

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 PORT OF ST. HELENS,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF SCAPPOOSE,  
10 *Respondent,*

11 and

12  
13 SIERRA PACIFIC COMMUNITIES, LLC,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2008-114

17  
18 FINAL OPINION  
19 AND ORDER

20  
21 Appeal from City of Scappoose.

22  
23 Mark J. Greenfield, Portland, filed the petition for review and argued on behalf of  
24 petitioner.

25  
26 E. Andrew Jordan, Portland, filed a response brief and represented respondent. With  
27 him on the brief were Jordan Schrader Ramis PC, Jack L. Orchard, Thorkild G. Tingey and  
28 Ball Janik LLP.

29  
30 Jack L. Orchard, Portland, filed a response brief and argued on behalf of intervenor-  
31 respondent. With him on the brief were Thorkild G. Tingey, Ball Janik LLP, E. Andrew  
32 Jordan and Jordan Schrader Ramis PC.

33  
34 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

35  
36 RYAN, Board Member, did not participate in the decision.

37  
38 AFFIRMED

39 12/31/2008

40  
41 You are entitled to judicial review of this Order. Judicial review is governed by the  
42 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a decision that adopts comprehensive plan and land use regulation amendments.

**MOTION TO STRIKE**

On October 22, 2008, petitioner moved to strike appendices 1 and 2 of the city's and intervenor's Joint Response Brief. Petitioner also moved to strike page 14, lines six through 24 of the Joint Response Brief, which discuss the Federal Aviation Administration's (FAA's) Airport Compliance Handbook. Finally, petitioner moved to strike page 15, line 33 through page 16, line 19 of the Joint Response Brief, which discusses an order in a FAA enforcement proceeding. We understood petitioner to state at oral argument in this matter that it withdrew the motion to strike, except with regard to the discussion in the Joint Response Brief concerning the FAA's Airport Compliance Handbook.

Respondent and intervenor-respondent (respondents) argue that the FAA's Airport Compliance Handbook and the documents from the FAA enforcement proceeding are properly viewed as official acts of a federal agency. Those documents are cited to clarify existing federal law and are not offered as evidence outside the record in this appeal. Therefore, respondents argue, the Airport Compliance Handbook and the documents from the FAA enforcement proceeding are subject to official notice under OEC 202. *See McCaw Communications, Inc. v. Marion County*, 17 Or LUBA 206, 209 (1988), *rev'd on other grounds*, 96 Or App 552, 773 P2d 779 (1989) (LUBA will take official notice of the Code of Federal Regulations under OEC 202, as judicially cognizable law). Respondents similarly argue that the argument in the Joint Response Brief based on that judicially cognizable law should not be subject to petitioner's motion to strike.

We have taken official notice of the decisional law of the Land Conservation and Development Commission (LCDC). *DLCD v. Klamath County*, 24 Or LUBA 643, 646

1 (1993) (enforcement orders). The FAA enforcement proceeding documents are similarly  
2 subject to official notice under OEC 202(1), as decisional law of a federal agency. We also  
3 agree that the FAA’s Airport Compliance Handbook is properly the subject of official notice  
4 as the official act of a federal agency. OEC 202(2). Petitioner’s motion to strike is denied.

5 **FACTS**

6 **A. The Challenged Amendments**

7 The Scappoose Industrial Airpark (SIA or Scappoose Airport) is a combined airport  
8 and industrial park located in the City of Scappoose.<sup>1</sup> The City of Scappoose  
9 Comprehensive Plan (SCP) map designation for the Scappoose Airport and nearby  
10 surrounding lands is Industrial. The zoning designation for the Scappoose Airport under the  
11 Scappoose Land Use and Development Code (SLUDC) is Public Use Airport (PUA).  
12 SLUDC 17.69. The Scappoose Airport is also subject to a Public Use Airport Safety and  
13 Compatibility Overlay Zone (AO). SLUDC 17.88. The decision that is before us in this  
14 appeal does not change the existing Industrial comprehensive plan map designation, the PUA  
15 zoning map designation or the AO zoning overlay designation. All of those designations  
16 applied to the Scappoose Airport and surrounding lands before the challenged decision was  
17 adopted and continue to apply after the challenged decision was adopted.

18 Intervenor-respondent (intervenor) sought the amendments that were adopted by the  
19 challenged decision. The challenged decision amends the SCP to create a new Airport (A)  
20 comprehensive plan map designation. The decision also amends the SCP Airport Land Use  
21 Goals and Policies and adopts a new Airport Related (AR) zone. SLUDC 17.73. The  
22 parties’ focus and our focus in this opinion is on the new AR zone.

23 As a result of the challenged decision, the new AR zoning map designation could be  
24 applied to Scappoose Airport and surrounding lands in the future, in the place of their current

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<sup>1</sup> The parties generally refer to the Scappoose Industrial Airpark as SIA. In this opinion we refer to it as the Scappoose Airport.

1 PUA zoning map designation. The new AR zoning map designation potentially would allow,  
2 as a conditional use, what the parties refer to as airport residential development or residential  
3 airparks.<sup>2</sup> Airport residential development is not allowed under the current Industrial and  
4 PUA comprehensive plan and zoning map designations as either a permitted or a conditional  
5 use. For purposes of this appeal, the critical features of airport residential development are  
6 that the residences include home-based aircraft and those aircraft would have access to  
7 airport facilities via a through-the-fence (TTF) agreement with the airport sponsor.<sup>3</sup> Again,  
8 while the challenged decision does not apply the new AR zoning designation to the  
9 Scappoose Airport or any surrounding lands, the decision creates the potential for future  
10 decisions that might: (1) apply the new AR zoning map designation to the Scappoose Airport  
11 and surrounding lands in place of the current PUA zoning map designation and (2) approve  
12 applications for conditional use approval for airport residential development at the  
13 Scappoose Airport.

14 Finally, there are two additional features of the AR zone that merit mention at this  
15 point. First, an applicant for airport residential development in the AR zone must “provide a  
16 letter from the Federal Aviation Administration in support of the proposed project \* \* \*.”  
17 SLUDC 17.73.050. Second, before a final plat for airport residential development can be

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<sup>2</sup> The parties use those terms interchangeably.

<sup>3</sup> The new AR zone includes the following definitions;

“‘Airport residential development’ is a residential development in the vicinity of the Scappoose [Airport] requiring a conditional use permit that has a through-the-fence agreement with the airport sponsor to facilitate runway access for residents of the development.” SLUDC 17.73.030(B).

