

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 N.W.D.A., THE COMMUNITY
5 ASSOCIATION OF NORTHWEST
6 PORTLAND, INC., FRANK DIXON and
7 RUTH C. ROTH,
8 *Petitioners,*

9
10 vs.

11
12 CITY OF PORTLAND,
13 *Respondent.*

14
15 LUBA Nos. 2003-162, 2003-163, 2003-164,
16 2003-183 and 2003-195

17
18 NICOL INVESTMENT, INC.,
19 *Petitioner,*

20
21 vs.

22
23 CITY OF PORTLAND,
24 *Respondent.*

25
26 LUBA Nos. 2003-165, 2003-166 and 2003-167

27
28 FINAL OPINION
29 AND ORDER

30
31 Appeal on remand from Court of Appeals

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33 Carrie A. Richter and Edward J. Sullivan, Portland, represented petitioner N.W.D.A *et al.*

34
35 Peter Livingston, Portland, represented petitioner Nicol Investment, Inc.

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37 Dan Volkmer, Portland, represented himself.

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39 Peter A. Kasting, Deputy City Attorney, Portland, represented respondent.

40
41 Steven W. Abel, Portland, represented intervenor-respondent CNF, Inc.

42
43 Christen C. White, Portland, represented intervenors-respondent Onder *et al.*

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2 Timothy V. Ramis, Portland, represented intervenor-respondent Nob Hill Business
3 Association.

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5 Richard Singer, Portland, represented himself.

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7 Don Singer, Portland, represented himself.

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

11
12 REMANDED (LUBA No. 2003-162) 10/05/2005
13 AFFIRMED (LUBA Nos. 2003-163/164/165/166/167/183/195)

14
15 You are entitled to judicial review of this Order. Judicial review is governed by the
16 provisions of ORS 197.850.

2 **INTRODUCTION**

3 These appeals challenge four ordinances and a resolution that adopt plan and land use
4 regulation amendments affecting the Northwest District of the city. Ordinance 177920 adopts the
5 Northwest District Plan (NDP) as part of the city comprehensive plan. Ordinance 178020 adopts
6 code amendments implementing the NDP that in relevant part authorize construction of six
7 commercial parking structures within the Alphabet Historic District, a historic district located within
8 the Northwest District. In a final opinion dated September 27, 2004, we sustained a challenge to
9 one of the four ordinances, but rejected all challenges to Ordinance 178020 and the commercial
10 parking structures. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004). As relevant here, we
11 rejected arguments by the petitioners in LUBA Nos. 2003-162/163/164/183/195 (hereafter,
12 NWDA) that the city failed to demonstrate that allowing parking structures within the historic district
13 is consistent with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas and
14 Open Spaces), under the first subassignment to the first assignment of error.

15 The Court of Appeals remanded our decision for reconsideration of that subassignment of
16 error, but otherwise affirmed our decision. *NWDA v. City of Portland*, 198 Or App 286, 108
17 P3d 589 (2005). We allowed the parties' request for additional briefing, and now respond to the
18 court's remand.

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

20 Under this subassignment, NWDA argued that the city erred in failing to conduct the
21 economic, social, environmental and energy (ESEE) analysis required under the Goal 5 rule, at
22 OAR 660-023-0040. Had the city conducted an ESEE analysis, NWDA argued, it could not have
23 justified the parking structures, particularly amendments that allow three parking structures next to
24 historic structures without any setback.

25 We rejected that argument for two reasons. First, we agreed with the city that because
26 OAR 660-023-0200(7) exempts local governments from the requirement to conduct an OAR 660-

1 023-0040 ESEE analysis when determining “a program to protect historic resources,” OAR 660-
2 023-0200(7) also exempts local governments from the obligation to conduct an ESEE analysis
3 when adopting a post-acknowledgment plan amendment (PAPA) that allows uses that could
4 conflict with historic resources.¹

5 Second, we reasoned that, even if the challenged ordinance did not fall within the
6 OAR 660-023-2000(7) exemption, Goal 5 does not necessarily require a local government to
7 conduct the entire standard Goal 5 analysis, including the ESEE analysis at OAR 660-023-0040,
8 where it adopts a PAPA allowing uses that could conflict with Goal 5 resources. Citing to an earlier
9 LUBA case, we explained that in many cases no more is necessary than an explanation for why the
10 existing program to protect Goal 5 resources, as amended or affected by the challenged
11 amendments, continues to be sufficient to protect those resources.² We then examined the city’s

¹ We concluded, in relevant part:

“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.’ 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.” 47 Or LUBA at 542-43 (footnote omitted, emphasis original).

² We stated:

“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*

1 findings addressing Goal 5, and concluded that NWDA had not shown that those findings were
2 insufficient to demonstrate that the city’s program to protect the historic district continues to comply
3 with Goal 5.

4 Before the Court of Appeals, NWDA argued in relevant part that Ordinance 178020 is not
5 a “program to protect historic resources” within the meaning of OAR 660-023-0200(7), and
6 therefore the exemption under that rule does not apply to the city’s adoption of the ordinance.
7 According to NWDA, Ordinance 178020 allows uses that conflict with historic resources, and
8 does nothing to “protect” them. Consequently, NWDA argued, the city is obligated to conduct an
9 ESEE analysis, and LUBA erred in concluding otherwise.

10 The court concluded that the key to resolving that argument is a determination whether
11 Ordinance 178020 is part of the city’s “program to protect historic resources,” a determination that
12 LUBA did not make.³ Because that determination presents a mixed question of fact and law, the

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. The city’s 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.” 47 Or LUBA at 543-44 (footnote omitted; emphasis and brackets in original).

³ The court’s opinion states, in relevant part:

1 court decided to remand to LUBA to resolve that issue in the first instance. To resolve the issue,
2 the court indicated, LUBA should “examine the ordinances that the city adopted in this case, the
3 requirements in Goal 5 and the pertinent rules, and the responsiveness of the city’s findings to those
4 requirements.” 198 Or App at 302.

5 **A. Goal 5 Requirements**

6 We start with the pertinent requirements of Goal 5. As the court found, the adoption of
7 Ordinance 178020 implicates Goal 5, pursuant to OAR 660-023-250(3), because it is a PAPA
8 that “allows new uses that could be conflicting uses” with regard to a particular Goal 5 resource—
9 here, the Alphabet Historic District.⁴ The Goal 5 rule sets out both “standard” procedures and

“As we have already indicated, LUBA reasoned that, even if Goal 5 had been triggered by the city’s actions here, OAR 660-023-0200(7) applied to the city’s decision to allow the commercial parking structures and ‘exempts the city from the requirement to conduct an ESEE analysis.’ It is apparent that a critical question here is whether LUBA was correct in its determination that the city’s decision is within the scope of the exemption in OAR 660-023-0200(7). In its decision, however, LUBA left unanswered the question whether, as here, an ordinance that allows a use that could conflict with a Goal 5 resource comes within the scope of OAR 660-023-0200(7) because it is within the definition of a ‘program’ in OAR 660-023-0010(6). Although the rule that governs the applicability of Goal 5, OAR 660-023-0250(3)(b), includes the ‘could be conflicting’ standard, the definition of a ‘program,’ OAR 660-023-0010(6), contains the ‘that conflicts’ standard. Those two standards, however, appear to refer to the same subject. It is unclear to us how those two provisions interrelate in the context of the rules implementing Goal 5.

