BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

N.W.D.A., THE COMMUNITY ASSOCIATION OF NOTHWEST PORTLAND, INC., FRANK DIXON and RUTH C. ROTH,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent.

LUBA Nos. 2003-162, 2003-163, 2003-164, 2003-183 and 2003-195

NICOL INVESTMENT, INC.,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA Nos. 2003-165, 2003-166 and 2003-167

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Carrie A. Richter and Edward J. Sullivan, Portland, filed a petition for review and argued on behalf of petitioner NWDA *et al*. With them on the brief was Garvey Schubert Barer, PC.

Peter Livingston, Portland, filed a petition for review and argued on behalf of petitioner Nicol Investment, Inc. With him on the brief was Schwabe, Williamson and Wyatt, PC.

Dan Volkmer, Portland, filed a petition for review on his own behalf.

Peter A. Kasting, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Steven W. Abel, Portland, filed a response brief and argued on behalf of intervenor-respondent CNF, Inc. With him on the brief was Stoel Rives, LLP.

Christen C. White, Portland, filed a response brief and argued on behalf of intervenors-respondent Onder *et al*. With her on the brief was Renee France and Ball Janik, LLP.

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of Nob Hill Business Association. With him on the brief was Gary F. Firestone and Ramis, Crew, Corrigan and Bachrach, LLP.

Richard Singer, Portland, filed a response brief on his own behalf.

Don Singer, Portland, represented himself.

BASSHAM, Board Member; HOLSTUN, Board Chair; DAVIES, Board Member, participated in the decision.

REMANDED (LUBA No. 2003-162) 09/27/2004
AFFIRMED (LUBA Nos. 2003-163/164/165/166/167/183/195)

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

Opinion by Bassham.

NATURE OF THE DECISION

In these consolidated appeals, petitioners appeal a city ordinance that adopts the Northwest District Plan, along with three related ordinances and a city council resolution.

MOTION TO STRIKE

Petitioners in LUBA Nos. 2003-162, 2003-163, 2003-164, 2003-183 and 2003-195 (hereafter, Petitioners NWDA or NWDA) move to strike Appendix A to the city's response brief. Appendix A is a one-page spreadsheet that in relevant part (1) identifies the number of acres that were rezoned by the challenged decisions and (2) calculates and compares the number of potential housing units allowed on the rezoned acres under the old and new zoning designations. NWDA argues that the document at Appendix A is not in the record, and the city has not established any basis for LUBA to consider the document. According to NWDA, the acreage totals do not appear in that form anywhere in the record, and the calculations of potential new housing units are not based on anything in the record.

The city responds that the acreage totals are based on similar totals in the planning commission recommendation at Record 429, supplemented by city council amendments as derived from two maps at Record 779-80. The city explains that the calculation of potential housing units is derived by simply multiplying the housing density allowed for each zoning district by the number of acres rezoned to that district. However, the city concedes that the calculations themselves are not in the record. The city states that it has no objection to striking the calculations of potential housing units from Appendix A.

As discussed below, the parties dispute the acreage rezoned by the challenged decisions. The Board's ability to examine demonstrative exhibits not in the record is quite limited. *See Carver v. City of Portland*, 42 Or LUBA 305, 309, *aff'd* 184 Or App 503, 57 P3d 602 (2002) (striking a record map modified to include disputed information). The document in Appendix A is not in the

record and includes disputed information not found in the record. The motion to strike the document in Appendix A is granted.

FACTS

The challenged decisions are the culmination of a lengthy process to update the city comprehensive plan and zoning code regulations governing the Northwest District of the city. The Northwest District is governed by the Northwest District Policy Plan, part of the city's comprehensive plan adopted in 1977. In 1999, petitioner NWDA proposed a number of changes to update the Northwest District Policy Plan. In June 2000, the city council directed planning staff to review NWDA's proposals in combination with an ongoing planning effort related to industrial lands north of NW Vaughn Street. The city's planning efforts resulted in the following decisions.

Ordinance 177920 adopts the Northwest District Plan (NDP), replacing the 1977 Northwest District Policy Plan. As relevant in this appeal, the NDP rezones a number of acres in the Northwest District, including a "Transition Area" south of NW Vaughn Street where a number of parcels zoned for industrial uses are placed into employment zone designations allowing commercial, office and residential uses.[1] Ordinance 177920 also amends (1) the Central City Plan by rezoning a number of properties along the Burnside Corridor, south of the Northwest District, and (2) the Guild's Lake Industrial Sanctuary Plan to redesignate 16 acres within the sanctuary north of NW Vaughn from industrial to employment comprehensive plan map designations.

Ordinance 178020 adopts city code amendments governing parking in the Northwest District. As relevant here, Ordinance 178020 authorizes construction of six commercial parking structures on specifically identified sites that are either zoned residential or split-zoned for residential and commercial uses. Five of the six sites are currently used as surface parking lots. Design review is required for all six parking structures. Four of the parking structures would provide between 75 and 110 spaces each and would be allowed outright as permitted uses in the pertinent zones. Two

[1] The parties dispute whether the rezoned properties total 88 acres, as petitioners claim, or 36 acres, as the city claims. We do not find it necessary to resolve the dispute.

structures would require conditional use approval. Ordinance 178020 exempts three of the parking structures from applicable setback requirements and allows zero setbacks. If constructed, the six parking structures would result in a net increase of 402 off-street commercial parking spaces. Ordinance 178020 also allows commercial parking on private accessory use parking spaces in residential areas.

Ordinance 177921 amends the city code to grant a property tax exemption for construction of new "transit-supportive" residential and mixed use development. Ordinance 177992 amends the city code to include a new chapter that creates a transportation fund for improving transportation facilities in the Northwest District. Resolution No. 36171 adopts a series of "action charts" that implement the projects, programs and regulations described in the NDP.

Petitioner NWDA and intervenor-petitioner Volkmer challenge from various directions the rezoning accomplished by adoption of the NDP, pursuant to Ordinance 177920. Petitioner NWDA also challenges the commercial parking regulations adopted pursuant to Ordinance 178020. Petitioner Nicol Investment, Inc. (Nicol) appeals aspects of Ordinance 177920 that affect a particular site in the Burnside Corridor.[2]

FIRST ASSIGNMENT OF ERROR, FIRST SUBASSIGNMENT OF ERROR (NWDA)

Under their first subassignment to the first assignment of error, NWDA argues that the commercial parking structures allowed by Ordinance 178020 are inconsistent with protection of historic resources and therefore violate Statewide Planning Goal 5 (Natural Resources, Scenic and

[2] All three petitioners adopt all or part of assignments of error in other petitions for review. The respondents also take a tag-team approach, with the city, intervenor-respondent Nob Hill Business Association (Nob Hill) and intervenors-respondent Richard Singer and Don Singer (Singer) responding to NWDA's petition, the city, Singer and intervenor-respondent CNF, Inc. responding to Volkmer's petition, and intervenors-respondent John A. Onder and Williams & Dame Development, Inc. (Onder) responding to Nicol's petition. The four response briefs freely adopt arguments from other response briefs. Except as noted below, our references to the parties will generally credit an argument to the party whose brief advances that argument, without sorting out adoptions by reference.

Historic Areas and Open Spaces) and implementing administrative rules and comprehensive plan provisions.[3]

OAR chapter 660, division 23 implements Goal 5. OAR 660-023-0250(3) provides that Goal 5 is applicable to a post-acknowledgment plan amendment that (1) creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or (2) allows "new uses" that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list.[4] NWDA argues that the parking structures allowed by Ordinance 178020 implicate both triggers.

A. OAR 660-023-0250(3)(a)

According to NWDA, each of the parking structures allowed by the ordinance is within the Alphabet Historic District. NWDA argues that construction of one parking structure will require demolition of a "noncontributing" historic structure that is listed in the National Register of Historic Places inventory for the Alphabet Historic District.[5] Because Ordinance 178020 authorizes demolition of a structure listed on the National Register, NWDA argues, it "amends a resource list" within the meaning of OAR 660-023-0250(3)(a), thus triggering the obligation to comply with the full requirements of the rule and Goal 5.

