board as a review body was
10 powerless to review and find error in the facility review committee decision and could only
11 “return the [facility review committee’s] decision to the [facility review committee] for
12 further consideration.” 17 Or LUBA at 730. Here, the hearings official may review the city
13 manager’s decision and identify error in any part of the decision. The two procedures are
14 therefore significantly different, and *Murray* lends no support to petitioners’ argument that
15 the open waterways ordinance appeal procedure violates ORS 227.175(10)(a)(D).

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 **A. ORS 227.173(1) (Adopt Approval Criteria by Ordinance)**

19 ORS 227.173(1) provides:

20 “Approval or denial of a discretionary permit application shall be based on
21 standards and criteria, which shall be set forth in the development ordinance
22 and which shall relate approval or denial of a discretionary permit application
23 to the development ordinance and to the comprehensive plan for the area in
24 which the development would occur and to the development ordinance and
25 comprehensive plan for the city as a whole.”

26 Petitioners argue that two provisions of the open waterways ordinance violate ORS
27 227.173(1). Those provisions are as follows:

28 “The city manager shall deny approval unless the proposal demonstrates that
29 any potential negative impacts to the waterway have been avoided and

1 minimized to the maximum extent practicable. To the extent there are
2 remaining impacts, they are to be mitigated in accordance with adopted city
3 administrative rules which shall require rehabilitation of the degraded
4 hydrological, ecological, and water quality treatment functions, or
5 alternatively, payment to a mitigation fund at an amount determined by the
6 city manager sufficient to secure rehabilitation of lost functions. As part of
7 the administrative rules to be adopted under [EC 6.665(3)], the city manager
8 also shall provide guidance for making determinations on avoidance and
9 minimization.” EC 6.660(5)(b).

10 “The city manager shall adopt administrative rules to implement and assist
11 with enforcement of the provisions of [EC 6.650 to 6.670], including
12 specifying public notice procedures for actions taken pursuant to [EC 6.660].”
13 EC 6.665(3).

14 Most of petitioners’ arguments under this subassignment of error are directed at the
15 temporary rule that was adopted pursuant to EC 6.660(5)(b) and 6.665(3). As we have
16 already explained, petitioners’ appeal of the temporary rule is moot, and we therefore do not
17 consider those arguments. However, petitioners also argue that the above-quoted ordinance
18 provisions violate ORS 227.173(1), because they delegate “to the [c]ity [m]anager authority
19 to adopt standards and criteria for permitting in addition to those in the ordinance.” Petition
20 for Review 11. Although petitioners do not further develop this claim, we will consider the
21 argument.

22 ORS 227.173(1) only requires that “standards and criteria” for “[a]pproval or denial”
23 be included in the ordinance. EC 6.660(5)(b) imposes a two-part requirement. In the first
24 part, the city manager must determine whether “any potential negative impacts to the
25 waterway have been avoided and minimized to the maximum extent practicable.” If this
26 avoidance and minimization requirement is met, the application must be approved. If this
27 avoidance and minimization requirement is not met, the application must be denied. The
28 second part of EC 6.660(5)(b) applies in cases where the application has been approved, but
29 some negative impacts remain. In that circumstance, the remaining negative impacts must be
30 “mitigated.” Because the EC 6.660(5)(b) “mitigation” requirement only applies in
31 circumstances where the application must be approved, any rules the city manager might

1 adopt could not constitute “standards and criteria” for “[a]pproval or denial” of the permit.
2 Therefore, the authority to adopt mitigation rules under EC 6.660(5)(b) does not violate ORS
3 227.173(1).

4 However, the last sentence of EC 6.660(5)(b) also requires rules to “provide guidance
5 for making determinations on avoidance and minimization.” It is possible that such rules
6 could be written in a way that they would add to or subtract from the “avoidance and
7 minimization” standard in a way that would violate ORS 227.173(1). However, we agree
8 with the city that any such rules could also be written such that they simply provide guidance
9 on how to comply with the standards and criteria in the open waterways ordinance, without
10 impermissibly adding to or subtracting from the legal standards in the ordinance.
11 Accordingly, we do not agree that EC 6.660(5)(b) itself violates ORS 227.173(1). We reach
12 the same conclusion concerning EC 6.665(3) for the same reason.