“Because LUBA did not address a key issue concerning the applicability of the exemption in OAR 660-023-0200(7)—that is, whether the city’s decision is a ‘program to protect historic resources’—it is difficult for this court to conduct a meaningful review of that issue without LUBA’s analysis in the first instance. It appears to us that, in order for LUBA to resolve the issue, it must, among other things, examine the ordinances that the city adopted in this case, the requirements in Goal 5 and the pertinent rules, and the responsiveness of the city’s findings to those requirements.” 198 Or App at 301-02.

⁴ OAR 660-023-00250(3) provides:

“Local governments are not required to apply Goal 5 in consideration of a PAPA 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;

1 requirements and “specific” procedures and requirements for particular Goal 5 resources. As the
2 court noted, OAR 660-023-0020(1) describes the relationship between the standard and specific
3 procedures and requirements:

4 “The standard Goal 5 process, OAR 660-023-0030 through 660-023-0050,
5 consists of procedures and requirements to guide local planning for all Goal 5
6 resource categories. This division also provides specific rules for each of the fifteen
7 Goal 5 resource categories (see OAR 660-023-0090 through 660-023-0230). In
8 some cases this division indicates that both the standard and the specific rules apply
9 to Goal 5 decisions. In other cases, this division indicates that the specific rules
10 supersede parts or all of the standard process rules (i.e., local governments must
11 follow the specific rules rather than the standard Goal 5 process). In case of
12 conflict, the resource-specific rules set forth in OAR 660-023-0090 through 660-
13 023-0230 shall supersede the standard provisions in OAR 660-023-0030 through
14 660-023-0050.”

15 **1. Standard Goal 5 Rule Process**

16 Much simplified, the “standard” process at OAR 660-023-0030 through 660-023-0050
17 requires that local governments inventory Goal 5 resources, determine the significance of resource
18 sites, and adopt a list of significant resource sites. OAR 660-023-0030. The local government
19 must next conduct an ESEE analysis that (1) identifies conflicting uses and (2) analyzes the ESEE
20 consequences that could result from decisions to allow, limit, or prohibit conflicting uses.⁵ Based on

“(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or

“(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.”

One of the potential issues the court noted in its opinion is the difference in language between OAR 660-023-0250(3)(b), which triggers application of the Goal 5 rule if the PAPA allows new uses that “could be conflicting uses,” and OAR 660-023-0010(6), which defines “program” to include plans and actions that prohibit, limit or allow uses “that conflict” with significant resources. The parties appear to agree that the different textual references to uses that “could be conflicting” and uses “that conflict” play no role in resolving the issue before us. As intervenor points out, the definition of “conflicting use” at OAR 660-023-0010(1) includes uses that “could adversely affect” resources. Like the parties, we do not think the different phrasings in the rule have any significance in the present case.

⁵ The text of OAR 660-023-0040 is set out infra at n 11.

1 that ESEE analysis, the local government must determine whether to allow, limit, or prohibit
2 identified conflicting uses. OAR 660-023-0040. Finally, for each resource site the local
3 government must adopt a program or programs to achieve Goal 5, consisting of “comprehensive
4 plan provisions and land use regulations” to implement the decisions made during the ESEE process.
5 OAR 660-023-0050(1).⁶ Such programs may include “zoning measures that partially or fully allow
6 conflicting uses * * *.” *Id.*

7 OAR 660-023-0010 defines several key terms to be “used in this division, unless the
8 context requires otherwise.” OAR 660-023-0010(6) defines “program” or “program to achieve
9 the goal” as

10 “a plan or course of proceedings and action either to prohibit, limit, or allow uses
11 that conflict with significant Goal 5 resources, adopted as part of the comprehensive
12 plan and land use regulations (e.g., zoning standards, easements, cluster
13 developments, preferential assessments, or acquisition of land or development
14 rights).”

15 OAR 660-023-0010(1) defines “conflicting use” in relevant part as a use “that could adversely
16 affect a significant Goal 5 resource[.]” Finally, OAR 660-023-0010(7) gives two definitions of the
17 term “protect,” as follows:

18 “‘Protect,’ when applied to an individual resource site, means to limit or prohibit
19 uses that conflict with a significant resource site (except as provided in OAR 660-
20 023-0140, 660-023-0180, and 660-023-0190). When applied to a resource
21 category, ‘protect’ means to develop a program consistent with this division.”

⁶ OAR 660-023-0050(1) provides:

“For each resource site, local governments shall adopt comprehensive plan provisions and land use regulations to implement the decisions made pursuant to OAR 660-023-0040(5). The plan shall describe the degree of protection intended for each significant resource site. The plan and implementing ordinances shall clearly identify those conflicting uses that are allowed and the specific standards or limitations that apply to the allowed uses. A program to achieve Goal 5 may include zoning measures that partially or fully allow conflicting uses (see OAR 660-023-0040(5)(b) and (c)).”

1 **2. Historic Resources Goal 5 Rule Process**

2 OAR 660-023-0200 is the specific rule applicable to historic resources.⁷ OAR 660-023-
3 0200(2) provides a general statement of which standards and procedures apply under the rule:

⁷ We set out the pertinent subsections of OAR 660-023-0200 here in full, to supplement the discussion of individual subsections in the text below.

“(1) For purposes of this rule, the following definitions apply:

“* * * * *

“(e) ‘Protect’ means to require local government review of applications for demolition, removal, or major exterior alteration of a historic resource.

“(2) Local governments are not required to amend acknowledged plans or land use regulations in order to provide new or amended inventories or programs regarding historic resources, except as specified in this rule. The requirements of the standard Goal 5 process (see OAR 660-023-0030 through 660-023-0050) in conjunction with the requirements of this rule apply when local governments choose to amend acknowledged historic preservation plans and regulations. However, the sequence of steps in the standard process is not recommended, as per section (3) of this rule. The provisions in section (3) of this rule are advisory only. Sections (4) through (9) of this rule are mandatory for all local governments, except where the rule provides recommended or optional criteria.

“(3) Local comprehensive plans should foster and encourage the preservation, management, and enhancement of structures, resources, and objects of historic significance within the jurisdiction in a manner conforming with, but not limited by, the provisions of ORS 358.605. In developing local historic preservation programs, local governments should follow the recommendations in the Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation. Where possible, local governments should develop a local historic context statement and adopt a historic preservation plan and a historic preservation ordinance before commencement of local historic inventories.