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[3] NWDA's first assignment of error also includes a Goal 5 challenge to aspects of Ordinance 177920 that rezone and apply a height bonus to a particular site that is the subject of Nicol's third assignment of error. We address NWDA's arguments below in discussing Nicol's third assignment of error.

[4] OAR 660-023-0250(3) provides, in relevant part:

> "Local governments are not required to apply Goal 5 in consideration of a PAPA [post-acknowledgement plan amendment] unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:
>
> "(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
>
> "(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]"

[5] NWDA explains that a "noncontributing" historic structure is one that has had alterations that damage its historic integrity so that the structure no longer contributes to the historic character of the district.

Nob Hill responds to NWDA's first argument by noting that the National Register is not a Goal 5 inventory and is not the city's acknowledged resource list. According to Nob Hill, the city's acknowledged Goal 5 inventory or resource list classifies the structure at issue as "noncontributing," and the city's acknowledged Goal 5 historic resource protection program does not protect noncontributing structures. That Ordinance 178020 authorizes demolition of a noncontributing structure does not alter the city's historic resource inventory. Therefore, Nob Hill argues, Ordinance 178020 does not "amend" a "resource list" within the meaning of OAR 660-023-0250(3)(a). We agree with Nob Hill.

B. OAR 660-023-0250(3)(b)

NWDA argues next that "commercial parking" as defined by the city's code is not allowed in the underlying base residential zones, and therefore Ordinance 178020 allows "new uses that could be conflicting uses," pursuant to OAR 660-023-0250(3)(b).[6]

NWDA explains that the city code classifies "commercial parking" as a distinct use type, and that the R-1 and RH base zones within the historic district do not allow commercial parking facilities. Allowing four commercial parking structures outright within the historic district, and conditionally permitting two more parking structures, NWDA argues, introduces a "new use" that conflicts with the Goal 5-protected historic district. Therefore, NWDA contends, Goal 5 is triggered and the city must conduct the economic, social, environmental and energy (ESEE) analysis required by OAR 660-023-0040. Had the city conducted an ESEE analysis, NWDA suggests, it likely could not have justified under that analysis zero setbacks for three of the commercial parking structures that abut historic structures.

Nob Hill responds that commercial parking structures are not "new uses" in the historic district and, even if they are, such structures are not "conflicting uses." The city does not appear to dispute that commercial parking structures are "new uses" for purposes of OAR 660-023-

[6] Portland City Code (PCC) 33.920.210 defines the use type "Commercial Parking" in relevant part as facilities that "provide parking that is not accessory to a specific use."

0250(3)(b), or that such structures "could be conflicting uses." However, the city argues that the Goal 5 rule does not require an ESEE analysis for post-acknowledgment actions that affect historic resources, and that the city's findings and record are adequate to demonstrate that the six commercial parking structures are compatible with historic resources and consistent with Goal 5.

We tend to disagree with Nob Hill's contention that allowing "commercial parking" in a historic district where that code-defined use type was not previously allowed is not a "new use" for purposes of OAR 660-023-0250(3)(b). It also seems apparent that commercial parking structures "could be" conflicting uses with historic structures in a historic district. Nonetheless, we need not resolve those questions, because even if Goal 5 is triggered pursuant to OAR 660-023-0250(3)(b), we agree with the city that the city's findings are adequate to demonstrate compliance with Goal 5.

As the city points out, OAR 660-023-0200(7), part of the Goal 5 rule specific to historic resources, provides that "[l]ocal governments are not required to apply the ESEE process in order to determine a program to protect historic resources."[7] If the city is not required to apply the ESEE process at OAR 660-023-0040 *at all* in determining a program to protect historic resources, it would seem strange to require the city to conduct an ESEE analysis when, as here, the city allows a new use that could conflict with a particular significant Goal 5 resource site protected by an acknowledged program, pursuant to OAR 660-023-0250(3)(b), as NWDA contends. We agree with the city that even if Ordinance 178020 triggers application of Goal 5 pursuant to OAR 660-023-0250(3)(b), OAR 660-023-0200(7) exempts the city from the requirement to conduct an ESEE analysis.

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[7] OAR 660-023-0200(7) provides:

> "Local governments are not required to apply the ESEE process in order to determine a program to protect historic resources. Rather, local governments are encouraged to adopt historic preservation regulations regarding the demolition, removal, or major exterior alteration of all designated historic resources. Historic protection ordinances should be consistent with standards and guidelines recommended in the Standards and Guidelines for Archeology and Historic Preservation published by the U.S. Secretary of the Interior."

In *Homebuilders Assoc. v. City of Eugene*, 41 Or LUBA 370, 443-44 (2002), we addressed the question of what Goal 5 requires when triggered by post-acknowledgment plan amendments under OAR 660-023-0250(3). The short answer, we held, is that

> "the city must demonstrate that, to the extent the [amended code] amends programs that were previously adopted to protect significant Goal 5 resources, the challenged amendments comply with the Goal 5 rule. OAR 660-023-0250(3); *Pekarek v. Wallowa County*, 36 Or LUBA 494, 498 (1999) (where a plan or zoning ordinance amendment affects inventoried Goal 5 resources, the local government must apply the requirements of the Goal 5 rule and determine that the rule is satisfied). *That does not necessarily mean that the city must repeat the entire Goal 5 process, or adopt new or amended ESEE analyses. Where the justification the city adopted to support its original Goal 5 programs also supports the amended Goal 5 programs, the city may simply explain why that is the case.* However, where the original justification does not justify the amended Goal 5 program, part or all of the original justification will need to be amended to support the amended Goal 5 program."

As the emphasized language indicates, where application of Goal 5 is triggered pursuant to OAR 660-023-0250(3), the city need not in all cases repeat the entire Goal 5 process, including the ESEE process, even where historic resources are not at issue and OAR 660-023-0200(7) does not come into play. In many cases no more is required than an explanation for why the existing program to protect Goal 5 resources, as amended or affected by the challenged post-acknowledgment plan amendment, continues to be sufficient to protect those resources.

Here, the city adopted findings that explain why the disputed commercial parking structures are consistent with preservation of protected historic structures and the historic district.[8] The city's

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[8] The city's findings regarding Goal 5 state in relevant part:

> "[Goal 5] requires the conservation of open space and the protection of natural and scenic resources. The Parking Policy and Regulations amendment supports the district's historic core area known as the Alphabet Historic District because the:
>
> "a. Parking Policy calls for providing and managing parking to serve the community while protecting and enhancing the livability of the district.
>
> "b. The Zoning Code regulations designate 6 potential off-street parking sites adjacent to the 21st and 23rd main streets that do not involve a designated contributing or historic landmark structure, and [further] require historic design review for

findings rely on the existing Goal 5 program, specifically the requirement that the parking facilities satisfy historic design review standards applicable to proposed development within the historic district. Further, the city relied on limitations imposed under the new parking regulations that reduce the potential height of the parking structures from that otherwise allowed in the applicable zones, and that place a cap on the total number of parking spaces created. NWDA argues that those findings do not constitute an adequate ESEE analysis; however, as explained, the city is not required to conduct an ESEE analysis under the present circumstances. NWDA does not otherwise challenge the city's findings, or explain why those findings are inadequate to demonstrate that the city's program to protect the historic district, to the extent amended or affected by Ordinance 178020, continues to comply with Goal 5.

NWDA's first subassignment to the first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (NWDA)

Under this assignment of error, NWDA argues that Ordinances 177920 and 178020 are inconsistent with state and local housing-related requirements.