13 This subassignment of error is denied.

14 **B. ORS 227.175(2) (Consolidated Procedure)**

15 ORS 227.175(2) provides:

16 “The governing body of the city shall establish a consolidated procedure by
17 which an applicant may apply at one time for all permits or zone changes
18 needed for a development project. The consolidated procedure shall be subject
19 to the time limitations set out in ORS 227.178. The consolidated procedure
20 shall be available for use at the option of the applicant no later than the time
21 of the first periodic review of the comprehensive plan and land use
22 regulations.”

23 Petitioners argue that when the city adopts a new permitting requirement such as the one
24 established by the challenged ordinance it is obligated “to include a provision that allows an
25 applicant to apply in a consolidated procedure for all the permits and zone changes needed
26 for a development project.” Petition for Review 12.

27 The city responds that ORS 227.175(2) only requires that the city allow applicants for
28 development approval to apply for all needed permits at the same time. According to the
29 city, the consolidated review required by ORS 227.175(2) thereafter ensures that all such

1 permit applications are subject to the same 120-day deadline established by ORS 227.178(1).
2 The city argues that nothing in the challenged ordinance would prevent an applicant for an
3 open waterways exception from applying for any other required permits at the same time.
4 The city contends that although ORS 227.175(2) requires that the city provide the
5 opportunity for such a consolidated application and review process, the statute does not
6 require that each ordinance that adopts a new permitting process must separately set out
7 provisions for such consolidated review. We agree with the city.

8 This subassignment of error is denied.

9 **C. Remaining Subassignments of Error**

10 Petitioners' remaining subassignments of error under the second assignment of error
11 are all directed at the temporary rule.⁴ Because none of those subassignments of error are
12 directed at the challenged ordinance, they are denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 Under ORS 227.178(3), cities may not apply newly adopted standards and criteria to
15 completed permit applications that are pending at the time the newly adopted standards and
16 criteria take effect.

17 "If the application was complete when first submitted or the applicant submits
18 the requested additional information within 180 days of the date the
19 application was first submitted and the city has a comprehensive plan and land
20 use regulations acknowledged under ORS 197.251, approval or denial of the
21 application shall be based upon the standards and criteria that were applicable
22 at the time the application was first submitted."

23 Petitioners argue that EC 6.660(1) violates ORS 227.178(3) because it subjects permit
24 applications that may have been pending at the time the ordinance was adopted to the open
25 waterways exemption requirements. EC 6.660(1) provides:

⁴Petitioners argue the temporary rule violates ORS 227.175(1) (permit fees), ORS 227.175(3), (5) and (10) and ORS 197.763 (notice requirements), and ORS 227.175(10) (appeal rights).

1 “The prohibitions in [EC] 6.655(2) shall not apply under the following
2 circumstances:

3 “(a) The piping or filling is pursuant to a land use approval or building
4 permit specifically authorizing the piping or filling if the approval was
5 final at the local level prior to the effective date of [EC] 6.650 to
6 6.670, is *required by state law*, or is in a waterway that is part of a
7 wetland site designated for development by the West Eugene Wetlands
8 Plan; and

9 “(b) The owner of the property or permittee has submitted to the city, and
10 the city has approved, a plan for minimizing and mitigating negative
11 impact to the waterway as a result of the filling or piping.” (Emphasis
12 added.)

13 The city first argues that the prohibition against fill or construction within open
14 waterways, unless an exception is authorized under EC 6.660, is not properly viewed as a
15 permit standard or criterion for purposes of ORS 227.178(3). We do not agree. Any
16 complete development permit applications, which proposed piping or filling within open
17 waterways and were pending on the date the ordinance took effect, would be exempt from
18 the requirements of the ordinance under ORS 227.178(3).