“‘Airport sponsor’ is the owner, manager, person, or entity designated to represent the interests of an airport. For the Scappoose [Airport], the airport sponsor is the Port of St. Helens.” SLUDC 17.73.030(C)

“‘Through the fence’ is access to an airport’s public landing area by aircraft based on land adjacent to, but not part of, the airport public property requiring a permit from the airport sponsor.” SLUDC 17.73.030(R)

1 recorded and before any development permits for airport residential development could be  
2 issued, a TTF agreement must “be secured from the airport sponsor.”

3 **B. The Federal Aviation Administration’s Afton Decision**

4 Much of petitioner’s dispute with the city and intervenor appears to be based directly  
5 or indirectly on the current position of the FAA regarding the compatibility of airport  
6 residential development with certain types of airports. TTF agreements exist at a number of  
7 Oregon airports, including some that allow access by aircraft based at nearby residences.  
8 Record 184-88. Almost all of the residential TTF agreements are at smaller private airports  
9 that do not receive federal funding. Simply stated, the FAA’s current position appears to be  
10 that airport residential development is compatible with smaller airports that do not receive  
11 federal funding but is incompatible with larger public airports that do receive federal  
12 funding.

13 The Oregon State Aviation System Plan places airports into one of five categories.  
14 Those categories range from Category 1 (Commercial Service Airports) to Category 5 (Low  
15 Activity General Aviation Airports). Record 189. Scappoose Airport is in Category 2  
16 (Business or High Activity General Aviation Airports), which have at least 30,000 annual  
17 operations that include at least 500 business related (turbine) aircraft operations. *Id.* The  
18 Scappoose Airport is a public airport, and it has received over \$4.8 million dollars in federal  
19 funding since 1977. Record 96. As a condition of receiving such federal funding, Congress  
20 requires that the Secretary of Transportation receive certain assurances from airport sponsors,  
21 including an assurance that the airport sponsor will take action to ensure that uses next to  
22 such airports will be “compatible with normal airport operations.” 49 USC 47107(a)(10).<sup>4</sup>

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<sup>4</sup> 49 U.S.C § 47107 is set out in relevant part below:

“49 U.S.C § 47107. **Project grant application approval conditioned on assurances about airport operations**”

1 As a condition of receiving its federal funding, the Port of St. Helens was required to agree to  
2 39 assurances, which became contractual obligations after the federal grant money was  
3 accepted. One of those assurances is Assurance 21, which provides:

4 “**21. Compatible Land Use.** It [the airport sponsor] will take appropriate  
5 action, to the extent reasonable, including the adoption of zoning laws, to  
6 restrict the use of land adjacent to or in the immediate vicinity of the airport to  
7 activities and purposes compatible with normal airport operations, including  
8 landing and takeoff of aircraft. In addition, if the project is for noise  
9 compatibility program implementation, it will not cause or permit any change  
10 in land use, within its jurisdiction, that will reduce its compatibility, with  
11 respect to the airport, of the noise compatibility program measures upon  
12 which Federal funds have been expended.” Record 312.

13 In a January 19, 2007 Order, the FAA considered whether the Afton-Lincoln County  
14 Wyoming Municipal Airport Joint Powers Board (hereafter Afton) had violated Assurance  
15 21 “by allowing and promoting the development of a residential airpark adjacent to the  
16 airport.” Record 290. The FAA concluded that Afton violated Assurance 21:

17 “The FAA generally discourages residential airparks adjacent to the airport  
18 property because such airparks can create a compatible land use problem,  
19 especially with noise compatibility and zoning issues, in the future. Grant  
20 assurance 21, Compatible Land Use, requires airport sponsors to take  
21 appropriate action, including the adoption of zoning laws, to restrict the use of  
22 land adjacent to, or in the immediate vicinity of, the airport to activities and  
23 purposes compatible with normal airport operations, including landing and  
24 taking off of aircraft. The FAA recognizes residential development adjacent  
25 to airport property as an incompatible land use.

26 “In this case, [Afton] not only failed to object to establishing the residential  
27 airpark, but also is actively involved in promoting its development. [Afton]  
28 made airport property available to the developer for the airpark, which  
29 includes residential homes. In addition, an Airport Board member is listed as

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“(a) **General Written Assurances.**— The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—

“\* \* \* \* \*

“(10) appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations[.]”

1 the contact person for the residential airpark. Having residential homes  
2 adjacent to the airport is an incompatible land use. The Director finds [Afton]  
3 is in violation of grant assurance 21, Compatible Land Use, by allowing and  
4 promoting the development of a residential airpark adjacent to the airport.”  
5 *Id.* (footnotes omitted).

6 In Afton’s April 19, 2007 appeal of the FAA January 19, 2007 Order, Afton  
7 explained that its activities regarding the airpark were done in consultation with the Denver  
8 FAA office. Joint Response Brief Appendix 1-3. In its corrective action plan, Afton agreed  
9 to “avoid promoting or encouraging any residential airparks in the future.” Joint Response  
10 Brief Appendix 1-6. A subsequent August 27, 2007 letter from the FAA to Afton explains  
11 that Afton acknowledged “that the FAA discourages residential airparks and considers them  
12 to be an incompatible land use.” Joint Response Brief Appendix 2-3. Afton also assured the  
13 FAA that it would not approve any new airparks, any expansion of the existing airpark or  
14 any TTF agreements for such new airparks or expansions of the existing airpark “without  
15 prior consent and approval from the FAA.” *Id.* Based on those assurances, the FAA  
16 concluded that Afton “is not currently in violation of grant assurance 21, Compatible Land  
17 Use, regarding development of a residential airpark adjacent to the airport.” *Id.* With those  
18 assurances regarding future or expanded residential airparks, the residential airpark that led  
19 to the FAA January 19, 2007 order apparently was allowed to remain and continue to have  
20 TTF access to the Afton airport.

21 **C. The Port’s Airport Master Plan**

22 Intervenor Port of St. Helens has adopted an Airport Master Plan. That Airport  
23 Master Plan was updated September 2004. Record 583-706. Almost two years later, on  
24 August 9, 2006, the Port approved an amendment of the Airport Master Plan to support  
25 consideration of residential airparks.

26 “There are a number of ways to develop a residential airpark at Scappoose  
27 Industrial Airpark. Since every airport is different, exploring all options is  
28 essential. The Port of St. Helens Board of Commissioners is supportive of a  
29 residential component adjacent to the Airpark and is willing to work with the  
30 private sector to provide residential development with airport access, if

1 reasonable and customary terms and conditions are adopted that will provide  
2 appropriate protection for the airport and will enhance its viability.” Record  
3 523.