A. ORS 197.307(b)

Ordinance 177920 rezones a number of properties from industrial zones to mixed use or employment zones that allow residential uses, subject to design review standards at PCC 33.825 or community design standards at PCC 33.218. Although none of the challenged decisions amend PCC 33.825 or PCC 33.218, NWDA argues that both sets of design review standards violate the requirement at ORS 197.307(3)(b) that local governments apply "clear and objective" approval standards to applications for needed housing when regulating for appearance or aesthetics.[9]

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development review of these 6 parking structure sites. Parking structure site regulations also limit the building height and number of parking spaces that are permitted on these sites along with an overall cap for the 6 sites that will minimize impacts to the historic district. Other Parking Policy and Regulation provisions seek to more efficiently utilize existing on and off-street parking resources, which may in the long-term negate the need for some of the 6 parking structures from being built." Record 55-56.

[9] ORS 197.307(3)(b) provides:

NWDA cites to *Dept. of Transportation v. Douglas County*, 157 Or App 18, 967 P2d 901 (1998), for the proposition that LUBA has the authority to review unamended portions of the city's code for compliance with controlling statutes or administrative rules. We understand NWDA to argue that LUBA may remand Ordinance 177920 because, in rezoning industrial lands to allow residential uses, the city incurred the affirmative obligation to amend PCC 33.825 or PCC 33.218 to be consistent with ORS 197.307(3)(b).

The city responds, and we agree, that NWDA reads *Dept. of Transportation v. Douglas County* too broadly. That case involved amendments to the county's comprehensive plan transportation elements that implemented the transportation planning rule (TPR). LUBA held that it lacked authority to review challenges to unamended portions of the existing plan that did not comply with the TPR. The court disagreed, noting that the county intended its decision to be a comprehensive implementation of the rule, and the rule itself required complete, as opposed to piecemeal, implementation. Here, the city was not attempting to implement or comply with ORS 197.307 at all. Because the challenged decisions do not amend PCC 33.825 or PCC 33.218, and nothing cited to us obligates the city to amend those code provisions in this decision, NWDA's arguments with respect to PCC 33.825 or PCC 33.218 are impermissible collateral attacks on those code provisions.

B. Housing Density and Capacity

As explained above, Ordinance 178020 authorizes six commercial parking facilities in residentially-zoned areas. NWDA explains that Metro Code (MC) 3.07.140(A) requires the city to establish minimum dwelling unit densities for each residential zoning district, and the city has done so. However, NWDA argues, by allowing commercial parking structures in residential zones, the

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> "A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development of needed housing or to a permit, as defined in ORS 215.402 or 227.160, for residential development. The standards or conditions may not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone."

city has undermined its ability to comply with MC 3.07.140(A). For the same reason, NWDA contends, Ordinance 178020 is inconsistent with Portland Comprehensive Plan (PCP) Objective 4.1(H) and PCP Policy 4.2, which respectively require the city to create alternatives to demolition of housing on residentially-zoned property and require that the city replace any loss of potential housing when considering comprehensive plan map amendments.[10]

The city responds that Metro recently determined that the city's code and plans, as amended by the challenged decisions, conform with all Metro requirements, including MC 3.07.140(A). Therefore, the city argues, NWDA's arguments to the contrary are collateral attacks on Metro's compliance order. In any case, the city argues, the small amount of potential housing density lost through Ordinance 178020 is more than replaced by Ordinance 177920, which rezones a number of industrial acres in the district to zones that allows high-density residential uses. In addition, Nob Hill argues, no potential housing capacity is lost, as the base residential zone was not changed for any of the six sites, and residential uses are still allowed on those sites. For these reasons, the city and Nob Hill argue, the challenged ordinances are consistent with PCP Policy 4.2. We agree with respondents that NWDA has not established that Ordinance 178020 is inconsistent with Metro requirements or PCP Policy 4.2.

With respect to PCP Objective 4.1(H), Nob Hill argues, and we agree, that Ordinance 178020 does not compel demolition of the dwelling on one of the six sites, and that alternatives to demolition of that structure continue to exist under the city's code.

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[10] PCP Objective 4.1(H) states:

> "Create alternatives to the demolition, without replacement, of structurally sound housing on residentially zoned property."

PCP Policy 4.2 provides:

> "Retain housing potential by requiring no net loss of land reserved for, or committed to, residential or mixed-use. When considering requests for amendments to the Comprehensive Plan map, require that any loss of potential housing units be replaced."

C. PCP Objectives 4.6(C) and 4.6(D)

Finally, NWDA argues that Ordinance 178020 is inconsistent with PCP Objectives 4.6(C) and (D), which require respectively that the city protect housing from excessive off-site impacts and that the city limit conflicts between existing business areas and housing.[11] NWDA argues that allowing four-story commercial parking structures, some with zero setbacks, next to residential development fails to protect housing and limit conflicts.

The city adopted findings concluding that Objectives 4.6(C) and (D) are met because of the limited number and size of structures allowed, subject to design review and other standards designed to mitigate impacts.[12] NWDA argues that mitigating some impacts through design review

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[11] PCP Policy 4.6 is to "[e]ncourage the development of housing that exceeds minimum construction standards," pursuant to four objectives, which include the following:

> "C. Protect housing from excessive off-site impacts including pollution, noise, vibration, odors, and glare.
>
> "D. Limit conflicts between existing business areas and housing caused by traffic and parking, noise, and signage."

[12] The city's findings state, in relevant part:

> "**49.** ***Objective C***: * * * The amendments support this objective because commercial parking regulations allow this use to occur on a very limited number of sites and parking must be in a structure. Additionally, there are existing development standards and design review guidelines that would have to be met that specifically relate minimizing off-site impacts. * * *
>
> "**50.** ***Objective D***: * * * The amendments support this objective for the following reasons.
>
> "a. The impacts of potential commercial parking uses located near housing was considered in development of the regulations and these sites are intentionally limited in the amount of new parking spaces and the overall number of parking spaces per site to minimize impacts. This use must also be in a structure, which helps to minimize impacts.
>
> "b. * * * Parking strategy elements designed to limit conflicts between residential uses and parking facilities include limits on the number of spaces, design review provisions, conditional use review for potentially larger structures that includes meeting transportation criterion, development standards, and the creation of a Transportation Management Association to monitor and administer elements of the district's parking programs." Record 64-65.

and other standards still allows increased impacts on residential uses, and thus fails to "limit conflicts" between existing business areas and housing.

Neither Objective 4.6(C) nor (D) requires that the city protect housing from any increase in impacts or that the city limit conflicts to present levels of conflict. The city's findings adequately explain why Ordinance 178020 is consistent with those plan objectives, given the limitations imposed and standards that will apply to the authorized commercial parking structures.

The second assignment of error (NWDA) is denied.

THIRD, FOURTH, FIFTH, EIGHTH AND NINTH ASSIGNMENTS OF ERROR (NWDA)

In these assignments of error, NWDA argues that Ordinance 178020 is inconsistent with Statewide Planning Goal 2 (Land Use Planning), the Transportation Planning Rule (TPR), the city's transportation system plan (TSP), and portions of the city's code and plan that relate to parking.

A. Goal 2 Adequate Factual Base

Goal 2 requires that the challenged decisions be supported by an adequate factual base—evidence that a reasonable person would believe. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff'd* 130 Or App 406, 882 P2d 1130 (1994). NWDA contends that the premise underlying Ordinance 178020, that there is a parking shortage in the Northwest District that must be addressed in part by authorizing six new commercial parking structures, is not supported by an adequate factual base.

NWDA explains that the city found, based on several studies, that there is a parking shortage of as much as 3,000 spaces in the Northwest District. NWDA argues that the studies the city relied upon are flawed, and that evidence NWDA submitted below based on census data suggests that there is actually a 4,000-parking space surplus in the Northwest District.

The city and Nob Hill respond that there is no requirement that the city precisely quantify the amount or shortage of parking spaces in the district, and that ample evidence in the record establishes that there is a current shortage of parking in the district that will only get worse over the

city's 20-year planning period. Even if the studies relied upon by the city overestimate the current shortage, respondents argue, a reasonable person could rely on those studies to conclude that current and future shortages justify the 402 additional parking spaces authorized by Ordinance 178020.