19 The city next points out that the question of whether ORS 227.178(3) might exempt
20 certain development proposals where permit applications were pending was raised and
21 discussed during the proceedings that led to the city’s adoption of the ordinance. Record 42-
22 3. The city contends that the exemption in EC 6.660(1)(a) for piping or filling that is
23 “required by state law” was inserted to exempt any such pending development permits from
24 the requirements of the ordinance where applying the ordinance to such pending
25 development permits would violate ORS 227.178(3).

26 With that understanding of the “required by state law” language in EC 6.660(1)(a),
27 we agree with the city that EC 6.660(1)(a) is not inconsistent with ORS 227.178(3). We note
28 however that, in discussing this issue below, the city attorney stated “that there would be
29 many instances in which [ORS 227.178(3)] would not apply.” Record 43. That statement
30 appears to have been based on an understanding that the prohibition and exemption

1 provisions of the ordinance are “police power regulation[s]” rather than “land use criteria.”
2 *Id.* To avoid any possible confusion on this point, we repeat our conclusion above. Any
3 complete development permit applications, which proposed piping or filling within open
4 waterways and were pending on the date the ordinance took effect, would be exempt from
5 the requirements of the ordinance under ORS 227.178(3). It does not matter that the city did
6 not codify the ordinance with its land use regulations. The relevant question under ORS
7 227.178(3) is whether the ordinance would prohibit the development proposed in any
8 complete and pending permit applications unless an exemption was sought and approved. If
9 the answer to that question is yes, ORS 227.178(3) applies, and the ordinance may not be
10 applied to such development.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 Petitioners argue the challenged ordinance violates Goal 10 (Housing), OAR 660-
14 008-0015 and ORS 197.307(6). ORS 197.307(6) applies to “needed housing,” as that term is
15 defined by ORS 197.303, and requires that any standards, conditions or procedures that are
16 applied to needed housing must be “clear and objective.”

17 “Any approval standards, special conditions and the procedures for approval
18 adopted by a local government shall be clear and objective and shall not have
19 the effect, either in themselves or cumulatively, of discouraging needed
20 housing through unreasonable cost or delay.”⁵

21 Petitioners argue that a number of ordinance provisions are not clear and objective.

22 ORS 197.307(3)(a) requires that the city ensure that its comprehensive plan and
23 zoning ordinance provide sufficient “buildable land” to meet the city’s identified housing
24 needs. OAR 660-008-0010 elaborates on this requirement and provides as follows:

25 “The mix and density of needed housing is determined in the housing needs
26 projection. Sufficient buildable land shall be designated on the

⁵OAR 660-008-0015 imposes the same requirement as ORS 197.307(6).

1 comprehensive plan map to satisfy housing needs by type and density range as
2 determined in the housing needs projection. The local buildable lands
3 inventory must document the amount of buildable land in each residential plan
4 designation.”

5 Petitioners make no attempt to demonstrate that any of the open waterways that are
6 subject to the ordinance are also planned and zoned for needed housing or are required to
7 meet the city’s identified housing needs. *See Rogue Valley Assoc. of Realtors v. City of*
8 *Ashland*, 35 Or LUBA 139, 149 n 14, *aff’d* 158 Or App 1, 970 P2d 685, *rev den* 328 Or 594
9 (1999) (needed housing requirements do not apply to lands that are not required to meet
10 identified housing needs). Unless that is the case, the ordinance could not violate the cited
11 statutory, goal and rule provisions. Because petitioners do not establish the necessary
12 predicate for their arguments under the fourth assignment of error, this assignment of error is
13 denied.

14 **SIXTH ASSIGNMENT OF ERROR**

15 Petitioners argue the city erred by failing to apply Goal 5 when it adopted the
16 disputed ordinance. In particular, petitioners argue the city erred by failing to conduct the
17 analysis and planning process required by Goal 5, before it adopted the ordinance’s
18 limitations on piping and fill in open waterways.