“* * * * *

“(5) Local governments shall adopt or amend the list of significant historic resource sites (i.e., ‘designate’ such sites) as a land use regulation. Local governments shall allow owners of inventoried historic resources to refuse historic resource designation at any time prior to adoption of the designation and shall not include a site on a list of significant historic resources if the owner of the property objects to its designation.

“(6) The local government shall allow a property owner to remove from the property a historic property designation that was imposed on the property by the local government.

“(7) 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

1 “Local governments are not required to amend acknowledged plans or land use
2 regulations in order to provide new or amended inventories or programs regarding
3 historic resources, except as specified in this rule. The requirements of the standard
4 Goal 5 process (see OAR 660-023-0030 through 660-023-0050) in conjunction
5 with the requirements of this rule apply when local governments choose to amend
6 acknowledged historic preservation plans and regulations. However, the sequence
7 of steps in the standard process is not recommended, as per section (3) of this rule.
8 The provisions in section (3) of this rule are advisory only. Sections (4) through (9)
9 of this rule are mandatory for all local governments, except where the rule provides
10 recommended or optional criteria.”

11 OAR 660-023-0200(2) is not an exemplar of clarity. The first sentence appears to state
12 that local governments need not adopt new or amended inventories or programs regarding historic
13 resources, unless the rule so specifies. The second sentence indicates that if a local government
14 “choose[s] to amend acknowledged historic preservation plans and regulations,” it must apply the
15 standard Goal 5 process as well as “the requirements of this rule.” The third sentence appears to
16 qualify the second sentence, stating that “the sequence of steps in the standard process is not
17 recommended,” per OAR 660-023-0200(3), discussed below. The fourth and fifth sentences of
18 OAR 660-023-0200(2) indicate that the standards in OAR 660-023-0200(3) are advisory, and
19 that only the requirements of OAR 660-023-0200(4) through (9) are mandatory, “except where the
20 rule provides recommended or optional criteria.”

21 OAR 660-023-0200(3) states in relevant part that comprehensive plans “should foster and
22 encourage the preservation, management, and enhancement of structures, resources, and objects of
23 historic significance[.]” If possible, local governments should “adopt a historic preservation plan and

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.

“(8) Local governments shall protect all historic resources of statewide significance through local historic protection regulations, regardless of whether these resources are ‘designated’ in the local plan.

“(9) A local government shall not issue a permit for demolition or modification of a historic resource described under subsection (6) of this rule for at least 120 days from the date a property owner requests removal of historic resource designation from the property.”

1 historic preservation ordinance before commencement of historic inventories.” Presumably this
2 sequence is the exception or qualification to the “sequence of steps” in the standard process
3 referred to in the third sentence of OAR 660-023-0200(2).

4 OAR 660-023-0200(5) provides that local governments shall adopt or amend a list of
5 significant historic resource sites as a land use regulation, but shall not include a site on the list if the
6 property owner objects. OAR 660-023-0200(6) clarifies that a property owner may remove
7 property from the list, if the property is placed there.

8 OAR 660-023-0200(7) is the main focus of the parties’ arguments. That section provides
9 that “[l]ocal governments are not required to apply the ESEE process in order to determine a
10 program to protect historic resources.” Instead, local governments are “encouraged to adopt
11 historic preservation regulations regarding the demolition, removal, or major exterior alteration” of
12 designated historic resources. We discuss below the parties’ arguments concerning the meaning of
13 OAR 660-023-0200(7).

14 OAR 660-023-0200(8) provides that local governments shall “protect” historic resources
15 “of statewide significance,” whether or not designated as such. OAR 660-023-0200(9) provides
16 that local governments shall not issue a permit for demolition or modification of a historic resource
17 described for at least 120 days from the date the property owner requests removal of the historic
18 designation.

19 Finally, OAR 660-023-0200(1) sets out definitions that apply “for purposes of this rule.”
20 OAR 660-023-0200(1)(e) defines “protect” to mean “to require local government review of
21 applications for demolition, removal, or major exterior alteration of a historic resource.” Thus the
22 historic resources rule provides a different, and narrower, definition of “protect” than those generally
23 applicable elsewhere in the Goal 5 rule, at OAR 660-023-0010(7).

24 **B. The City’s Ordinances**

25 We first describe the pertinent city legislation governing historic resources that the parties
26 have brought to our attention, before describing the Northwest District Plan or NDP and its

1 implementing regulations adopted by Ordinances 177920 and 178020. Our purpose is to gain
2 some understanding of the city’s acknowledged “program to achieve the goal” with respect to
3 historic resources, in order to determine the role, if any, of the NDP in that program.

4 **1. Acknowledged Historic Resources Land Use Regulations**

5 Portland City Code (PCC) 33.445 provides for a “Historic Resource Protection Overlay
6 Zone” that applies to all historic resources, including the Alphabet Historic District. The principle
7 vehicles for protecting historic districts, it appears, are to require historic design review for certain
8 development or redevelopment proposals, and to require demolition review for proposals to
9 demolish historic structures within a district. PCC 33.445.320 describes the circumstances that do
10 and do not warrant historic design review in historic districts. Generally, proposals for “[e]xterior
11 alteration of a primary structure” or “[b]uilding a new structure” within a historic district trigger
12 historic design review. PCC 33.445.320(A). PCC 33.445.330 requires demolition review for
13 demolition of “contributing” structures within a district. The procedures and standards for
14 demolition review are set out in PCC 33.445.800.

15 PCC 33.846.060 sets out the procedures and standards for historic design review.
16 PCC 33.846.060(E)(1)(c) specifies that, for the Alphabet Historic District, the approval criteria for
17 historic design review are the Community Design Guidelines and the Historic Alphabet District
18 Community Design Guidelines Addendum. PCC 33.846.060(G) sets out “other approval criteria”
19 that are in addition to any district-specific guidelines. If there is a conflict between a criterion in
20 PCC 33.846.060(G) and a district-specific guideline, the criterion supersedes the guideline.
21 PCC 33.846.060(E)(4).

22 **2. Other Land Use Regulations**

23 The above-described regulations at PCC 33.445, 33.846 and the district-specific guidelines
24 referenced in those regulations are indisputably part of the city’s acknowledged “program to achieve
25 the goal” with respect to historic districts. However, other regulations, policies or guidelines may
26 also be part of that program. We understand NWDA to argue that the underlying residential and

1 commercial zones within the Alphabet Historic District are also part of the program. *See*
2 OAR 660-023-0050(1) (a program to achieve the goal “may include zoning measures that partially
3 or fully allow conflicting uses”). In particular, NWDA argues that the setbacks and similar
4 limitations imposed under those residential and commercial zones for new development are part of
5 the program to achieve Goal 5, because those setbacks and other limitations may function to protect
6 historic structures within the district. As discussed below, the NDP specifically eliminates side and
7 rear setbacks otherwise applicable in the multi-dwelling residential zone for three of the commercial
8 parking structures authorized in the plan.