We agree with respondents. Even assuming that the studies relied upon by the city overestimate current parking needs, a reasonable person could rely on those studies, and the other evidence cited by respondents, to conclude that the additional 402 parking spaces authorized by Ordinance 178020 are necessary to address a current or future parking shortage. NWDA has not demonstrated that the city's conclusions to that effect are not supported by an adequate factual base.

B. Goal 2 Consistency Requirement

Goal 2 requires in relevant part that the city's plans, and land use regulations be internally consistent. Ordinance 178020 amends the existing plan district to allow commercial parking structures that are prohibited in the underlying residential base zones. NWDA argues that Ordinance 178020 violates the Goal 2 consistency requirement, because it authorizes a use type, commercial parking structures, that is prohibited in the underlying residential base zones. In addition, NWDA argues that Ordinance 178020 violates PCC 33.500.050(D), which authorizes adoption of a plan district that is in conformance with the comprehensive plan and meets the general purpose and intent of the base zone.[13] NWDA contends that commercial parking structures are contrary to the purpose of the pertinent residential zones, which is to preserve land for housing.

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[13] PCC 33.500.030 provides, in relevant part:

> "**33.500.030 Scope of Plan Districts**
>
> "Plan district regulations are applied in conjunction with a base zone. The plan district provisions may modify any portion of the regulations of the base zone, overlay zone, or other regulations of this Title. The provisions may apply additional requirements or allow exceptions to general regulations.
>
> "**33.500.040 Relationship to Other Regulations**

The city responds that PCC 33.500.030 and 33.500.040 expressly allows plan districts to modify or provide exceptions to base zone regulations or requirements. Therefore, even if the commercial parking structures are inconsistent with the residential base zones, a point neither the city nor Nob Hill concede, the city argues that PCC 33.500.030 and 33.500.040 expressly allow the city to amend the Northwest Plan District to authorize uses not allowed in the base zone. For that reason, the city argues, Ordinance 178020 is consistent with Goal 2 and PCC 33.500.050(D).[14] We agree with the city.

C. PCP Policy 2.23

NWDA argues that allowing commercial parking structures in residential zones is inconsistent with PCP Policy 2.23, because Ordinance 178020 does not ensure that impacts on residential uses are mitigated through use of buffers, as required by that policy.[15]

> When there is a conflict between the plan district regulations and base zone, overlay zone, or other regulations of this Title, the plan district regulations control. The specific regulations of the base zone, overlay zones, or other regulations of this Title apply unless the plan district provides other regulations for the same specific topic.
>
> "**33.500.050 Adoption Criteria**
>
> "A plan district may be established if all the following adoption criteria are met:
>
> "* * * * *
>
> "B. Existing base and overlay zone provisions are inadequate to achieve a desired public benefit or to address an identified problem in the area; [and]
>
> "* * * *
>
> "D. The regulations of the plan district are in conformance with the Comprehensive Plan and continue to meet the general purpose and intent of the base zone and any overlay zones applied in the district, and do not prohibit uses or development allowed by the base zone without clear justification."

[14] In addition, as Nob Hill points out, PCC 33.500.050 applies to adoption of a plan district, not a decision amending an existing plan district.

[15] PCP Policy 2.23 provides, in relevant part:

> "When residential zoned lands are changed to commercial, employment, or industrial zones, ensure that impacts from nonresidential uses on residential areas are mitigated through the use of buffering and access limitation. * * *"

PCP Policy 2.23 applies when residentially zoned lands are changed to commercial, employment or industrial zones. The city and Nob Hill argue, and we agree, that PCP Policy 2.23 does not apply to Ordinance 178020, because that ordinance does not rezone residential lands to commercial, employment or industrial zones.

D. Transportation Management Association

Ordinance 178020 authorizes shared commercial use of certain accessory residential parking lots that will ultimately be subject to administration by a transportation management association (TMA). NWDA argues, first, that creation of the TMA is intended to ensure compliance with elements of the TPR, specifically OAR 660-012-0035 and 660-012-0045 and similar comprehensive plan provisions, that generally require the city to encourage and increase public transit and a multi-model transportation system. From that premise, NWDA argues that the city erred in relying on the TMA to satisfy the rule's requirements, because the TMA does not yet exist and Ordinance 178020 neither creates, directs, nor funds the TMA. Further, NWDA argues that the TMA has no power to perform its intended function. Specifically, NWDA complains that the TMA is not empowered to evaluate whether there is an actual need for development of the commercial parking structures authorized by Ordinance 178020.

The city and Nob Hill respond that the TMA is not intended to implement the cited TPR provisions or the cited comprehensive plan provisions, and that other aspects of the city's transportation system plan do so. We agree with respondents that NWDA has not demonstrated that the TMA is required to implement the cited rules and plan provisions, or that the city intended the TMA to do so. Without establishing the validity of that premise, NWDA's arguments under this assignment of error do not provide a basis for reversal or remand.

The third, fourth, fifth, eighth and ninth assignments of error (NWDA) are denied.

SIXTH ASSIGNMENT OF ERROR (NWDA)

As noted, Ordinance 177920 rezones a large area of the Northwest District from industrial use to employment, commercial and residential uses. NWDA contends that by rezoning large areas

of land to more traffic-intensive uses Ordinance 177920 "significantly affects" one or more transportation facilities within the meaning of OAR 660-012-0060, and therefore the city cannot adopt the disputed rezonings without applying one or more of the mitigations described in OAR 660-012-0060(1).[16]

In addition, NWDA argues that the Northwest District Plan is inconsistent with the city's transportation system plan (TSP) and Metro's regional transportation plan (RTP).

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[16] OAR 660-012-0060 provides, in relevant part:

> "(1) Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:
>
> > "(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;
> >
> > "(b) Amending the TSP to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division;
> >
> > "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or
> >
> > "(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided.
>
> "(2) A plan or land use regulation amendment significantly affects a transportation facility if it:
>
> > "(a) Changes the functional classification of an existing or planned transportation facility;
> >
> > "* * * * *
> >
> > "(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or
> >
> > "(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP."

A. OAR 660-012-0060

NWDA's arguments under the sixth assignment of error focus on NW Vaughn Street and the intersection of NW Vaughn Street and NW 23rd, which includes an on-ramp and off-ramp from nearby Interstate 405. Both NW Vaughn Street and NW 23rd are classified as neighborhood collectors. The city's TSP classifies the on/off-ramps to Interstate 405 as major city traffic streets.

1. OAR 660-012-0060(2)(c)

NWDA first argues that Ordinance 177920 "significantly affects" NW Vaughn Street as defined by OAR 660-012-0060(2), because it allows uses that will significantly increase traffic from outside the neighborhood and effectively convert the street from a "neighborhood collector," as the TSP describes that classification, to a more intensive classification.[17] We understand NWDA to argue that Ordinance 177920 "[a]llows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility," for purposes of OAR 660-012-0060(2)(c).

The city responds that the city's TSP does not define a "neighborhood collector" in terms of traffic levels or types of traffic, and disputes that Ordinance 177920 allows types or levels of land uses that are inconsistent with the TSP definition of neighborhood collector. According to the city,

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[17] The TSP description of "Neighborhood Collector" states, in relevant part:

> "Neighborhood Collectors are intended to serve as distributors of traffic from Major City Traffic Streets or District Collectors to Local Service Streets and to serve trips that both start and end within areas bounded by Major City Traffic Streets and District Collectors.
>
> "[1] Land Use/Development. Neighborhood Collectors should connect neighborhoods to nearby centers, corridors, station communities, main streets, and other nearby destinations. New land uses and major expansions of land uses that attract a significant volume of traffic from outside the neighborhood should be discouraged from locating on Neighborhood Collectors.
>
> "* * * * *
>
> "[3] Function. The design of Neighborhood Collectors may vary over their length as the land use character changes from primarily commercial to primarily residential. Some Neighborhood Collectors may have a regional function, either alone or in concert with other nearby parallel collectors. All Neighborhood Collectors should be designed to operate as neighborhood streets rather than as regional arterials." TSP 2-8.

allowing uses that change the traffic mix on NW Vaughn Street from neighborhood traffic to non-neighborhood traffic would not be inconsistent with NW Vaughn Street's functional classification.