19 The ordinance is a “post-acknowledgment plan amendment,” as defined by OAR 660-
20 023-0010(5).⁶ OAR 660-023-0250(3) sets out the circumstances where a post-
21 acknowledgment plan amendment must apply Goal 5. That rule provides, in part:

⁶OAR 660-023-0010(5) provides:

“‘PAPA’ is a ‘post-acknowledgment plan amendment.’ The term encompasses actions taken in accordance with ORS 197.610 through 197.625, including amendments to an acknowledged comprehensive plan or land use regulation and the adoption of any new plan or land use regulation. The term does not include periodic review actions taken in accordance with ORS 197.628 through 197.650.

1 “Local governments are not required to apply Goal 5 in consideration of a
2 PAPA unless the PAPA affects a Goal 5 resource. For purposes of this
3 section, a PAPA would affect a Goal 5 resource only if:

4 “(a) The PAPA creates or amends a resource list or a portion of an
5 acknowledged plan or land use regulation adopted in order to protect a
6 significant Goal 5 resource or to address specific requirements of Goal
7 5[.]”

8 The rule is awkwardly written, but we read OAR 660-023-0250(3) to require that the city
9 must apply Goal 5 where it adopts a new land use regulation to “protect a significant Goal 5
10 resource.”

11 The city’s acknowledged comprehensive plan includes a map that shows
12 drainageways. We understand petitioners to argue that those drainageways are inventoried
13 as a significant Goal 5 resource in the city’s comprehensive plan.⁷ We do not understand
14 respondent to dispute the argument. It is reasonably clear that the open waterways that are
15 the subject of the disputed ordinance overlap significantly with the drainageways that are
16 included on the city’s Goal 5 inventory. All of those drainageways presumably include open
17 waterways, although some open waterways may not be inventoried drainageways.

18 The city’s main defense against petitioners’ Goal 5 challenge relies on the scope of
19 the ordinance. The city contends that because the ordinance regulates *all* open waterways
20 and is not limited to *significant* open waterways, the challenged ordinance does not affect a
21 Goal 5 resource under OAR 660-023-0250(3), and the city committed no error by failing to
22 apply Goal 5.

23 Although the city’s reasoning is facially plausible, and presumably relies on a literal
24 reading of OAR 660-023-0250(3), it is an erroneous interpretation of the rule when it is read
25 in context with the remaining sections of OAR chapter 660, division 23. Goal 5 and OAR

⁷At oral argument, petitioners supplied copies of city planning documents and relevant Department of Land Conservation and Development Staff Reports concerning the city’s Goal 5 planning efforts. Petitioners request that we take official notice of those documents, and the city does not object.

1 chapter 660, division 23 impose obligations and limitations. OAR 660-023-0030 requires
2 that the city complete an inventory process to determine the “significance” of Goal 5
3 resources. Once that is done, OAR 660-023-0040 requires the city to analyze the “economic,
4 social, environmental, and energy” (ESEE) consequences of allowing, prohibiting or limiting
5 uses that might conflict with those significant Goal 5 resource sites *before* it adopts a
6 program to achieve Goal 5. In other words, the regulatory programs that are required by the
7 goal and rule must be based on these prior planning exercises. OAR 660-023-0030(7) allows
8 the city to adopt interim protection for significant Goal 5 resources in advance of performing
9 the ESEE analysis that is required by OAR 660-023-0040. However, such interim measures
10 are specifically limited by the rule.⁸

11 In this case the purpose statement of the challenged ordinance explicitly recognizes
12 the close fit between open waterways and the city’s inventoried significant Goal 5 resources.

13 “It is the intent of [EC] 6.650 to 6.670 to establish interim protection for
14 constructed and natural open waterways that provide multiple stormwater
15 benefits to the entire community. The protection established in these sections
16 shall remain in effect until the city completes its Goal 5 process for wildlife
17 habitat values and incorporates the results, along with the stormwater
18 conveyance and water quality treatment functions, into a comprehensive set of
19 open waterway protection measures. * * *” Record 18.