4 In an April 25, 2007 letter to the Port of St. Helens regarding the application that led  
5 to the decision in this appeal, the FAA took the position, based on its Afton order, that  
6 residential airparks next to public airports that receive federal funds are an incompatible use.  
7 Record 413-14. The FAA also took the position in that letter that allowing such an  
8 incompatible land use would violate grant assurance 21. In a November 7, 2007 letter, the  
9 FAA advised the Port of St. Helens that if it “elects to promote or permit through the fence  
10 access \* \* \* to the airport from an off-airport residential airpark,” it would jeopardize its  
11 future federal funding. Record 331. The Port of St. Helens thereafter took action on  
12 November 14, 2007 to “suspend” the August 9, 2006 Airport Master Plan amendment.  
13 Record 230.

14 **D. The FAA’s Position Before the City of Scappoose in this Proceeding**

15 Before the city, the FAA took the position that approval of a TTF residential airpark  
16 at Scappoose Airport would violate grant assurance 21 and would lead to a loss of any future  
17 federal funding at Scappoose Airport. Record 76-85, 91-92. In a December 12, 2007 letter  
18 to the director of the Oregon Depart of Aviation, which appears in the record of this appeal,  
19 the FAA reiterated that position. Record 181-183.

20 **INTRODUCTION**

21 Before turning to petitioner’s assignments of error, we note that there are several  
22 recurring problems that arise in petitioner’s assignments of error. We discuss those recurring  
23 problems briefly before turning to the assignments of error.

24 **A. Petitioner’s Challenge is a Facial Challenge**

25 As we have noted, the decision that is before us in this appeal adopts the AR zone,  
26 but does not apply the AR zone to any property. Although it seems likely that intervenor will  
27 seek to have property near the Scappoose Airport rezoned to AR in the future, it is also

1 possible that no property will ever be zoned AR. If property is zoned AR in the future, that  
2 action would constitute a post-acknowledgment amendment of a land use regulation which  
3 would be reviewable at that time for compliance with applicable law. Similarly, any city  
4 decision to grant conditional use approval for airport residential development on any lands  
5 that might be zoned AR in the future would be a land use decision, subject to review by  
6 LUBA for compliance with applicable law. As we explained in *Okray v. City of Cottage*  
7 *Grove*, 47 Or LUBA 297, 301 (2004):

8 “Where, as here, a petitioner appeals an ordinance that (1) adopts a new zone  
9 potentially applicable to a number of properties but (2) does not actually apply  
10 that new zone to any property, the only challenges we can meaningfully  
11 review are facial challenges to the new zone, *i.e.*, arguments that the new zone  
12 is facially inconsistent with controlling legal standards such as comprehensive  
13 plan provisions, statutes, administrative rules or statewide planning goals. To  
14 advance such a facial challenge, the petitioner must demonstrate that the new  
15 zone is categorically incapable of being applied consistently with controlling  
16 legal standards. *See Rogue Valley Assoc. of Realtors v. City of Ashland*, 158  
17 Or App 1, 4, 970 P2d 685 (1999) (challenge to legislative zoning ordinance  
18 amendments is a facial challenge that, to succeed, must demonstrate that the  
19 amendments are categorically incapable of being applied consistent with  
20 statutory requirements for clear and objective regulations). \* \* \*”

21 Petitioner concedes that with the exception of the disputed authorization for airport  
22 residential development, the AR zone is consistent with applicable law.

23 **B. Petitioner’s Reliance on 49 USC 47107(a)(10) and Grant Assurance 21**

24 Petitioner’s assignments of error rely directly or indirectly on 49 USC 47107(a)(10)  
25 and Grant Assurance 21. There are two serious problems with that reliance.

26 The first problem is that, contrary to petitioner’s arguments, neither 49 USC  
27 47107(a)(10) nor Grant Assurance 21 categorically prohibit the city from adopting a zone  
28 that, if applied to airport property or property near the airport, would potentially allow airport  
29 residential development. The statute and the assurance merely require that airport sponsors  
30 provide assurance that they will take reasonable action to restrict uses of land near the airport  
31 to uses that are “compatible with normal airport operations.” Based on the Afton decision, it

1 appears the FAA currently interprets the 49 USC 47107(a)(10) and Grant Assurance 21 to  
2 require that airport sponsors not support or assist in securing approval for airport residential  
3 development at airports like Scappoose Airport. However, as we have already noted, the  
4 challenged decision does not approve any airport residential development; it merely creates  
5 the possibility that approval for such development might be sought in the future.

6 If the city were to rezone the Scappoose Airport and nearby properties AR and  
7 approved airport residential development, it is certainly possible that such development  
8 might cause the FAA to take action against the Port of St. Helens under Grant Assurance 21.  
9 However, it is also possible that the FAA would not adopt a categorical interpretation of  
10 Grant Assurance 21 in the future to conclude that *any* airport residential development at  
11 public federally funded airports is incompatible with normal airport operations. While there  
12 is language in the FAA’s Afton decision that suggests it categorically views new airport  
13 residential development at federally funded public airports as incompatible development,  
14 there is no way to know at this point whether the FAA will continue to interpret Grant  
15 Assurance 21’s compatibility obligation in that manner. As respondents argue, the FAA may  
16 adopt a less categorical case-by-case assessment regarding whether a particular proposed  
17 airport residential development is incompatible airport operations, as is reflected in the  
18 FAA’s Airport Compliance Handbook:

19 “As a general principle, FAA will recommend that airport owners refrain from  
20 entering into any agreement which grants access to the public landing area by  
21 aircraft normally stored and serviced on adjacent property. Exceptions can be  
22 granted on a case-by-case basis where operating restrictions ensure safety and  
23 equitable compensation for use of the airport. Examples include:

24 “\* \* \* \* \*

25 “2. Where an individual or corporation, actually residing or doing  
26 business on an adjacent tract of land, proposes to gain access to the  
27 landing area solely for aircraft use incidental to such residence or  
28 business without offering any aeronautical services the public. This  
29 situation is commonly encountered where an industrial airport is

1 developed in conjunction with the airport.” FAA Order 5190.6A,  
2 Section 6-6(d).

3 A second problem that petitioner has in relying on 49 USC 47107(a)(10) and Grant  
4 Assurance 21 is that the Port of St. Helens assurances pursuant to those authorities have the  
5 legal effect of creating a legal obligation for Port of St. Helens; they do not impose any direct  
6 legal obligation on the City of Scappoose. While City of Scappoose actions might have  
7 consequences for the Port of St. Helens, neither 49 USC 47107(a)(10) nor Grant Assurance  
8 21 create legal obligations that apply directly to the City of Scappoose. It is true that the city  
9 is obligated under state law to coordinate its land use decision making with other affected  
10 governmental units under Goal 2 (Land Use Planning) and OAR 660-013-0030(2). But even  
11 if those coordination obligations required the city not to take action that would cause the Port  
12 to be in violation of 49 USC 47107(a)(10) and Grant Assurance 21, as we explain later in this  
13 opinion, the city has satisfied any coordination obligation it might have in this matter.