9 **3. Northwest District Plan and Regulations**

10 As noted, Ordinance 177920 adopts the NDP, while Ordinance 178020 adopts code
11 amendments implementing the NDP. Together, both ordinances authorize six commercial parking
12 garages at particular sites within the Alphabet Historic District. The regulations adopted by
13 Ordinance 178020 are codified at PCC 33.562. We briefly describe the uses allowed under
14 PCC 33.562.130.

15 PCC 33.562 allows four parking garages as a permitted use, on three small sites that are
16 split-zoned for multifamily and commercial use and one site zoned for multifamily use. Three of
17 these sites are currently used as surface parking lots, and half of the fourth site is approved for a
18 commercial parking lot. The number of parking spaces allowed on these four sites is limited to 75
19 or 110, depending on the site, and the height limit on the multifamily-zoned portions is reduced from
20 45 feet to 30 feet. Three of these four sites are allowed without the side and rear setbacks
21 otherwise applicable in the underlying base zones.

22 A parking garage is allowed as a conditional use on two other sites, one with split
23 residential/commercial zoning and another with multi-family zoning. The number of parking spaces
24 on these two sites is limited to 450 spaces, and the total number of parking spaces on all six sites is
25 capped at 650. There are no historical structures on any of the six sites.

1 The six parking structures are subject to historic design review under the city’s existing Goal
2 5 program. In addition, the NDP adopts “Desired Characteristics and Traditions” statements
3 applicable to six areas in the Northwest District that function as an amendment to the Community
4 Design Guidelines. Specifically, review bodies will apply the statements when determining whether
5 or not proposed development meets the intent of Guideline P1, one of the guidelines applied during
6 historic design review in the Alphabet Historic District. Record 336.

7 **C. The Parties’ Arguments**

8 The parties’ arguments and positions have evolved somewhat since the last time the parties
9 were before this Board. Before LUBA, NWDA argued that Goal 5 was implicated under
10 OAR 660-023-0250(3)(a) and (b) because adoption of the NDP and its regulations amended the
11 city’s Goal 5 program and also because the NDP and its regulations allowed “new uses” that could
12 be conflicting uses. *See* n 4. The city and intervenor, on the other hand, took the position that the
13 NDP and its regulations were not amendments to or part of the city’s Goal 5 program with respect
14 to historic resources, and therefore Goal 5 was not triggered under OAR 660-023-0250(3)(a). As
15 noted, the city also argued that OAR 660-023-0200(7) exempted the city from the obligation to
16 conduct an ESEE analysis, even if the Goal 5 rule is triggered under OAR 660-023-0250(3)(b).
17 NWDA made no written response to the city’s arguments with respect to OAR 660-023-0200(7).
18 As explained above, we ultimately agreed with the city that if OAR 660-023-0200(7) exempts the
19 city from the obligation to conduct an ESEE analysis in developing its Goal 5 program with respect
20 to historic resources, the rule implicitly exempts the city from that obligation in adopting plan
21 amendments that modify that program or that allow uses that could conflict with historic resources.

22 Before the Court of Appeals, NWDA argued that the OAR 660-023-0200(7) exemption
23 applies only to programs that in fact *protect* historic resources. Because the NDP and its
24 implementing regulations harm rather than protect historic resources, NWDA argued, they do not
25 fall within the exemption. As explained, the court ultimately concluded that the dispositive question

1 with respect to OAR 660-023-0200(7) is whether the challenged ordinances are “programs to
2 protect historic resources” under that subsection, and therefore whether the exemption applies.

3 In the supplemental briefing allowed on remand, NWDA continues to take the position that
4 the NDP and its regulations are not “programs to protect historic resources” within the meaning of
5 OAR 660-023-0200(7), for the reasons argued to the court, and therefore the exemption does not
6 apply. However, NWDA also advances a new or at least a refined argument that was not
7 presented to LUBA or, as far as we can tell, to the court.

8 In addition to arguing that OAR 660-023-0200(7) does not apply because the NDP and its
9 regulations harm rather than protect historic resources, NWDA cites to the definition of “protect” at
10 OAR 660-023-0200(1)(e). As noted above, that definition states that “protect” means “to require
11 local government review of applications for demolition, removal, or major exterior alteration of a
12 historic resource.” Thus, NWDA argues, when OAR 660-023-0200(7) uses the phrase “program
13 to *protect* historic resources,” that reference is not necessarily to the city’s Goal 5 program in its
14 entirety, but only to those aspects of the city’s Goal 5 program that concern “local government
15 review of applications for demolition, removal, or major exterior alteration of a historic resource.”
16 We understand NWDA to argue that the OAR 660-023-0200(7) exemption would apply to the
17 challenged ordinances only if those ordinances amended the PCC provisions that govern demolition
18 review or historic design review, at PCC 33.445 or 33.846, and then only to the extent those
19 amendments concern demolition, removal or major exterior alteration of a historic resource. In
20 other words, NWDA argues that the question is not whether the challenged ordinances are part of
21 the city’s “program” or “program to achieve the goal” as those terms are broadly defined by
22 OAR 660-023-0010(6), but whether the challenged ordinances amend the city’s regulations
23 regarding demolition, removal or exterior alterations of historic resources, and thus constitute a
24 “program to protect historic resources.”

25 The respondents’ positions have also evolved in the course of these appeals. Intervenor-
26 respondent Nob Hill (intervenor) now argues that the NDP and its regulations are part of the city’s

1 Goal 5 “program” as that term is broadly defined at OAR 660-023-0010(6), and therefore agrees
2 with the city that it is exempt from the obligation to conduct an ESEE analysis under OAR 660-
3 023-0200(7). Respondents cite to findings indicating that one of the main purposes of the NDP
4 and its regulations is to protect the historic district. The city also notes that commercial parking is an
5 allowed use in the commercial zones along NW 21st and NW 23rd avenues in the heart of the
6 historic district, and argues that many of the lots in those commercial zones are developed with
7 historic contributing structures, structures that legally can be demolished. Once those structures are
8 demolished, the city argues, the sites could be redeveloped with commercial parking uses under the
9 existing historic preservation program, in order to meet the demand for 3000 parking spaces
10 identified in the city’s decision. The city argues that the challenged ordinances forestall or reduce
11 the likelihood of such demolition by authorizing six commercial parking garages on sites with no
12 historic structures, subject to reduced height limitations and design review standards designed to
13 mitigate impacts on adjacent properties.