20 To the extent the city is relying on Goal 5 to impose the disputed piping and fill limitations,
21 it has not yet performed the necessary planning under Goal 5 to support imposing such
22 limitations. To the extent the city is imposing those limitations as interim measures under

⁸OAR 660-023-0030(7) provides:

“Local governments may adopt limited interim protection measures for those sites that are determined to be significant, provided:

“(a) The measures are determined to be necessary because existing development regulations are inadequate to prevent irrevocable harm to the resources on the site during the time necessary to complete the ESEE process and adopt a permanent program to achieve Goal 5; and

“(b) The measures shall remain effective only for 120 days from the date they are adopted, or until adoption of a program to achieve Goal 5, whichever occurs first.”

1 OAR 660-023-0030(7), it has not explained why the disputed ordinance is consistent with the
2 rule.

3 We do not mean to foreclose the possibility that the disputed ordinance might be
4 justified on the basis of Goal 6 (Air, Water and Land Resources Quality), Goal 7 (Areas
5 Subject to Natural Disasters and Hazards) or other state or federal environmental laws that
6 may require regulatory measures independently of Goal 5.⁹ Specifically, we do not mean to
7 foreclose the possibility that those goals or other environmental laws might independently
8 require that the city impose the disputed piping and fill limitations on open waterways that
9 are also within the ambit of Goal 5, without performing the prior planning and analysis that
10 would otherwise be required under OAR chapter 660, division 23 to protect such Goal 5
11 resources. However, the city has not shown that such is the case here. To the contrary, it is
12 reasonably clear in this case that the city’s purpose in regulating *all* open waterways was to
13 regulate more broadly and more stringently than the city has currently justified under Goal 5
14 *until* the city’s pending Goal 5 planning and study process can be completed. Doing so
15 without demonstrating compliance with Goal 5 and all applicable procedures in the Goal 5
16 rule is possible only under OAR 660-023-0030(7), which allows local governments to adopt
17 interim Goal 5 protective measures affecting “significant” resources. *See* n 8. The city’s
18 approach in adopting the disputed ordinance in this matter is not consistent with Goal 5 and
19 OAR chapter 660, division 23.

20 The sixth assignment of error is sustained.

21 **SEVENTH ASSIGNMENT OF ERROR**

22 ORS 227.186(2) provides that “[a]ll legislative acts relating to comprehensive plans,
23 land use planning or zoning adopted by a city shall be by ordinance.” Petitioners argue:

⁹OAR 660-023-0240(1) specifically provides that the city need not comply with the requirements of Goal 5 to adopt measures that are required by Goals 6 and 7, but states that “to the extent such measures exceed the requirements of Goals 6 or 7 and affect a Goal 5 resource site, [a] local government shall follow all applicable steps of the Goal 5 process.”

1 “The ordinance authorized rulemaking to implement and expand on the
2 ordinance. The rule implemented and expanded on the ordinance. This
3 misinterpreted and was contrary to ORS 227.186(2).” Petition for Review 25.

4 We concluded under the second assignment of error that it is not possible to know
5 whether the city will exercise its rulemaking authority under EC 6.660(5)(b) and 6.665(3) in
6 a way that would violate the requirement in ORS 227.173(1) that permit approval standards
7 be adopted by ordinance. We agree with the city that ORS 227.186(2) would only be
8 violated if the rulemaking that is authorized by EC 6.660(5)(b) and 6.665(3) constitutes a
9 legislative act. Petitioners do not explain why such rules necessarily would constitute
10 legislative acts, and we do not see that they necessarily would. Therefore EC 6.660(5)(b)
11 and 6.665(3) are not inconsistent with ORS 227.186(2).

12 The seventh assignment of error is denied.

13 The city’s decision is remanded.