#### 14 **C. Petitioner’s Findings Challenges**

15 At one point in the petition for review, petitioner argues that the city’s decision  
16 should be remanded simply because the findings that the city adopted in support of its  
17 legislative decision do not respond to issues that were raised below. *Norvell v. Portland*  
18 *Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *McCoy v. Tillamook County*, 14 Or  
19 LUBA 108, 116-17 (1985). Petitioner also suggests elsewhere in the petition for review that  
20 the decision should be remanded because the city’s findings are not sufficiently detailed.

21 With regard to legislative land use decisions, the Court of Appeals has observed that  
22 “there must be enough in the way of findings or accessible material in the record of the  
23 legislative act to show that applicable criteria were applied and that required considerations  
24 were indeed considered.” *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12,  
25 16 n 6, 38 P3d 956 (2002). Therefore, even if the findings that support a legislative land use  
26 decision are defective in some way, respondents are free to cite material in the record that  
27 demonstrates applicable criteria were applied. However, with the caveat that the lack of

1 findings in support of a legislative land use decision may leave LUBA or the appellate courts  
2 unable to perform their review function, as LUBA has observed many times, there is no  
3 statute, goal or rule that generally requires that legislative decisions must in all cases be  
4 supported by findings that are sufficient to demonstrate compliance with applicable criteria.  
5 *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539, 546 n 7 (2001), *aff'd* 179  
6 Or App 12, 38 P3d 956 (2002); *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870, 875,  
7 *aff'd* 169 Or App 599, 10 P3d 316 (2000); *Churchill v. Tillamook County*, 29 Or LUBA 68,  
8 77 (1995); *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 563  
9 (1994). To the extent petitioner is arguing that the level of scrutiny that LUBA should apply  
10 to the city's findings in support of the legislative land use decision that is the subject of this  
11 appeal should be the same as the level of scrutiny that LUBA applies to findings supporting  
12 quasi-judicial land use decisions, we reject the argument. *See Manning v. Marion County*, 42  
13 Or LUBA 56, 63 (2002) ("findings supporting quasi-judicial decisions play a more essential  
14 role in establishing compliance with applicable criteria, and hence are subject to more  
15 rigorous scrutiny, than findings supporting legislative decisions").

16 We turn to petitioner's assignments of error.

### 17 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

18 In 2005, the Oregon Legislature directed the Oregon Department of Aviation to  
19 establish a TTF pilot program at up to three rural airports.

20 "The Oregon Department of Aviation shall establish a pilot program at up to  
21 three rural airports to encourage development of through the fence operations  
22 designed to promote economic development by creating family wage jobs, by  
23 increasing local tax bases and by increasing financial support for rural  
24 airports. \* \* \*." ORS 836.642(1).

25 Scappoose Airport is one of the three rural airports selected for the pilot program.

26 The statutory authority for the three rural airport TTF pilot programs appears at ORS  
27 836.640 through 836.642. The Oregon Department of Aviation has adopted administrative  
28 rules that elaborate on that statutory authority. OAR Chapter 738, Division 14. According to

1 petitioner, the TTF pilot program envisioned by ORS 836.640 through 836.642 and OAR  
2 Chapter 738, Division 14 is limited to commercial or industrial users.<sup>5</sup> Moreover, according  
3 to petitioner, the pilot program users would have to be included in the Scappoose Airport's  
4 boundary and the pilot program would have to be reflected on the Scappoose Airport's  
5 Airport Layout Plan (ALP).<sup>6</sup> OAR 660-013-0020(1); 660-013-0040(1)(c)(A); 738-014-  
6 0020(1); 738-014-0040(1).

7 Petitioner argues that because the TTF pilot program authorized by ORS 836.640  
8 through 836.642 is limited to commercial and industrial users, it was error to adopt the AR  
9 zone, which authorizes TTF access by residential users. Petitioners also contend that  
10 residential TTF development is antithetical to many of the economic development and  
11 operational goals that are established for the TTF pilot program. Petition for Review 16-23.  
12 Finally, petitioner contends that because the pilot program TTF arrangement must be  
13 included in the Scappoose Airport's ALP and it is clear that under its Afton decision the  
14 FAA will not approve an ALP that includes residential TTF access, it was error for the city to  
15 adopt an AR zone that permits such residential TTF access.

16 Respondents contend that the short answer to petitioner's TTF pilot program  
17 arguments is that ORS 836.640 through 836.642 and the implementing rules at OAR Chapter  
18 738, Division 14 are a pilot program that authorizes certain TTF operations to achieve certain

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<sup>5</sup> As defined by ORS 836.640(4), a pilot program TTF operation "[i]s conducted by a commercial or industrial user of property within an airport boundary[.]" Under ORS 836.642(3):

"The Oregon Department of Aviation, by rule, shall provide standards and guidelines for through the fence operations that:

"\* \* \* \* \*

"(c) Ensure that the operations are conducted according to a written contract between the commercial or industrial user of property within the airport boundary and the airport sponsor[.]"

<sup>6</sup> The ALP is part of the Airport Master Plan and the ALP must be approved by the FAA.

1 specified economic development goals, but the statutes and rules do not purport to be the  
2 exclusive authority for allowing TTF operations. Respondents contend that the statute and  
3 rules also do not purport to limit or regulate TTF operations that may be approved under the  
4 city’s general authority to adopt rules governing airport uses and activities.<sup>7</sup>

5 We agree with respondents. It is reasonably clear from the city’s decision that it was  
6 not relying on ORS 836.640 through 836.642 and the implementing rules at OAR Chapter  
7 738, Division 14 as authority for creating an AR zone that authorizes airport residential  
8 development. Record 34. Although neither the decision nor the Joint Response Brief  
9 identifies the enabling legislation that the city is relying on to adopt an AR zone that allows  
10 airport residential development, we note that the city has broad planning and zoning  
11 authority. ORS 197.015(5) and (11); 227.090(1). With regard to airports specifically, under  
12 ORS 836.616, the city is required to authorize a number of uses and activities. .<sup>8</sup>

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<sup>7</sup> As we noted earlier, there are a number of airports that have TTF agreements. Record 388-89.