14 In addition, the city argues that the NDP effectively amends the Community Design
15 Guidelines to add the “Desired Characteristics and Traditions” statements as considerations in
16 applying the guidelines. Because the challenged ordinances amend the criteria that will be applied in
17 conducting historic design review, the city argues, the ordinances constitute part of the city’s
18 “program to protect historic resources” within the meaning of OAR 660-023-0200(7).

19 **D. Analysis**

20 How the various provisions of OAR 660-023-0200 are supposed to work together, much
21 less how OAR 660-023-0200 is supposed to work with the remainder of the Goal 5 rule, is less
22 than clear to us. However, although it is a close question, for the following reasons we agree with
23 respondents that the NDP and its regulations are part of the “program to protect historic resources”
24 within the meaning of OAR 660-023-0200(7) and therefore exempt from the obligation to conduct
25 an ESEE analysis.

1 We begin with the first sentence of OAR 660-023-0200(2), which provides that local
2 governments are not required to amend acknowledged plans or land use regulations in order to
3 provide new or amended inventories or programs regarding historic resources. Although written
4 awkwardly, this sentence essentially makes adoption of “new or amended inventories or programs
5 regarding historic resources” an optional exercise, except where the rule specifies otherwise.
6 OAR 660-023-0200 includes few mandatory requirements. Aside from the requirement at
7 OAR 660-010-0200(5) to adopt an inventory as a land use regulation, there is no requirement that
8 a local government adopt or amend comprehensive plan provisions and land use regulations to
9 actually protect historic resources. Local governments are merely “encouraged to adopt historic
10 preservation programs regarding the demolition, removal, or major exterior alteration of all
11 designated historic resources.” OAR 660-023-0200(7). Even then, property owners may refuse
12 to allow their property to be designated and may request removal of their property from the
13 inventory, which would bring the property out from under some if not all regulations under a Goal 5
14 program to protect historic resources, assuming a local government has in fact adopted such
15 regulations. OAR 660-023-0200(5) and (6).

16 The optional theme is continued in the second sentence of OAR 660-023-0200(2), which
17 provides that the standard Goal 5 process at OAR 660-023-0030 through 660-023-0050 applies
18 “in conjunction with the requirements of this rule when local governments *choose* to amend
19 acknowledged historic preservation plans and regulations.” (Emphasis added.) Read together with
20 the first sentence, it seems relatively clear that the “standard Goal 5 process” applies only when the
21 local government in fact chooses to amend its acknowledged historic preservation plans and
22 regulations, in other words, its “program to achieve the goal” with respect to historic resources.
23 Even then the standard “sequence of steps” is not “recommended,” and local governments are
24 encouraged to first adopt a historic preservation plan and preservation ordinance *before* compiling

1 the inventory of historic resources. OAR 660-023-0200(2) and (3).⁸ It is perhaps significant that
2 the last sentence of OAR 660-023-0200(3) mentions only two of the three steps in the standard
3 Goal 5 process, and does not refer to the intermediate step, the ESEE process.

4 The only explicit reference to the ESEE process is in OAR 660-023-0200(7), which as
5 noted exempts local governments from the obligation to conduct an ESEE analysis “in order to
6 determine a program to protect historic resources.” As respondents understand OAR 660-023-
7 0200(7), the key term here is “program,” which OAR 660-023-0010(6) defines broadly as “a plan
8 or course of proceedings and action either to prohibit, limit, or allow uses that conflict with
9 significant Goal 5 resources[.]” Because the challenged ordinances adopt plan and land use
10 regulations that prohibit, limit or allow uses that conflict with Goal 5 resources, respondents argue,
11 the ordinances are part of the city’s “program to achieve the goal” with respect to historic resources
12 and therefore fall within the exemption.

13 For NWDA, the key term in OAR 660-023-0200(7) is “protect,” which OAR 660-023-
14 0200(1)(e) defines as meaning “to require local government review of applications for demolition,
15 removal, or major exterior alteration of a historic resource.” According to NWDA, only decisions
16 or aspects of decisions that adopt or amend programs or parts of programs that provide for local
17 government review of applications for demolition, removal or major exterior alteration of historic
18 resources qualify for the OAR 660-023-0200(7) exemption. NWDA argues that all other
19 decisions or aspects of decisions, including decisions to prohibit, limit or allow conflicting uses, must
20 undergo the ESEE process.

21 NWDA’s view has some support in the second sentence of OAR 660-023-0200(7),
22 which, following the exemption for “program[s] to protect historic resources,” encourages local
23 governments to adopt “historic preservation regulations regarding the demolition, removal, or major

⁸ How the local government is supposed to figure out whether and how to protect historic resources without knowing what those resources are is not explained. The intent may be to encourage local governments to adopt protective regulations without waiting to develop an inventory.

1 exterior alteration of all designated historic resources.” That language, which repeats the definition
2 of “protect” at OAR 660-023-0200(1)(e), suggests that the term “protect” as used in the first
3 sentence has the specific meaning assigned it by OAR 660-023-0200(1)(e).

4 The issue boils down to whether OAR 660-023-0200(7) is intended to be a
5 comprehensive exemption from the ESEE process for decisions that adopt or amend the city’s
6 “program” to achieve the goal with respect to historical resources, or whether the rule functions
7 much more narrowly, to exempt only decisions or portions of decisions that adopt or affect what
8 may be only a subset of the city’s program, those that directly relate to reviews for demolition,
9 removal or exterior modification of historic resources.

10 Neither view is compelled by, and both views have some support in, the pertinent text and
11 context. We are ultimately persuaded by the following considerations, however, that OAR 660-
12 023-0200(7) is intended as a comprehensive rather than limited exemption from the ESEE process.

13 First, we agree with respondents that the operative term is “program.” That term is broadly
14 defined, and the challenged decisions adopt plan and land use regulations that fall within that broad
15 definition. The phrase “to protect historic resources” describes “program,” but there is little to
16 suggest that that modifier is intended to limit the scope of “program” to a mere subset of a local
17 government’s program or programs to achieve the goal with respect to historic resources. A
18 program to achieve the goal with respect to a particular resource category may have multiple
19 components or distinct sub-programs, and may be (indeed must be) site-specific. But in many if not
20 most cases a local government program to achieve the goal with respect to historic resources will
21 form a unitary whole in which any regulations requiring “local government review of applications for
22 demolitions, removal, or major exterior alteration of a historic resource” are intertwined with other
23 regulations and plan policies that govern historic resources.