While the city is correct that the TSP functional classifications are not defined in terms of traffic levels, the TSP functional classifications appear to be defined by and distinguished from each other by the *type* or source of traffic. For example, major city traffic streets are intended to serve traffic between transportation districts.[18] TSP 2-6. District collectors are intended to serve traffic that starts and ends within a transportation district. TSP 2-7. Neighborhood collectors, as noted, are intended to distribute traffic from major city streets and district collectors to local streets, and to serve traffic that starts and ends within neighborhoods that are bounded by major city traffic streets and district collectors. *See* n 17. Further, TSP Policy 6.5 provides that "[f]or each type of traffic classification, the majority of motor vehicle trips on a street should conform to its classification description." Thus, to be consistent with the applicable functional classification, it appears that the majority of trips on NW Vaughn Street must conform to the neighborhood collector classification description.

As we explained in *Alliance for Responsible Land Use v. Deschutes County*, 40 Or LUBA 304, 339 (2001), *aff'd* 179 Or App 348, 42 P3d 948 (2002), whether an amendment "significantly affects" a transportation facility under OAR 660-012-0060(2)(c) depends on how the TSP or relevant classification scheme defines functional classifications and how such classifications are distinguished from each other. Here, the city's classification scheme appears to define and distinguish classifications based on the predominant type of traffic served by the facility.

While it is not at all clear to us that the uses allowed by Ordinance 177920 change the predominant type of traffic on NW Vaughn Street in a manner inconsistent with its functional classification as a neighborhood collector, as NWDA alleges, the city cites to no evidence and

[18] NW Vaughn Street is within the Northwest transportation district, which is adjacent to the Central City transportation district. TSP 2-89. As relevant here, the boundary between the two districts runs along Interstate 405 and Highway 30.

offers no interpretation or other explanation of the functional classification scheme that would support a different conclusion. As NWDA points out, the neighborhood collector classification discourages new land uses and major expansions of land uses that attract a significant volume of traffic from outside the neighborhood. The city cites to no findings or evidence addressing OAR 660-012-0060(2)(c) or whether the likely traffic-related impact of Ordinance 177920 is consistent with NW Vaughn Street's functional classification. Accordingly, remand is necessary for the city to address whether Ordinance 177920 "significantly affects" NW Vaughn Street for purposes of OAR 660-012-0060(2)(c), as alleged by NWDA.

2. OAR 660-012-0060(2)(d)

NWDA next argues that rezoning industrial land to higher-intensity employment, commercial and residential uses will "significantly affect" the NW Vaughn Street/NW 23rd Avenue intersection, within the meaning of OAR 660-012-0060(2)(d). *See* n 16.

NWDA cites to a traffic study (DKS study) concluding that the NW Vaughn Street/NW 23rd Avenue intersection will operate at a level of service (LOS) E in the year 2020, under background increases in traffic levels, but will operate at a LOS F in the year 2020 under the challenged amendments. Record 4441. NWDA argues that the applicable LOS for the intersection is LOS E, pursuant to TSP Policy 11.13, Objective A, which refers to Table 11.1 at TSP 2-132.[19] According to NWDA, Table 11.1 sets out performance measures for regionally

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[19] Objective A and B of TSP Policy 11.13 state, in relevant part:

> "A. Maintain acceptable levels of performance on the regional transportation system, consistent with Table 11.1, in the development and adoption of, and amendments to, the Transportation System Plan and in legislative amendments to the Comprehensive Plan Map.
>
> "* * * * * *
>
> "B. Use level-of-service as one measure to evaluate the adequacy of transportation facilities in the vicinity of sites subject to land use review.
>
> Explanation: The Portland Office of Transportation typically uses level-of-service D to evaluate whether streets and intersections in the vicinity of a site will operate adequately when

significant streets, and it provides in relevant part that the acceptable two-hour peak LOS for industrial areas, employment areas and neighborhoods is E for the first hour and E for the second hour, while the "deficiency threshold" is F for the first hour and E for the second hour.[20] NWDA also argues that the on-ramp to Interstate 405 that is part of the NW Vaughn Street/NW 23rd Avenue intersection is part of Interstate 405, and thus subject to an acceptable LOS of F for the first peak hour and E for the second peak hour, with a "deficiency threshold" of F for both peak hours. Because the DKS study indicates that Ordinance 177920 will cause the NW Vaughn Street/NW 23rd Avenue intersection, including the on-ramp, to fall from LOS E to LOS F during the relevant planning period, NWDA argues, Ordinance 177920 "reduce[s] the performance standards of the facility below the minimum acceptable level identified in the TSP," for purposes of OAR 660-012-0060(2)(d).

The city responds that it did not rely on the DKS study, but instead conducted its own modeling concluding that the challenged amendments "will not significantly increase levels of congestion on the regional transportation system above what is already anticipated" by the RTP. Respondent City of Portland's Brief 23-24 (citing to Record 2885-2921 and 6819-20). However, the modeling study cited by the city does not appear to support the above-quoted assertion in the city's brief. The study finds that the challenged amendments will increase traffic levels approximately 30 percent over that assumed in the RTP. Record 2890, 6819. The study further finds that some transportation facility segments will exceed "acceptable level of service standards," and recommends a number of mitigations. Record 6819. In addition, the study concludes that the "biggest impacts" will occur on the "freeway access to I-405" and "the intersection of 23rd and NW Vaughn." Record 2893. There may be evidence in the city's study or elsewhere in the record

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new development or zoning is proposed through land use reviews such as Comprehensive Plan Map amendments, zone changes, parking reviews, conditional uses, master plans, and impact mitigation plans. * * *".

[20] TSP Table 11.1 is based on Metro RTP Table 1.2. For some reason, NWDA discusses RTP Table 1.2 rather than TSP Table 11.1, and the city follows suit. As far as we can tell, the two tables are identical for all relevant purposes.

that would allow a reasonable person to conclude that Ordinance 177920 will not "reduce the performance standards" of the NW Vaughn Street/NW 23rd Avenue intersection and the Interstate 405 on-ramp of the facility "below the minimum acceptable level identified in the TSP" within the meaning of OAR 660-012-0060(2)(d), but the city has not cited us to it.

The sixth assignment of error (NWDA) is sustained.

SEVENTH ASSIGNMENT OF ERROR (NWDA)

Ordinance 177993 creates a transportation fund for improving transportation facilities in the Northwest District, including identified improvements to NW Vaughn Street. Ordinance 177993 also allows developers of commercial property near NW Vaughn Street to increase the applicable base floor to area ratio (FAR) depending on how much the developer contributes to the transportation fund. The ordinance sets the contribution at $2.90 per square foot, about half of what would be required to fund the identified improvements. The ordinance contemplates that the city will provide the other half.

A. Transportation Fund

NWDA first contends that the city erred in failing to amend its TSP to include the transportation fund created by Ordinance 177993. NWDA argues OAR 660-012-0040, which governs the transportation financing program that is a required element of every TSP, prohibits the city from adopting stand-alone financing funds for improving identified transportation facilities. According to NWDA, because the TSP is the city's "constitution" with respect to transportation, all transportation financing elements must be included in the TSP.

The city responds that nothing in the TPR requires the city to amend its TSP to include the new transportation fund or projects financed by that fund, contemporaneous with adopting the fund. The city explains that the city's TSP requires that the city update the TSP every five years, and in fact the list of transportation projects identified in Ordinance 177993 is currently being added to the TSP as part of that periodic update process.

We agree with the city that NWDA has not cited any TPR provision that requires the city to amend its TSP contemporaneously with its decision to adopt a new transportation fund for identified improvements. OAR 660-012-040 prescribes the content of the transportation financing program, but does not mention under what circumstances that program must be amended. OAR 660-012-0055(5) provides generally that local governments shall update their TSPs at the time of periodic review. Nothing in the TPR cited to us precludes the city from adopting a new transportation fund without first amending its TSP. NWDA does not argue that Ordinance 177993 is inconsistent with the TSP.