<sup>8</sup> ORS 836.616 provides in part:

- “(2) Within airport boundaries established pursuant to commission rules, local government land use regulations shall authorize the following uses and activities:
  - “(a) Customary and usual aviation-related activities including but not limited to takeoffs, landings, aircraft hangars, tie-downs, construction and maintenance of airport facilities, fixed-base operator facilities and other activities incidental to the normal operation of an airport;
  - “(b) Emergency medical flight services;
  - “(c) Law enforcement and firefighting activities;
  - “(d) Flight instruction;
  - “(e) Aircraft service, maintenance and training;
  - “(f) Crop dusting and other agricultural activities;
  - “(g) Air passenger and air freight services at levels consistent with the classification and needs identified in the State Aviation System Plan;
  - “(h) Aircraft rental;

1           Because petitioner’s argument regarding the TTF pilot program authorized by ORS  
2 836.640 through 836.642 and OAR Chapter 738, Division 14 are premised on the erroneous  
3 assumption that the city was relying on ORS 836.640 through 836.642 and OAR Chapter  
4 738, Division 14 to authorize airport residential development in the AR zone and that those  
5 statutes and rules operate to limit the city’s authority to create a zone that might allow it to  
6 approve airport residential development, those arguments provide no basis for reversal or  
7 remand.

8           The first, second and third assignments of error are denied.

9 **FOURTH ASSIGNMENT OF ERROR**

10           Under the fourth assignment of error, petitioner argues the city’s decision violates its  
11 coordination and planning obligations under the Airport Planning Rule (APR). OAR chapter  
12 660 division 13. We address petitioner’s coordination arguments under the fifth and sixth  
13 assignments of error below. We address petitioner’s APR planning arguments under this  
14 assignment of error.

15           OAR 660-013-0010 sets out the purpose and policy of the APR. OAR 660-013-  
16 0010(1) states that “[t]he policy of the State of Oregon is to encourage and support the  
17 continued operation and vitality of Oregon’s airports.” Petitioner contends that creating a  
18 zone that potentially allows airport residential development at Scappoose Airport is  
19 inconsistent with that policy.

20           OAR 660-013-0040 imposes planning requirements for airports.

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“(i)     Aircraft sales and sale of aviation equipment and supplies; and

“(j)     Aviation recreational and sporting activities.

“(3)    “\* \* \* A local government may authorize commercial, industrial and other uses in  
addition to those listed in subsection (2) of this section within an airport boundary  
where such uses are consistent with applicable provisions of the acknowledged  
comprehensive plan, statewide land use planning goals and commission rules and  
where the uses do not create a safety hazard or limit approved airport uses.”

1 “A local government shall adopt comprehensive plan and land use regulation  
2 requirements for each state or local aviation facility subject to the  
3 requirements of ORS 836.610(1). Planning requirements for airports  
4 identified in ORS 836.610(1) shall include:

5 “(1) A map, adopted by the local government, showing the location of the  
6 airport boundary. The airport boundary shall include the following  
7 areas, but does not necessarily include all land within the airport  
8 ownership:

9 “\* \* \* \* \*

10 “(c) Areas at non-towered airports needed for existing and planned  
11 airport uses that:

12 “(A) Require a location on or adjacent to the airport  
13 property;

14 “(B) Are compatible with existing and planned land uses  
15 surrounding the airport; and

16 “(C) Are otherwise consistent with provisions of the  
17 acknowledged comprehensive plan, land use  
18 regulations, and any applicable statewide planning  
19 goals.”<sup>9</sup>

20 Petitioner contends that the city’s adoption of the AR zone violates OAR 660-013-  
21 0040 for several reasons. First, petitioner contends that while there may be a market demand  
22 for airport residential development, there is no “legally recognizable ‘need’” for such  
23 housing. Second, the record includes no “economic and use forecasts supported by market  
24 data” that would justify such housing. Third, petitioner contends that although pilots might  
25 find airport residential housing “desirable, it is not something they ‘need.’” Fourth,  
26 petitioner contends “[t]here is no evidence that residential airparks are compatible with  
27 airport industrial uses or consistent with applicable comprehensive plan policies and

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<sup>9</sup> OAR 660-013-0040(5) provides that the city can plan “for airport uses not currently located at the airport” “[b]ased on the projected needs for such uses over the planning period,” and “[b]ased on economic and use forecasts supported by market data.”

1 statewide planning goals.” Petition for Review 30. Fifth, petitioner argues the city failed to  
2 adopt findings addressing these planning requirements.

3 OAR 660-013-0110 provides:

4 “Notwithstanding the provisions of OAR 660-013-0100, a local government  
5 may authorize commercial, industrial, manufacturing and other uses in  
6 addition to those listed in OAR 660-013-0100 within the airport boundary  
7 where such uses are consistent with applicable provisions of the  
8 acknowledged comprehensive plan, statewide planning goals and LCDC  
9 administrative rules and where the uses do not create a safety hazard or  
10 otherwise limit approved airport uses.”

11 Relying on arguments scattered throughout the petition for review, petitioner contends that  
12 allowing airport residential development next to the Scappoose Airport is inconsistent with  
13 comprehensive plan policies, statewide planning goals and LCDC administrative rules.  
14 Petitioner also argues there is no factual base in the record of this appeal that would allow the  
15 city to conclude that airport residential development will not “create a safety hazard or  
16 otherwise limit approved airport uses.”

17 Finally, OAR 660-013-0160(5) provides in part that “amendments to acknowledged  
18 comprehensive plans and land use regulations, including map amendments and zone changes,  
19 require full compliance with the provisions of this division.” Petitioner contends that the city  
20 erroneously found that petitioner’s APR concerns could be deferred and considered when  
21 and if an application for conditional use approval is submitted.

22 Respondents contend that “[p]etitioner will have multiple and ample opportunities to  
23 raise the types of issues it has briefed.” Joint Response Brief 20. Respondents also contend  
24 that petitioner’s concern that the city might be able to approve airport related development in  
25 the future without having to address APR and statewide planning goal requirements is  
26 without merit.

27 “Petitioner misunderstands the process. Before a conditional use for a  
28 residential airpark could even be considered, the subject property would need  
29 to be redesignated to the Airport Related zone. This process of re-  
30 designation, changing from an existing zone to Airport Related, must first

1 occur as a Comprehensive Plan map change. This will require addressing the  
2 various planning standards raised by Petitioner—at that time.” Joint Response  
3 Brief 20 (underscoring in original).

4 We generally agree with respondents that the only questions that are properly  
5 presented in this appeal are whether the city violated any legal standard that must be applied  
6 at the time the city adopts a new zoning district and whether the AR zone is “categorically  
7 incapable of being applied consistent with” applicable legal requirements. *Okray*, 47 Or  
8 LUBA at 301.