24 The city’s regulations at PCC 33.445 and 33.846, for example, provide some of the
25 standards and procedures governing applications for demolition, removal and major exterior
26 alteration of historic resources, but those regulations are merely part of a larger scheme that

1 regulates more than demolition, removal or exterior modification of historic resources. As far as we
2 can tell the city applies the same or similar historic design review standards and procedures to
3 applications for major exterior alterations of a historic structure and to applications for *new*
4 development on vacant land within a historic district. If the scope of the exemption is strictly limited
5 to regulations that “protect” historic resources as narrowly defined at OAR 660-023-0200(1)(e), as
6 NWDA argues, then the city would be obligated to conduct an ESEE analysis when it adopts or
7 amends regulations governing new development within a historic district, but not when it adopts or
8 amends the *same* regulations governing exterior alteration of a historic structure within a district.⁹
9 NWDA’s approach would require Solomonic judgment from local governments, in discerning which
10 portions of their program “protect” historic resources within the narrow meaning of OAR 660-023-
11 0200(1)(e) and which portions go beyond those minimal protections.

12 Further, NWDA’s argument is premised on the view that the meaning of “protect” as used
13 in OAR 660-023-0200(7) is exclusively determined or limited by the definition at OAR 660-023-
14 0200(1)(e), and that “protect” cannot have any broader meaning. As noted above, OAR 660-
15 023-0010 sets out several definitions that apply throughout the Goal 5 rule “unless the context
16 requires otherwise.” OAR 660-023-0010(7) provides two definitions of “protect.” When applied
17 to an individual resource site, “protect” means to limit or prohibit conflicting uses. When applied to
18 a resource category, “protect” means to “develop a program consistent with this division.” In the
19 usual case, a specific definition would be deemed to apply instead of a general definition. However,
20 nothing in OAR 660-023-0200 “requires” that the general definitions of “protect” at OAR 660-
21 023-0010(7) do not apply, or requires exclusive application of the definitions at OAR 660-023-
22 0200(1). While the definition at OAR 660-023-0200(1)(e) certainly applies within the rule, there is
23 no suggestion in the rule that it is the exclusive source of meaning. There is no inherent reason why

⁹ Indeed, as we understand it, that very scenario is present here. As the city points out, the NDP adds a new criterion or consideration to the historic design review guidelines that apply to various kinds of development proposals within a historic district, including but not limited to major exterior alterations to historic structures.

1 the term “protect” as used in OAR 660-023-0200 cannot encompass both the meaning at
2 OAR 660-023-0200(1)(e) and one of the two meanings at OAR 660-023-0010(7).

3 The term “protect” occurs in OAR 660-023-0200(7) in the phrase “in order to determine a
4 program to protect historic resources.” The phrase applies that term to a resource category, and
5 concerns “determin[ing] a program,” which implicates the second definition at OAR 660-023-
6 0010(7): “development of a program” to achieve the goal.¹⁰ To the extent the definitions at
7 OAR 660-023-0010(7) apply, those definitions support respondents’ position that the exemption at
8 OAR 660-023-0200(7) is intended to apply broadly to “development of the program” to achieve
9 the goal with respect to historic resources, and is not narrowly limited to those provisions requiring
10 review of demolition, review and major exterior alteration of historic resources.

11 Finally, as noted above, NWDA advances its arguments under OAR 660-023-0200(1)(e)
12 for the first time on remand, as a refinement of its more general argument that the exemption at
13 OAR 660-023-0200(7) is limited to decisions that adopt or amend regulations that in fact “protect”
14 historic resources in the commonly understood sense of that term, *i.e.*, actions that preserve and do
15 not harm historic resources. NWDA argued to the court, and now to us, that a decision that allows
16 what could be a conflicting use (commercial parking structures) in a historic district and eliminates
17 setbacks for such uses adjacent to historic structures cannot possibly “protect” historic resources in
18 any sense of that term. In effect, NWDA argues that “protect” as used in OAR 660-023-0200(7)
19 has the first of the two meanings defined at OAR 660-023-0010(7): actions that “limit or prohibit
20 uses that conflict with a significant resource site.”

21 We are not persuaded by NWDA’s more general argument regarding the meaning of
22 “protect,” that it limits the scope of the exemption to programs or aspects of programs that limit or
23 prohibit conflicting uses. As noted, the definition of “program” at OAR 660-023-0010(6) includes

¹⁰ “Determining” a program may not necessarily constitute the same thing as “developing” a program, but we have difficulty articulating a meaningful distinction in the present context. The two terms are so close in meaning that we suspect a different word choice was not intended.

1 plans and actions “either to prohibit, limit or allow uses that conflict with Goal 5 resources[.]” A
2 program to achieve the goal can and often does include provisions that allow conflicting uses in
3 whole or in part, subject to various limitations. Moreover, as discussed, such programs often
4 consist of a unitary set of regulations that to various degrees and in an intertwined manner may
5 prohibit some conflicting uses while limiting others or allowing them fully. It would be difficult if not
6 impossible for local governments to sort out which regulations are subject to the ESEE analysis and
7 which are exempt, under NWDA’s reading of the rule. Again, the challenged ordinances are
8 perhaps a case in point: The NDP and its regulations allow for six commercial parking structures on
9 specific sites within the historic district on which no historic structures stand subject to reduced
10 height limitations, parking caps, enhanced historic design review criteria and conditional use criteria.
11 Three of the sites can be developed with zero side and rear setbacks, in an apparent trade-off for
12 the reduced height. Taken as a whole, these regulations are an interwoven mix of provisions that to
13 various degrees prohibit, limit or allow a use that could conflict with the historic district. Interpreting
14 the OAR 660-023-0200(7) exemption to apply only to aspects of the program that strictly *limit* or
15 *prohibit* conflicting uses would effectively make the exemption useless. Given the difficulty of
16 figuring out which provisions are subject to the ESEE process and which are not, local governments
17 would be effectively forced to apply the ESEE process to the whole.

18 To sum up, we agree with respondents that the NDP and its implementing regulations are
19 part of the city’s “program to achieve the goal” with respect to historic resources, and thus subject
20 to the OAR 660-023-0200(7) exemption. While the scope and subject matter of that exemption is
21 exceedingly ambiguous, for the foregoing reasons we read the exemption to be comprehensive; that
22 is, it extends to decisions that amend the city’s program to achieve the goal, whether those
23 amendments prohibit, limit or allow uses that could be conflicting uses with respect to historic
24 resources, or some combination thereof.

1 **E. Goal 5 Requirements if the Exemption Does Not Apply**

2 In our initial decision, we rejected NWDA’s arguments under the first assignment of error,
3 first subassignment of error on alternate grounds. After concluding that the city was not required to
4 apply the ESEE process pursuant to OAR 660-023-0200(7), we held in the alternative that the
5 city’s findings suffice to demonstrate that the challenged ordinances comply with Goal 5, and that
6 NWDA, which did not challenge those findings, had not demonstrated otherwise.