B. Adequacy of Fund

NWDA next argues that the new transportation fund is inadequate to provide the identified improvements to the NW Vaughn Street area. According to NWDA, the city has failed to ensure that the monies generated by the new FAR bonuses will be sufficient to pay for the identified improvements.

The city responds that the new transportation fund is simply an additional source of revenue for the identified improvements, and that it is not intended to cover all of the costs of the identified improvements, which may in fact be covered by a variety of other transportation funds, frontage improvements as development occurs, local improvement districts, etc. We agree with the city that NWDA has not demonstrated that the new transportation fund is required to cover all of the costs of the identified improvements.

C. Metro RTP

Under this subassignment of error, NWDA repeats its arguments that the on-ramp to Interstate 405 at the NW Vaughn Street/NW 23rd Avenue intersection is part of Interstate 405, and thus subject to the LOS E standard set forth in the RTP. According to NWDA, that on-ramp will fall to LOS F as a result of expanding the allowed uses in the area to include employment and commercial uses.

As far as we can tell, this subassignment of error adds nothing to the arguments under NWDA's sixth assignment of error, and does not provide an independent basis for reversal or remand.

The seventh assignment of error (NWDA) is denied.

FIRST ASSIGNMENT OF ERROR (VOLKMER)

Intervenor-Petitioner Volkmer argues that Ordinance 177920 is inconsistent with Statewide Planning Goal 9 (Economic Development) and its implementing rules, at OAR Chapter 660, division 009.[21] According to Volkmer, the city failed to conduct an adequate analysis of the impacts on the city's industrial lands base from (1) rezoning a number of acres of industrial lands in the new transition area south of NW Vaughn and (2) redesignating 16 acres north of NW Vaughn to an employment plan designation.

Volkmer explains that the city does not maintain a specific inventory of industrial lands within its jurisdiction, but rather relies on Metro to map and maintain the city's industrial land supply

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[21] Goal 9 is "[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens." Goal 9 requires, in relevant part:

> "Comprehensive plans and policies shall contribute to a stable and healthy economy in all regions of the state. Such plans shall be based on inventories of areas suitable for increased economic growth and activity after taking into consideration the health of the current economic base; materials and energy availability and cost; labor market factors; educational and technical training programs; availability of key public facilities; necessary support facilities; current market forces; location relative to markets; availability of renewable and non-renewable resources; availability of land; and pollution control requirements.
>
> "Comprehensive plans for urban areas shall:
>
> "1. Include an analysis of the community's economic patterns, potentialities, strengths, and deficiencies as they relate to state and national trends;
>
> "2. Contain policies concerning the economic development opportunities in the community;
>
> "3. Provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies;
>
> "4. Limit uses on or near sites zoned for specific industrial and commercial uses to those which are compatible with proposed uses."

as part of the Metro inventory of the regional industrial land supply. Volkmer notes that in 2002 Metro adopted a report concluding in relevant part that the region has a surplus of commercial lands and a substantial deficit of industrial lands. Following that 2002 report, Metro revised Title 4 of its Urban Growth Management Functional Plan (UGMFP) to restrict conversion of industrial lands to commercial uses. Given the regional deficit in industrial lands, Volkmer argues, the city cannot rezone industrial-zoned lands to allow non-industrial uses unless it demonstrates that doing so is consistent with the city's obligation under Goal 9 to maintain an "adequate supply" of lands zoned for industrial uses. At the least, Volkmer argues, the city must explain how the reduction in industrial-zoned lands is consistent with Metro's industrial lands inventory.

Volkmer further argues that OAR 660-009-0010(4) requires the city to either demonstrate that the rezoning is consistent with its comprehensive plan or explain how the rezoning complies with the requirements at OAR 660-009-0015 through 0025, including the requirement at OAR 660-009-0015 to conduct an "economic opportunities analysis."[22]

Volkmer next argues that the city's decision to re-designate approximately 12 acres of industrial land north of NW Vaughn within the Guilds Lake Industrial Sanctuary (GLIS) to allow non-industrial uses is inconsistent with PCP policies implementing Goal 9, specifically PCP policies

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[22] OAR 660-009-0010(4) provides:

> "Notwithstanding paragraph (2), above [requiring local governments to review plans and regulations for compliance with the rule at periodic review], a jurisdiction which changes its plan designations of lands in excess of two acres to or from commercial or industrial use, pursuant to OAR 660, Division 18 (a post acknowledgment plan amendment), must address all applicable planning requirements; and:
>
> "(a) Demonstrate that the proposed amendment is consistent with the parts of its acknowledged comprehensive plan which address the requirements of this division; or
>
> "(b) Amend its comprehensive plan to explain the proposed amendment, pursuant to OAR 660-009-0015 through 660-009-0025; or
>
> "(c) Adopt a combination of the above, consistent with the requirements of this division."

5.1(C), 5.8(D) and 5.12.[23] While the new plan designation allows many industrial uses as well as commercial and employment uses, Volkmer notes that the city's traffic modeling assumed that the area would in fact redevelop with non-industrial uses.

Finally, Volkmer argues that industrial uses along NW Vaughn are dependent on proximity to railroad, marine and interstate transportation facilities, and therefore such industrial uses are "specific uses with special site requirements" that the city must accommodate under OAR 660-009-0025(4).[24]

The city adopted findings explaining why Ordinance 177920 is consistent with Goal 9, Metro Title 4, and the CCP industrial lands policies. Record 661-63, 671-72, 713-14, 726-27. Volkmer does not challenge these findings, or explain why they are inadequate to demonstrate that the disputed rezoning and redesignation of industrial lands north and south of NW Vaughn Street is

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[23] PCP Policy 5.1(C) states: "Retain industrial sanctuary zones and maximize use of infrastructure and intermodal transportation linkages with and within these areas." PCP Policy 5.8(D) states that "[w]ithin industrial districts, allow some land designated for commercial and mixed employment. Provide this while maintaining the overall orientation of the district." PCP Policy 5.12 states:

> "Encourage the economic stability of the Guild's Lake Industrial Sanctuary (GLIS), maintain its major public and private investments in multimodel infrastructure, protect its industrial lands and job base, and enhance its capacity to accommodate future industrial growth by including the GLIS Plan as part of the Comprehensive Plan."

[24] OAR 660-009-0025(4) provides:

> "Jurisdictions which adopt objectives or policies to provide for specific uses with special site requirements shall adopt policies and land use regulations to provide for the needs of those uses. Special site requirements include but need not be limited to large acreage sites, special site configurations, direct access to transportation facilities, or sensitivity to adjacent land uses, or coastal shoreland sites designated as especially suited for water-dependent use under Goal 17. Policies and land use regulations for these uses shall:
>
> "(a) Identify sites suitable for the proposed use;
>
> "(b) Protect sites suitable for the proposed use by limiting land divisions and permissible uses and activities to those which would not interfere with development of the site for the intended use; and
>
> "(c) Where necessary to protect a site for the intended industrial or commercial use include measures which either prevent or appropriately restrict incompatible uses on adjacent and nearby lands."

consistent with the goal, Metro requirements, and the CCP. Absent a focused challenge to those findings, Volkmer has not established a basis to reverse or remand Ordinance 177920.

As to compliance with OAR chapter 660, division 009, the city argues, and we agree, that the city's unchallenged findings that Ordinance 177920 is consistent with its CCP policies implementing the Goal 9 rule are sufficient to satisfy OAR 660-009-0010(4)(a), and make it unnecessary for the city to apply OAR 660-009-0015 through 660-009-0025, pursuant to OAR 660-009-0040(4)(b). Further, we agree with the city that petitioner has not established that the industrial uses along NW Vaughn are "specific uses with special site requirements" for purposes of OAR 660-009-0025(4), or that the city is obligated to protect those industrial uses under that rule.