9 The last of the APR planning requirements noted above, OAR 660-013-0160(5),  
10 expressly provides that “amendments to acknowledged comprehensive plans and land use  
11 regulations, *including map amendments and zone changes, require full compliance with the*  
12 *provisions of [the APR].*” (Emphasis added.) Therefore, the city will have to demonstrate  
13 that any map amendments to apply AR zoning to property at the Scappoose Airport comply  
14 with the policy set out at OAR 660-013-0010(1) and the planning requirements at OAR 660-  
15 013-0040 and 660-013-0110. We see no reason why the findings and evidentiary showings  
16 required by OAR 60-013-0040 and OAR 660-013-0110 could not be addressed at that time  
17 when the precise area that may be developed with airport residential development will be  
18 known. So long as those APR planning requirements are addressed at the time any such map  
19 amendments are approved, we agree with respondents that the city is not required to apply  
20 them to a decision that merely creates the possibility that AR zoning may be applied in the  
21 future.

22 As we noted earlier, the city’s legislative decision to create an AR zone without  
23 applying it to any property might be reversible if petitioner demonstrated that the AR zone  
24 could in no circumstances be applied without necessarily violating one or more of those APR  
25 standards. Again, recognizing that petitioner, the FAA, the city and intervenor disagree  
26 about whether airport residential development is incompatible with airports like the

1 Scappoose Airport, we are not persuaded by petitioner’s arguments that as a matter of law  
2 any airport residential development would be incompatible with the Scappoose Airport.<sup>10</sup>

3 The fourth assignment of error is denied.

4 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

5 Petitioner’s fifth and sixth assignments of error are set out below:

6 “FIFTH ASSIGNMENT OF ERROR

7 “Ordinance 799 makes residential airpark use contingent on FAA approval of  
8 applications for airport residential development and Port approval of TTF  
9 agreements. Because neither the FAA nor the Port can lawfully provide those  
10 approvals, compliance with Ordinance 799 is neither feasible nor reasonable  
11 and the Ordinance does not further a legitimate planning purpose as required  
12 by Goal 2.

13 “SIXTH ASSIGNMENT OF ERROR

14 The City’s decision violates Statewide Planning Goal 2 requirements for  
15 coordination and consistency and lacks an adequate factual base. The City’s  
16 findings of compliance with Goal 2 are legally inadequate.” Petition for  
17 Review 33.

18 **A. Coordination**

19 Goal 2 (Planning) requires in part that:

20 “Each [comprehensive] plan and related implementation measure shall be  
21 coordinated with the plans of affected governmental units.”

22 Goal 2 adopts the definition of coordination that is included in the statutory definition of  
23 “comprehensive plan:”

24 “\* \* \* A plan is ‘coordinated’ when the needs of all levels of governments,  
25 semipublic and private agencies and the citizens of Oregon have been  
26 considered and accommodated as much as possible. \* \* \*”

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<sup>10</sup> Respondents appear to be correct that the compatibility question will be thoroughly addressed before any airport residential development could be approved. A number of APR planning requirements require consideration of compatibility. And one of the city’s conditional use criteria requires an applicant for conditional use approval to demonstrate that the proposed conditional use “is compatible with surrounding properties or will be made compatible by imposing conditions.” SLUDC 17.130.050(4).

1 The APR also requires that the city coordinate its plans and land use regulations concerning  
2 airports:

3 “A city or county with planning authority for one or more airports, or areas  
4 within safety zones or compatibility zones described in this division, shall  
5 adopt comprehensive plan and land use regulations for airports consistent with  
6 the requirements of this division and ORS 836.600 through 836.630. Local  
7 comprehensive plan and land use regulation requirements shall be coordinated  
8 with acknowledged transportation system plans for the city, county, and  
9 Metropolitan Planning Organization (MPO) required by OAR 660, division  
10 12. Local comprehensive plan and land use regulation requirements shall be  
11 consistent with adopted elements of the state [Aviation System Plan (ASP)]  
12 and shall be coordinated with affected state and federal agencies, local  
13 governments, airport sponsors, and special districts. If a state ASP has not yet  
14 been adopted, the city or county shall coordinate the preparation of the local  
15 comprehensive plan and land use regulation requirements with ODA. Local  
16 comprehensive plan and land use regulation requirements shall encourage and  
17 support the continued operation and vitality of airports consistent with the  
18 requirements of ORS 836.600 through 836.630.” OAR 660-013-0030(2).

19 The Port of St. Helen’s and the FAA’s concerns about allowing airport residential  
20 development at the Scappoose Airport were conveyed to the city in writing and in oral  
21 testimony and were considered by the city. It is fair to say that the Port and FAA have a  
22 different view from the city and intervenor regarding the scope and meaning of Grant  
23 Assurance 21 and whether approval of airport residential development at the Scappoose  
24 Airport would cause the Port of St. Helens to violate Grant Assurance 21.

25 As we have already explained, the city amended the AR zone so that it expressly  
26 requires that any application for conditional use approval for an airport residential  
27 development must include “a letter from the Federal Aviation Administration in support of  
28 the proposed project \* \* \*.” SLUDC 17.73.050. In addition, as “airport residential  
29 development” is defined, the conditional use permit applicant must secure a “through-the-  
30 fence agreement with the airport sponsor” and no final plat for airport residential  
31 development can be recorded and no development permits for such development can be  
32 issued unless and until the required TTF agreement is “secured from the airport sponsor.”  
33 SLUDC 17.73.030(B); 17.73.070(A). Notwithstanding these provisions, which would seem

1 to leave the FAA and Port of St. Helens each with the unilateral power to ensure that no  
2 airport residential development will ever occur at the Scappoose Airport, petitioner argues  
3 the city failed to accommodate the needs of the Port of St. Helens and the FAA because it  
4 places them in the position of having to support what they believe is prohibited by Grant  
5 Assurance 21. Petitioner characterizes the city’s action in this matter as definance rather  
6 than coordination. Petitioner contends that that airport residential development at Scappoose  
7 Airport is inconsistent with the Port’s desire to enhance commercial and industrial  
8 development at the airport and inconsistent with the FAA’s longstanding efforts to avoid the  
9 conflicts that inevitably result when residences are built close to busy airports.