7 On appeal, NWDA argued to the court that we erred in concluding that even if the
8 exemption did not apply the city’s findings sufficed to demonstrate compliance with Goal 5. In a
9 footnote, the court stated that, in light of its conclusion that the Board must reconsider whether the
10 city’s actions are exempt under OAR 660-023-0200(7), the court would not address “the legal
11 requirements that Goal 5 and its implementing rules impose if the city’s actions are not exempt.”
12 198 Or App at 303, n 13. Because the correct answer under OAR 660-023-0200(7) is far from
13 clear to us, we deem it appropriate to consider further whether we correctly resolved the question
14 of what the city must do if its actions are not exempt.

15 In a portion of our decision quoted at n 2, we relied on an earlier case of ours,
16 *Homebuilders Assoc. v. City of Eugene*, 41 Or LUBA 370, 443-44 (2002), to conclude that
17 where application of Goal 5 is triggered pursuant to OAR 660-023-0250(3), the city need not in all
18 cases repeat the entire Goal 5 process, including the ESEE process, even where the exemption at
19 OAR 660-023-0200(7) does not come into play. We stated that “[i]n many cases no more is
20 required than an explanation for why the existing program to protect Goal 5 resources, as amended
21 or affected by the challenged post-acknowledgment plan amendment, continues to be sufficient to
22 protect those resources.” 47 Or LUBA at 543. We examined the city’s findings, noted that
23 NWDA did not challenge those findings on any other basis than failure to follow the ESEE process,
24 and found those findings adequate to explain why the city’s actions are consistent with Goal 5. *Id.*
25 at 544.

1 We continue to believe that our analysis of what Goal 5 requires when triggered by a PAPA
2 under OAR 660-023-0250(3)(b) is substantively correct. We take this opportunity, however, to
3 clarify what we believe Goal 5 requires in such circumstances, to assist the parties and the court in
4 any future appeals in this case.

5 Much of the Goal 5 rule, and in particular the standard Goal 5 process, is clearly written to
6 apply to local governments that are developing or comprehensively amending Goal 5 inventories and
7 programs on a legislative scale. There are few requirements that are specific to PAPAs that amend
8 or affect existing acknowledged programs to achieve Goal 5 with respect to a particular resource
9 site. The extent to which a local government must undertake the standard Goal 5 process in
10 adopting a PAPA in such circumstances will depend on the nature of the PAPA. For example, not
11 many PAPAs that trigger the Goal 5 rule under OAR 660-023-0250(3)(b) will require the local
12 government to redo the inventory process, the first step in the standard Goal 5 process at
13 OAR 660-023-0030.

14 The ESEE process at OAR 660-023-0040 requires local governments to “develop a
15 program to achieve Goal 5 for all significant resource sites” based on an analysis of the ESEE
16 consequences that could result from a decision to allow, limit, or prohibit a conflicting use.
17 OAR 660-023-0040(1).¹¹ The rule describes four steps in the standard ESEE process: (1)

¹¹ OAR 660-023-0040 provides, in relevant part:

“(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. * * * The ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:

- “(a) Identify conflicting uses;
- “(b) Determine the impact area;
- “(c) Analyze the ESEE consequences; and
- “(d) Develop a program to achieve Goal 5.

-
- “(2) Identify conflicting uses. Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. * * * The following shall also apply in the identification of conflicting uses:
- “(a) If no uses conflict with a significant resource site, acknowledged policies and land use regulations may be considered sufficient to protect the resource site. * * *
- “(b) A local government may determine that one or more significant Goal 5 resource sites are conflicting uses with another significant resource site. The local government shall determine the level of protection for each significant site using the ESEE process and/or the requirements in OAR 660-023-0090 through 660-023-0230 (see OAR 660-023-0020(1)).
- “(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.
- “(4) Analyze the ESEE consequences. Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.
- “(5) Develop a program to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:
- “(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.
- “(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.

1 identify conflicting uses, (2) determine the impact area, (3) analyze the ESEE consequences, and (4)
2 develop a program to achieve Goal 5. The rule does not specify what must be done when a local
3 government already *has* an acknowledged program to achieve Goal 5 with respect to a particular
4 resource site, and is considering whether proposed new uses that could conflict with a resource site
5 are consistent with Goal 5. In that context, we continue to believe that the local government need
6 not in all cases undertake all four steps of the standard ESEE process, and need not in all cases
7 engage fully in any steps that are undertaken. For example, in addressing a PAPA that allows a
8 new potentially conflicting use at a specific location, it may not take much to “identify” the conflicting
9 use, and there may be no need to identify the “impact area.”

10 If the local government determines that the potentially conflicting use in fact does not
11 conflict, it may simply explain why it believes that to be the case and rely on its acknowledged
12 policies and land use regulation. OAR 660-023-0040(2)(a). If the local government determines
13 that the use is a conflicting use, it must “determine the level of protection” for the resource site using
14 the ESEE process and/or any resource-specific Goal 5 rules. OAR 660-023-0030(2)(b).

15 Analysis of the ESEE consequences requires the local government to consider the positive
16 and negative economic, social, environmental and energy consequences that could result from
17 decision to allow, limit, or prohibit a conflicting use. OAR 660-023-0030(4). The rule grants local
18 governments considerable flexibility in how it conducts the analysis, allowing similar or commonly-
19 occurring conflicting uses to be considered together. *Id.* The ESEE analysis must also consider any
20 applicable statewide goals or acknowledged plan requirements. *Id.* Based on that ESEE analysis
21 and any resource-specific Goal 5 requirements, the local government must “determine whether to
22 allow, limit, or prohibit identified conflicting uses for significant resource sites.” OAR 660-023-

“(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.”

1 0040(5). Under OAR 660-023-0040(5)(b), a local government “may decide that both the
2 resource site and the conflicting uses are important compared to each other, and, based on the
3 ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site
4 to a desired extent.”

5 In our view, the above “standard” ESEE analysis may be considerably simplified where the
6 local government already has an acknowledged program to achieve the goal, and is merely
7 considering a PAPA that allows a new conflicting use that was not considered in adopting the
8 acknowledged program. In that circumstance, the local government has already made key choices
9 about the relative importance of the resource site and a range of conflicting uses, and has adopted a
10 course of action based on those choices. We do not see that the local government must necessarily
11 reconsider or re-justify those basic choices, in adopting a PAPA that allows a new conflicting use.
12 Where, as here, the local government’s acknowledged program has chosen to allow conflicting uses
13 subject to various limitations, the local government might conclude, for example, that the new
14 conflicting use has similar impacts to conflicting uses that were considered in adopting the
15 acknowledged program, and simply choose to rely on the existing program. Or the local
16 government may decide that the new conflicting use has greater or more negative impacts, and
17 choose to impose new limitations, or to not allow the new conflicting use at all.