The first assignment of error (Volkmer) is denied.

SECOND ASSIGNMENT OF ERROR (VOLKMER)

Volkmer argues that Ordinances 177920 and 178020 are inconsistent with Statewide Planning Goal 6 (Air, Water and Land Resources Quality), because they authorize increased density and encourage automobile traffic that in turn will aggravate existing air quality problems within the city.[25] According to Volkmer, the city must analyze the cumulative air pollution discharges of existing and proposed uses and explain why it is reasonable to expect that the proposed uses will meet state and federal air quality standards.

The city adopted findings addressing Goal 6, concluding in relevant part that the proposed compact, mixed-use development and the multi-model transportation system in the Northwest

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[25] Goal 6 is "[t]o maintain and improve the quality of the air, water and land resources of the state." Goal 6 also provides:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources."

District would reduce vehicle miles traveled and positively impact air quality. Record 657-59. Again, petitioner does not challenge those findings or explain why they are inadequate to demonstrate consistency with Goal 6.

The second assignment of error (Volkmer) is denied.

THIRD ASSIGNMENT OF ERROR (VOLKMER)

Volkmer argues that Ordinance 177920 is inconsistent with Statewide Planning Goal 8 (Recreation), because it rezones land within the Northwest District to allow higher-density residential uses without adding any additional park or recreational lands to an area of the city that is already deficient in park and recreational amenities.[26]

The city and CNF respond by citing to a number of planning actions that the challenged ordinances take that are designed to improve parks and recreational opportunities within the Northwest District, including designating an additional 2.44 acres of land for open space uses. Volkmer does not challenge these actions, or the city's findings under Goal 8, except to suggest that the identified improvements are inadequate because (1) nothing ensures that the improvements will actually be made and (2) in any case, the improved facilities still fall short of redressing the deficiency of park and recreational facilities in the Northwest District.

We agree with the city and CNF that Volkmer has not established that Ordinance 177920 is inconsistent with Goal 8. Goal 8 requires the city to plan for recreational facilities "in such quantity, quality and locations as is consistent with the availability of the resources to meet such requirements." Goal 8 does not require that the city fully fund identified recreational improvements,

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[26] Goal 8 is "[t]o satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts." Goal 8 also provides:

> "The requirements for meeting such needs, now and in the future, shall be planned for by governmental agencies having responsibility for recreation areas, facilities and opportunities: (1) in coordination with private enterprise; (2) in appropriate proportions; and (3) in such quantity, quality and locations as is consistent with the availability of the resources to meet such requirements. * * *"

or ensure that those improvements are available concurrent with projected growth. Nor does Goal 8 require that the city fully redress long-standing recreational deficiencies in an area that is the subject of a post-acknowledgment plan amendment.

The third assignment of error (Volkmer) is denied.

FIRST AND FOURTH ASSIGNMENTS OF ERROR (NICOL)

Petitioner Nicol Investment, Inc. (Nicol) challenges aspects of the Northwest District Plan adopted by Ordinance 177920 that make a particular property eligible for a height bonus. The property at issue is a 3.5-acre site located near the intersection of Burnside Street and NW 23rd Avenue, currently occupied by a parking lot for the Uptown Shopping Center. The site is adjacent to the Northwest District Plan boundary and the historic district. Ordinance 177920 rezones the site and other properties along the Burnside corridor from General Commercial (CG) to Central Commercial with design overlay (CX), and extends the Central City Plan District boundaries to include the subject site and nearby properties. The maximum height permitted in the CG zone is 45 feet; the maximum height in the CX zone is 75 feet.

During the planning commission proceedings on Ordinance 177920, the owner of the site requested that the city amend the Residential Housing Floor Area and Height Bonus provisions at PCC 33.510.210 to make the site eligible for a 75-foot housing height bonus, in order to facilitate a proposed 116-unit residential tower. The owner provided a considerable amount of detail regarding the proposed tower, including a scale model, and the planning commission and city council discussed the proposal in detail. Other participants objected to the owner's height bonus proposal, citing negative impacts on nearby historic structures and other considerations. The city council ultimately agreed to amend the text of PCC 33.510.210(E) and Map 510-3 to extend the housing height bonus to the subject site. Under the amended text and map, the only other properties that are eligible for height bonuses are located some distance from the subject property. All other property near the subject site remains subject to the base zone height limits. The amended text and map distinguish between "general" height bonuses and "housing" height bonuses, and make

the subject site the only site in the central city district that is eligible for the housing height bonus, but not the general height bonus. As the city's findings explain:

> "* * * New text is also added in the subsection and the Maximum Heights Map 510-3 is revised to clarify those sites eligible for application of general and housing height bonuses and the site that is eligible for the housing height bonus only. The Uptown Shopping Center site on the north side of W. Burnside Street west of NW 23rd Place is designated the latter.
>
> "**Commentary**: * * * Additional text and map changes relate to a desire to allow the Uptown Shopping Center site to be eligible for a bonus height option for housing but not for the other general bonuses. The intent of this provision is to allow the review body to determine the appropriateness of all additional bonus height above the base zone allowed 75 feet (Central Commercial zone) for this site, which is located next to a historic district, and a mix of uses and scales of development." Record 787.

Nicol argues first that, while the bulk of Ordinance 177820 might be a legislative decision, the city's decision to rezone the subject site to CX and to extend the housing height bonus to that site is a quasi-judicial decision under the city code as well as under the test described in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979).

Nicol acknowledges several LUBA cases concluding that where a legislative decision includes discrete elements that, viewed alone, could be described as quasi-judicial actions, whether the decision is properly viewed as legislative or quasi-judicial depends on the character of the whole decision, not the character of the constituent parts. *OCAPA v. City of Mosier*, 44 Or LUBA 452, 468 (2003); *DeBell v. Douglas County*, 39 Or LUBA 695, 698-99 (2001); *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 655 (1999), *aff'd as modified* 165 Or App 1, 994 P2d 1205 (2000). However, Nicol cites to *Hummel v. City of Brookings*, 13 Or LUBA 25 (1984) for the proposition that, at least under some circumstances, it is appropriate to view distinct elements of an otherwise legislative decision as quasi-judicial in nature, and require the local government to apply the procedural and substantive protections afforded participants to a quasi-judicial decision.

In *Hummel*, the city initiated a proposal to rezone numerous properties in the downtown portion of the city to commercial zones. At the request of the three owners of five beachfront lots, those lots were included in the city's rezoning proposal and ultimately rezoned to allow high-density residential uses. On appeal to LUBA, the petitioner argued that the city failed to adopt adequate findings demonstrating rezoning the beachfront lots was consistent with applicable statewide planning goals. The city responded that the challenged decision was legislative in character, and thus the findings obligation described in *South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County*, 280 Or 3, 21, 569 P2d 1063 (1977) did not apply. We disagreed, concluding that the entire rezoning proposal was sufficiently focused and narrow to qualify as quasi-judicial. We then commented that, even if the part of the decision that rezoned the downtown properties was assumed to be legislative in nature, it was appropriate to view the part that rezoned the beachfront lots as quasi-judicial. This was because the few properties in question were unrelated to the main proposal, involving beachfront rather than downtown lots, and residential rather than commercial zoning. Further, we noted that the beachfront rezoning proposal was added to the city's proposal as an afterthought, at the behest of individual property owners. We therefore concluded that the city must adopt findings addressing whether rezoning the beachfront lots complied with applicable goals.[27]

Hummel is arguably inconsistent with *OCAPA*, *DeBell* and *D.S. Parklane Development, Inc.*, to the extent it suggests that a decision may possess a hybrid character, with part of the decision being legislative in nature, subject to legislative procedural requirements and the standard of review applicable to legislative decisions, and part being quasi-judicial in nature, subject to quasi-judicial procedural requirements and the standard of review appropriate to such decisions. If *Hummel* stands for that proposition, we now reject it. The practical difficulties of applying different

[27] However, because the legislative/quasi-judicial distinction in that case was "difficult to make," we proceeded on the assumption that the city was not obligated to make findings and went on to review the record and the city's brief to find support for the city's claim that the challenged ordinance was consistent with applicable goals.

procedures, findings obligations and standards of review to different elements of a single decision would render many local land use proceedings and our review unworkable. We adhere to our holdings in *OCAPA*, *DeBell* and *D.S. Parklane Development, Inc.*, that, where a decision includes discrete determinations that, viewed in isolation, would constitute quasi-judicial decisions, whether the decision is viewed as legislative or quasi-judicial depends on the character of the whole decision. In other words, the entire decision will either be legislative or quasi-judicial, not a hybrid of both. Under that test, there is no possible dispute that Ordinance 177920 is a legislative decision.