10 We agree with respondents that it is not necessary that LUBA attempt to resolve the  
11 parties’ disagreement regarding the compatibility of airport residential development and busy  
12 Category 2 airports like Scappoose Airport. The question presented by these assignments of  
13 error is whether the city considered the Port’s and FAA’s needs “and accommodated [those  
14 needs] as much as possible.” In *Turner Community Association v. Marion County*, 37 Or  
15 LUBA 324, 353-54 (1999) we summarized the duties imposed by the Goal 2 coordination  
16 obligation as follows:

17 “We have explained on many occasions that the coordination obligation does  
18 not mean that local governments must ‘accede to every request’ made by an  
19 affected governmental agency. *Brown v. Coos County*, 31 Or LUBA 142, 146  
20 (1996); *Waugh v. Coos County*, 26 Or LUBA 300, 314 (1993). However, the  
21 obligation imposed by Goal 2 and ORS 197.015(5) goes beyond the county’s  
22 obligation to address and demonstrate compliance with other applicable  
23 approval criteria. The coordination obligation requires an exchange of  
24 information and an attempt to accommodate the legitimate interests of all  
25 affected governmental agencies. *Rajneesh v. Wasco County*, 13 Or LUBA  
26 202, 210 (1985). Goal 2 and ORS 197.015(5) do not mandate success in  
27 accommodating the needs or legitimate interests of all affected governmental  
28 agencies, but they do mandate a reasonable effort to accommodate those  
29 needs and legitimate interests ‘as much as possible.’ For LUBA to be able to  
30 determine that this coordination obligation has been satisfied, a local  
31 government must respond in its findings to ‘legitimate concerns’ that are  
32 expressed by affected governmental agencies. *Waugh*, 26 Or LUBA at 314-  
33 15 (1993).”

1 No party argues that OAR 660-013-0030(2) imposes a more rigorous coordination  
2 obligation.

3 Based on our review of the record, although the parties have different ideas about the  
4 compatibility of airport residential development, the city clearly considered the Port's and  
5 FAA's position.<sup>11</sup> The requirement that an application for conditional use approval must  
6 include a letter of support from the FAA and the requirement that an applicant for airport  
7 residential development must secure a TTF agreement from the Port of St. Helens appears to  
8 give both the FAA and the Port of St. Helens what amounts to independent veto authority  
9 over any potential proposal for airport related development. Specifically, if the Port and  
10 FAA continue to believe that airport residential development is inconsistent with Grant  
11 Assurance 21 or any other legal requirement, we see no reason why the FAA would have to  
12 support an application for conditional use approval for airport residential development at the  
13 Scappoose Airport or why the Port could not refuse to enter into a TTF agreement. Certainly  
14 petitioner offers no reason why the FAA could be compelled to support a proposal it opposed  
15 or why the Port of St. Helens would have to enter into a TTF agreement with a development  
16 it opposed. The city's decision to give FAA and the Port such control over potential airport  
17 residential development is sufficient to address their concerns and sufficient to satisfy the  
18 city's coordination obligations under Goal 2 and OAR 660-013-0030(2).

19 **B. Petitioner's Remaining Arguments.**

20 We are not sure we understand petitioner's argument that the city's decision does not  
21 comply with the Goal 2 requirement that it be supported by an adequate factual base. That  
22 argument appears to turn on petitioner's view that airport residential development is  
23 categorically precluded by Grant Assurance 21, making the decision to adopt an AR zone

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<sup>11</sup> Petitioner presented its concerns about airport residential development in writing. Record 98-110, 240-44 and 406-409. Those concerns were addressed at hearings before the planning commission on November 8, 2007. Record 234-39. Those concerns were addressed at hearings before the city council. Record 50-57, 73-78, 158-76.

1 essentially a nullity. We have already rejected that view. Petitioner’s adequate factual base  
2 argument provides no basis for reversal or remand of the challenged decision.

3 Petitioner also argues that because intervenor had direct contacts with individual Port  
4 of St. Helens Commissioners without Port of St. Helens’ staff present there was violation of  
5 the Goal 2 coordination requirement. As respondents point out, the Goal 2 coordination  
6 obligation applies to the city rather than the intervenor. We also agree with respondents that  
7 assuming the Port was given adequate notice of the proposal, and petitioner offers no reason  
8 to believe the Port was not given such notice, it is up to the Port to determine which staff will  
9 participate in reviewing and commenting on the proposal.

10 Petitioner’s fifth and sixth assignments of error are denied.<sup>12</sup>

11 **SEVENTH ASSIGNMENT OF ERROR**

12 Under this assignment of error, petitioner argues the challenged decision violates  
13 Goal 9 (Economic Development), Goal 10 (Housing) and Goal 14 (Urbanization). Among  
14 other things, Goal 9 requires that the city plan for an adequate supply of land for industrial  
15 and commercial uses and limit uses near lands zoned for industrial and commercial  
16 development to make those uses compatible.

17 Petitioner first contends that the city has an inadequate supply of commercially and  
18 industrially planned land and because the AR zone could result in some industrially planned  
19 land being rezoned AR, which would permit residential development, it violates Goal 9.  
20 Petitioner then argues that airport residential development is not “needed housing” within the  
21 meaning of that term in Goal 10, and for that reason the city’s urban growth boundary could  
22 not be amended to include more land simply so that it could be zoned AR to allow airport  
23 residential development. Finally, petitioner argues that because the city may not include  
24 more land for industrial purposes than is needed and could not rezone currently needed

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<sup>12</sup> Subassignment of error B under the fourth assignment of error is also denied.

1 airport industrially planned land to AR to permit airport residential development it could  
2 never apply AR zoning without violating Goals 9, 10 and 14. Petitioner also argues that the  
3 city’s decision violates the Goal 9 requirement that uses located near commercially and  
4 industrially planned lands must be limited to those that are compatible with such uses.

5 Petitioner’s argument that it would be impossible to ever apply the AR zone  
6 overlooks the possibility that, if necessary, the UGB could be amended contemporaneously  
7 at the time AR zoning is applied to land that is now industrially planned to maintain the  
8 needed supply of industrially planned land. Petitioner’s argument also assumes a level of  
9 precision in planning for industrially and commercially zoned land that is rarely if ever  
10 encountered in reality. In any event, we agree with respondents, that petitioner’s challenge  
11 under the seventh assignment of error is premature. The challenged decision rezones no land  
12 and therefore results in no Goal 9, 10 or 14 violation that petitioner identifies. All of the  
13 arguments that petitioner advances under this assignment of error must await a decision by  
14 the city to apply the AR zone to land that is planned for industrial or commercial use.

15 **EIGHTH ASSIGNMENT OF ERROR**

16 In its final assignment of error, petitioner alleges the challenged decision violates a  
17 number of SCP economic, transportation, and industrial goals and policies. Petitioner also  
18 argues the decision violates OAR 660-012-0015(6), which requires that port districts “adopt  
19 plans for transportation facilities and services they provide.”

20 **A. Economic Goals and Policies**

21 SCP Economic Goal 1 states that it is a goal of the city to “[m]aintain conditions  
22 favorable for a growing, healthy, stable, and diversified business and industrial climate.”  
23 SCP Economic Policy 1 states that the city will “[m]ake sufficient land available for the  
24 anticipated expansion of commercial and industrial activities.”