18 In the present case, the city’s acknowledged program to achieve the goal with respect to
19 the Alhabet Historic District includes a number of components, the most pertinent one being
20 regulations that subject new development otherwise allowed in the underlying high-density
21 residential and commercial zones to historic design review. Both zones allow a variety of retail,
22 office and commercial uses. A potentially important difference is that the commercial zone allows
23 commercial parking as a permitted use, while the residential zone does not. It is reasonably clear
24 that in adopting its program to achieve the goal with respect to the Alhabet Historic District, the
25 city determined that potentially conflicting uses such as new retail, office and commercial uses

1 (including commercial parking, at least in commercial zones) should be allowed in the district,
2 subject to historic design review and other requirements that function to reduce conflicts.

3 As noted, in its petition for review NWDA faulted the city for failing to address “the formal
4 demands of conducting a Goal 5 inventory, identifying conflicts and performing an ESEE analysis[.]”
5 Petition for Review 11. We rejected that argument, explaining that the city was not required to
6 conduct an ESEE analysis and, in any case, NWDA did not otherwise challenge the city’s findings
7 addressing Goal 5, or “explain why those findings are inadequate to demonstrate that the city’s
8 program to protect the historic district, to the extent amended or affected by Ordinance 178020,
9 continues to comply with Goal 5.” 47 Or LUBA at 544. We now reconsider the responsiveness of
10 the city’s findings to the Goal 5 requirements, in light of the foregoing discussion.

11 The city adopted 27 pages of findings supporting Ordinance 178020, which address Goal
12 5, other statewide planning goals, and applicable city comprehensive plan policies implementing the
13 goals. For the reasons explained above, we disagree with NWDA that the city was required to
14 satisfy the “formal demands of conducting a Goal 5 inventory,” or a formal identification of
15 conflicting uses. There is no doubt about the identity of the conflicting use in this case, and no need
16 to reconsider the inventory. NWDA is correct that the city did not explicitly conduct a formal
17 ESEE analysis, or explicitly determine whether to allow, limit, or prohibit the identified conflicting
18 use, at least in those terms. However, we believe that the city implicitly made the required
19 determination, and that its findings, although not intended to address OAR 660-023-0040(5), are
20 nonetheless sufficient to satisfy the rule and demonstrate compliance with Goal 5.

21 The city’s findings addressing Goal 5 and city plan policies implementing historic resources
22 protected by Goal 5 are set out in the margin.¹² It is clear from those findings that the city

¹² The city’s findings 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:

1 concluded that the height reductions, historic design review and other limitations on the six
2 commercial parking structures are sufficient to “minimize impacts to the historic district” and to
3 ensure that the structures will “fit in with the historic context of the district.” Those findings do not
4 explicitly address positive and negative economic, social, environmental or energy consequences of
5 allowing or not allowing the proposed structures, and if those findings were the extent of the city’s
6 efforts we might agree with NWDA that remand is necessary for more focused consideration of
7 those consequences. However, the city’s findings also conclude that the proposed parking
8 structures are consistent with a number of other statewide planning goals and comprehensive plan
9 policies that address the same or very similar considerations. The findings address Statewide
10 Planning Goals 6 (Air, Water and Land Resources Quality), 9 (Economic Development), 10

“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 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.

“**Policy 3.4, Historic Preservation**, calls for the preservation and retention of historic structures and areas throughout the city. The amendments support this policy for the reasons below. Findings for State Goal 5, Open Space, Scenic and Historic Areas, and Natural Resources also support this policy.

“a. Policy 4, Parking, and its implementing objectives seek to provide and manage parking while protecting and enhancing the livability and urban character of the district.

“b. Zoning Code provisions allow a limited additional supply of commercial parking on identified sites that were thoughtfully considered and do not involve a historic landmark or contributing structure. Any new commercial parking development is limited in size and dimensions and would have to be permitted through historic design review and meet specific historic district guidelines. These guidelines along with community design guidelines and development regulations will make development of these structures fit in with the historic context of the district.” Record 63.

1 (Housing) and 13 (Energy Conservation), and conclude in each case that the proposed parking
2 structures are consistent with those goals.¹³ The city’s findings also address a number of
3 comprehensive plan policies involving neighborhood preservation, housing, economic development,
4 business development, transportation, energy, and the environment, among others. Record 61-
5 75.¹⁴ Read together, it is abundantly clear that the city believes the positive economic, social,
6 environmental and energy consequences of allowing the parking structures far outweigh the negative
7 consequences with respect to the historic district. Had the city adopted findings that explicitly
8 considered the ESEE consequences, it is difficult to imagine how those findings would differ in
9 substance from the findings the city adopted to address the cited statewide planning goals and
10 comprehensive plan policies. If there is any necessary consideration missing from those findings,
11 NWDA has not identified it, other to complain that the city failed to satisfy the “formal demands” of
12 the ESEE process. We decline to remand the decision to the city to adopt a formal ESEE analysis
13 denominated as such, when the city’s findings in all but name appear to constitute an ESEE analysis.

¹³ For example, the city’s findings under Goal 13 state, in relevant part:

“The 6 sites selected for potential commercial parking structures are strategically located in the most active and densest mixed-use area in the Northwest District. The number of spaces allowed under the Zoning Code regulations is limited as is the number of parking spaces per site. A developed parking structure on one or more of the 6 sites will be a resource for automobile drivers to go directly to the garage to park as opposed to circling around the neighborhood looking for on-street parking spaces.” Record 58.

¹⁴ For example, the city’s findings under Comprehensive Plan Goal 3, Neighborhoods, state in relevant part:

“**Goal 3, Neighborhoods**, calls for preservation and reinforcement of the stability and diversity of the city’s neighborhoods while allowing for increased density. The amendments along with the recently adopted *Northwest District Plan* are consistent with this goal because the combination of policies, objectives and actions work together to ensure that increased density occurs within the Northwest District while simultaneously preserving and reinforcing the stability and diversity of the district. The Parking Policy and Regulations amendments * * * reinforces commercial and residential vitality by * * * allowing a limited amount of additional commercial parking adjacent to the 23rd and 21st main streets. The latter must be in a structure, is limited in the number of spaces that can be built, be approved through historic design review, and is subject to other Northwest Plan District and Zoning Code development standards. This is to ensure that these generally smaller parking structures fit in with the neighborhood and do not degrade it.” Record 63.

1 In sum, even if the challenged ordinances do not fall within the exemption to the ESEE
2 process at OAR 660-023-0200(7), petitioners have not demonstrated that the city's findings are
3 insufficient to show compliance with the ESEE process at OAR 660-023-0040.

4 The first assignment of error, first subassignment of error (NWDA) is denied.

5 **DISPOSITION**

6 The court's decision does not require us to reconsider any other portion of our initial
7 decision. For the reasons expressed in our initial opinion, Ordinance 177920 is remanded. For the
8 reasons set out in our initial decision, as supplemented here, Ordinances 177921, 177993, 178020
9 and Resolution 36171 are affirmed.