However, we understand Nicol to also advance a slightly different argument, not that the entire ordinance is quasi-judicial or that it is a hybrid decision subject to different procedures and standards, but that the city committed reversible error in combining a legislative decision with an unrelated quasi-judicial decision. We understand Nicol to argue that where the local government initiates a legislative proposal with a particular geographic scope and subject-matter, the local government cannot combine that legislative proposal with a site-specific proposal that is unrelated to the geographic scope and subject matter of the legislative proposal. Here, Nicol argues, Ordinance 177920 principally concerns adoption of the Northwest District Plan. The subject site is located outside the district, Nicol points out, and extending a height bonus to that property has nothing to do with anything else in the Northwest District Plan. Therefore, we understand Nicol to argue, Ordinance 177920 must be remanded in order for the city to bifurcate that portion of the ordinance that grants the height bonus to the property, and for the city to apply to that portion the procedural and substantive requirements applicable to a quasi-judicial decision.

Assuming without deciding that it is reversible error to combine a legislative proceeding with a geographically and otherwise unrelated site-specific proposal, as Nicol argues, we agree with intervenor Onder that the city did not do so in the present case. Ordinance 177920 was initiated based on a study area consisting of 535 acres and 2,555 tax lots, involving areas within the Central City Plan District, the Guilds Lake Industrial Sanctuary Plan, and the Northwest District. That study

area included the subject site. The ordinance rezones and adopts a number of text and map amendments affecting multiple lots along the Burnside corridor outside the Northwest District boundaries. The subject site is one of the properties along the Burnside corridor rezoned and affected by the ordinance. It is located adjacent to the Northwest District Plan boundary. Even assuming it would be error for the city to combine a unitary legislative proceeding affecting one area of the city with unrelated site-specific amendments in a different area of the city, that is not what happened in the present case.

The first and fourth assignments of error (Nicol) are denied.

SECOND ASSIGNMENT OF ERROR (NICOL)

Nicol argues that even if the challenged ordinance is legislative, the city's action with respect to the subject site constitutes impermissible spot-zoning, contrary to the rule described in *Smith v. Washington County*, 241 Or 380, 384, 406 P2d 545 (1965). According to Nicol, arbitrary rezoning to accommodate the desires of a particular landowner, without considering whether the rezoning is consistent with the overall objectives of the comprehensive plan and the character of the neighborhood is impermissible. Nicol argues that granting the height bonus option to the owner of one isolated site, contrary to the objectives of the city code and the character of the adjoining historic district, is arbitrary or spot zoning.

In *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991), we noted that *Smith* predated adoption of statewide land use legislation and *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), which held that small scale rezonings are quasi-judicial actions requiring certain procedural safeguards. We defined "spot zoning" as an arbitrary zoning decision made in derogation of established criteria or made without criteria. 21 Or LUBA at 409. Because the zone change at issue in that case was adopted in compliance with applicable criteria, we held, it cannot be considered arbitrary and therefore cannot be "spot zoning." *Id.*

Given the ubiquity of land use regulations in today's regulatory environment, it is doubtful that the spot zoning standard described in *Smith* continues to have independent application. In

other words, it seems highly unlikely that a rezoning decision could satisfy all applicable criteria and yet constitute arbitrary or spot zoning under *Smith*. Applying the approach described in *Brown & Cole, Inc.*, Nicol has not demonstrated that rezoning the subject site to CX or making it eligible for a height bonus is in derogation of applicable criteria or made without application of criteria.

The second assignment of error (Nicol) is denied.

THIRD ASSIGNMENT OF ERROR (NICOL)

Nicol adopts by reference the arguments made by petitioner NWDA under the first assignment of error, contending that making the subject site eligible for a height bonus is inconsistent with the historic preservation requirements of Goal 5 and OAR chapter 660, Division 23. We address those arguments here.

According to NWDA, the decision to allow a tower up to 150 feet in height adjacent to historic two or three story structures within a historic district requires consideration under Goal 5 and the Goal 5 rule, because it either amends a portion of an acknowledged plan to protect a significant Goal 5 resource, or allows a "new use" that could conflict with a Goal 5 resource site. OAR 660-023-0250(3). *See* n 4.

NWDA argues first that the former CG zoning of the site, which allowed a maximum height of 45 feet, was part of the city's program to protect the adjacent historic district by ensuring that adjacent development is consistent in scale and mass with historic residential structures. However, NWDA does not explain the basis for its view that the CG zoning of the former site, or its height limitation, was part of the city's program to protect historic resources within the Alphabet Historic District.[28]

NWDA next argues that allowing a 150-foot residential tower is a "new use" that could conflict with historic structures, because the mass and bulk of the tower would have significantly greater adverse impacts on adjacent historic dwellings compared to a 45-foot tall structure allowed

[28] NWDA cites to Record 545 to support that claim, but we see nothing at Record 545 that does so.

under the former CG zoning. Therefore, NWDA argues, the city must conduct an ESEE analysis under OAR 660-023-0040.

As we explained in addressing NWDA's similar argument under the first assignment of error, where Goal 5 is triggered pursuant to OAR 660-023-0250(3), the city need not in all cases repeat the entire Goal 5 process, including the ESEE process. In many cases the local government can simply explain why the existing program to protect Goal 5 resources, as amended or affected by the challenged post-acknowledgment plan amendment, continues to be sufficient to protect those resources. As CNF, Inc. points out, the city in the present case adopted findings explaining why the height bonus for the subject site is consistent with the city's obligation to protect historic resources.[29] NWDA does not challenge these findings. Therefore, even assuming NWDA's premise that rezoning and applying a height bonus to allow a taller residential structure than previously allowed is a "new use" within the meaning of OAR 660-023-0250(3)(b), NWDA has not demonstrated a basis to reverse or remand the city's decision to rezone and apply a height bonus to the Uptown Shopping Center site.

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[29] The city's decision states, in relevant part:

> "b. The Central City Plan District Bonus Height Option for Housing is amended to clearly state that the review body has the ability to reconfigure the proposed building, including reducing its height, and that it may approval all, some or none of the requested bonus height. Approving the increased height must also be consistent with the purposes stated in [PCC] 33.510.205 (Height) which include such goals as protecting views, limiting shadows on residential neighborhoods and ensuring height compatibility and step downs to historic districts.
>
> "c. A portion of the Uptown Shopping Center site is made eligible for the Bonus Height Option for Housing only, which must be approved through the design review process and is subject to design guidelines and approval criteria for obtaining additional building height beyond the base zone maximum. This area is not made eligible for the general height bonuses that are granted as a part of earning FAR bonuses. The intent of this provision is to allow the review body to determine the appropriateness of all additional bonus height above the base zone allowed 75 feet (Central Commercial zone) for this site, which is located next to a historic district and a mix of uses and scales of development. Together, these amendments (including those described in b, above) allow increased development potential for infill residential and mixed-use development in this important Central City gateway area, while providing design review bodies the means for ensuring that the new development will respect its urban context, including proximity to historic districts." Record 768.

The third assignment of error (Nicol) and the second subassignment to the first assignment of error (NWDA) are denied.

CONCLUSION

For the reasons expressed under the sixth assignment of error (NWDA), Ordinance 177920 is remanded. Ordinances 177921, 177993, 178020 and Resolution 36171 are affirmed.