25 Petitioner contends residential airparks are not needed and the city’s speculation that  
26 airport residential development might stimulate development at the airport is simply that—

1 speculation. Petitioner also argues that airport residential development will lead to security  
2 problems at the airport. For all of these reasons, petitioner contends that allowing  
3 industrially designated land to be rezoned to AR to permit development of residential  
4 airparks violates SCP Economic Goal 1 and Policy 1.

5 **B. Transportation Goals and Policies and the TPR**

6 SCP Transportation Goal 13 states that the city will “[w]ork with the Port of St.  
7 Helens to maintain the continuing viability of the Scappoose Industrial Airpark.” SCP  
8 Transportation Policy 11 is set out below:

9 “Work with the Port of St. Helens on their plans for the Scappoose Industrial  
10 Airpark, as well as for industrial development and transportation. Apply  
11 appropriate zoning designations to ensure that land identified for airport uses  
12 in the 2004 Scappoose Industrial Airpark Airport Master Plan (as amended  
13 August 9, 2006) is utilized for airport-related development.”

14 LCDC’s Transportation Planning Rule provides that airport sponsors are to “prepare and  
15 adopt plans for transportation facilities and services they provide.” OAR 660-012-0015(6).

16 Petitioner contends the challenged decision, by creating the possibility of residential  
17 airparks, violates the city’s goal of maintaining “the continuing viability of the Scappoose  
18 Industrial Airpark.” Petitioner also argues that although SCP Transportation Policy 11 refers  
19 to the Airport Master Plan as amended in 2006 to support consideration of a residential  
20 airpark, the city was aware that the Port voted to suspend that language on November 14,  
21 2007. Petitioner contends that without the suspended amendment the Port’s Airport Master  
22 Plan no longer calls for airport residential development, and the city’s decision to adopt an  
23 AR zone that allows such development is inconsistent with the Airport Master Plan and  
24 therefore violates SCP Transportation Policy 11 and OAR 660-012-0015(6).

25 **C. Industrial Land Designation Goals and Policies**

26 The SCP Industrial Land Designation Goal is to “[p]rovide a place for industrial  
27 activities where their requirements can be met, and where their environmental effects will  
28 have a minimal impact on the community.” Petitioner contends this Goal is violated because

1 the city has not demonstrated that converting industrially designated lands to AR ““meets the  
2 requirements’ for industrial activities, or that airport residential \* \* \* use surrounded by  
3 industrial use would experience minimal environmental effects.” Petition for Review 47.

4 The SCP also sets out a number of Policies for the Industrial Land Use Designation,  
5 several of which are set out below;

6 “1) Provide suitable areas for industrial expansion, utilizing for such  
7 purposes relatively large, flat areas that are separated by buffers from  
8 the City’s residential districts.

9 “2) Prevent Industrial development from disrupting homogenous  
10 residential neighborhoods.

11 “\* \* \* \* \*

12 “4) Screen, setback, or buffer the boundaries of industry, particularly  
13 unsightly areas which can be viewed from arterials or from residential  
14 use.

15 “5) Apply this designation where industrial concerns have become  
16 established and where vacant industrial sites have been set aside for  
17 this purpose.

18 “6) Protect the stability and financial aspects of industrial areas by  
19 protecting them from incompatible uses.”

20 Petitioner contends the decision violates Policy 1 because the city has a shortage of  
21 industrially designated land and rezoning land to AR would exacerbate that shortage.

22 Petitioner contends the decision violates Policy 2, because airport residential development  
23 will be disruptive to the Scappoose Airport. Petitioner contends the decision violates Policy

24 4 because airport residential development will be next to the airport. Finally, petitioner  
25 contends the decision violates Policy 6 because airport residential development is not

26 compatible with the Scappoose Airport.

27 **D. Discussion**

28 Some of petitioner’s arguments under this assignment of error are based on its  
29 position that airport residential development, as a matter of law, is incompatible with

1 operations at the Scappoose Airport and thus violates the above goals and policies that  
2 require the city to promote appropriate development at the Scappoose Airport and on  
3 industrially designated lands around the airport. To the extent petitioner relies on its position  
4 that airport residential development is inherently incompatible with the Scappoose Airport to  
5 support its arguments under this assignment of error that the AR zone violates the cited SCP  
6 goals and policies or OAR 660-012-0015(6) as a matter of law, we reject the argument.  
7 Under the challenged decision, no properties are zoned AR and no airport related residential  
8 development is approved. We do not agree that adopting a zoning district that merely creates  
9 the possibility that land may be zoned AR in the future violates the above Goals and Policies.

10 Application of the AR zone to property next to the Scappoose Airport clearly could  
11 implicate some if not all of the above cited policies. When and if the city actually applies  
12 AR zoning to property near the Scappoose Airport, it will have to demonstrate that doing so  
13 is consistent with relevant statutory requirements, statewide planning goals, LCDC  
14 administrative rules and the SCP. But with one possible exception, we conclude that  
15 petitioner has failed to demonstrate that a decision that simply creates the possibility that a  
16 city decision in the future might apply AR zoning to property at the Scappoose Airport  
17 violates the above SCP Goals and Policies or OAR 660-012-0015(6).

18 As noted above, petitioner argues that the challenged decision violates SCP  
19 Transportation Policy 11, which requires the city to “[a]pply appropriate zoning designations  
20 to ensure that land identified for airport uses in the 2004 Scappoose Industrial Airpark  
21 Airport Master Plan (as amended August 9, 2006) is utilized for airport-related  
22 development.” While the AR zone is clearly consistent with the Airport Master Plan as it  
23 was amended in August 9, 2006 to call for the possibility of developing airport residential  
24 development, that amendment was “suspended” on November 14, 2007. Record 230. We  
25 understand petitioner to contend that without the suspended amendment, applying AR zoning  
26 to airport property would in all cases be inconsistent with the Airport Master Plan.

1           Suspending the August 9, 2006 amendment is presumably different than repealing it  
2 altogether. It may be that with the suspension the Airport Master Plan is now simply silent  
3 about the permissibility of airport residential development at the Scappoose Airport. Or it  
4 may be, as petitioner suggests, that the suspension means the Airport Master Plan now  
5 precludes airport residential development unless the suspension is lifted. There is sufficient  
6 question in our mind about the legal effect of the Port’s action to “suspend” the amendment  
7 that we reject petitioner’s argument that the Port’s November 14, 2007 suspension of the  
8 August 9, 2006 amendment necessarily means that the appealed decision to create the AR  
9 zone is facially inconsistent with SCP Transportation Policy 11. But that does not mean a  
10 decision to apply AR zoning might not be inconsistent with SCP Transportation Policy 11.  
11 We need not and do not decide that question here. When and if AR zoning is applied in the  
12 future, that question may be raised and answered.

13           The eighth assignment of error is denied.

14           The city’s decision is affirmed.