BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHELLE BARNES,
Petitioner,

vs.

CITY OF HILLSBORO,
Respondent,

and

THE PORT OF PORTLAND,
Intervenors-Respondent.

LUBA No. 2010-011

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

William K. Kabeiseman filed the petition for review and argued on behalf of petitioner. With him on the brief was Jennifer M. Bragar and Garvey Schubert Barer.

David F. Doughman, Portland, filed the joint response brief and argued on behalf of respondent. With him on the brief was Dana Krawczuk and Beery Elsner and Hammond, LLP.

Dana Krawczuk, Portland, filed the joint response brief on behalf of intervenor-respondent. With her on the brief was David F. Doughman and Beery Elsner and Hammond, LLP. Misti K. Johnson, Portland, argued on behalf of intervenor-respondent.

BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

HOLSTUN, Board Chair, concurring.

REVERSED 06/30/2010

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city ordinance that amends the city zoning map to apply the city's Airport Use (AU) zone to the Hillsboro Airport and the city's Airport Safety and Compatibility Overlay (ASCO) zone to surrounding properties.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to five alleged "new matters" raised in the response brief, pursuant to OAR 661-010-0039. The city and intervenor-respondent Port of Portland (intervenor or Port) object that the last two alleged new matters are not "new matters" within the meaning of OAR 661-010-0039.

Both disputes involve the third assignment of error, in which petitioner alleges that the city "failed to comply" with Statewide Planning Goal 12 (Transportation) and the Transportation Planning Rule (TPR). Petition for Review 21. In the response brief, respondents argue that the third assignment of error is limited to a challenge to the adequacy of the city's findings regarding Goal 12 and the TPR, and point out that there is no generally applicable obligation to adopt findings supporting a legislative land use decision. The response brief then argues that even without specific findings addressing the TPR, the challenged decision is consistent with the rule, for the reasons set out in the response brief. The reply brief disputes that the third assignment of error is limited to a findings challenge, and contends that even in the absence of a general findings obligation the city must at least cite to evidence in the record demonstrating compliance with applicable criteria.

We agree with petitioner that the dispute raised in the response brief over the nature of an assignment of error and hence LUBA's scope of review is an appropriate subject for a reply brief. The reply brief is allowed.

FACTS

In 2005, the city commissioned a study that recommended adoption of new zones for the Hillsboro Airport, which is owned and operated by intervenor Port of Portland. Accordingly, in 2009, the city adopted ordinances 5925 and 5926, which amended the Hillsboro Comprehensive Plan and the Hillsboro Zoning Ordinance (HZO), respectively, to create two new zones, the AU and ASCO zones. The new AU zone allows a variety of airport related uses. The ASCO zone is intended to be applied to property within 6,000 feet of the airport, and imposes various limitations on uses and new development within six subzones, depending on proximity to the airport and its runways.

Under Ordinance 5926, development in ASCO subzones 2, 3, 4, and 5 and 6 is subject to the obligation to provide an "avigation easement" to the Port prior to recording land division plats or issuing certificates of occupancy.[1] Ordinance 5926, Section 135B(C)(6) defines "avigation easement" as:

> "A type of easement which conveys the following rights:
>
> "[1] A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude above a surface specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).
>
> "[2] A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.
>
> "[3] A right to prohibit the erection or growth of any structure, tree, or other object that would penetrate the imaginary surfaces as defined in this ordinance.

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[1] For example, under Ordinance 5926, Section 135B(G)(2)(e), governing subzone 2, states:

> "Land use or limited land use approvals by the City shall be conditioned to provide an avigation easement and an Airport Activity Disclosure Statement to the Port of Portland prior to recordation of land division plats or Certificates of Occupancy, as applicable."

Similar provisions govern subzones 3, 4, 5 and 6.

> "[4] A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surfaces as defined in this ordinance.
>
> "[5] A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance from being created on the property."

Ordinances 5925 and 5926 did not, however, apply the AU or ASCO zones to any property in the city when those ordinances were adopted in 2009. Following adoption and acknowledgment of Ordinances 5925 and 5926, the city initiated a legislative zoning map amendment process to apply the AU and ASCO zones to approximately 7,000 properties located in or near the Hillsboro Airport. The city proposed to rezone the Airport from the current M-2 Industrial and MP Industrial Park zoning, in which the Airport is a non-conforming use, to the AU zone. The city proposed applying the ASCO zone to a number of properties within 6,000 feet of the Airport. On January 19, 2010, the city council adopted Ordinance 5935, which amends the city zoning map to apply the AU and ASCO zones as proposed. This appeal of Ordinance 5935 followed.

MOTION TO STRIKE

Petitioner moves to strike Exhibit 2 and Appendix G to the joint response brief. Exhibit 2 consists of two notices from the Department of Land Conservation and Development that the city had adopted Ordinances 5925 and 5926. Appendix G consists of two tables created by respondents' counsel that compares the uses allowed in the M-2 and MP zones with the uses that are allowed in the AU zone, with commentary and explanations. Petitioner argues that the documents in Exhibit 2 and Appendix G are not part of the record in this appeal, and that respondents have not offered any basis for LUBA to consider those extra-record documents.

The city and intervenor respond that Exhibit 2 simply demonstrates that Ordinance 5926 was acknowledged in October 2009 to comply with the statewide planning goals. However, that response does not explain why it is permissible for LUBA to consider

materials outside the record. With exceptions not invoked here, ORS 197.835(2)(a) confines our review to the documents and evidence in the record.[2]

With respect to Appendix G, respondents argue that the tables comparing uses under the M-2, MP and AU zones are simply extensions of respondents' arguments in their brief that the uses in the new AU zone are not substantively different or more intense than the uses allowed in the old M-2 and MP zones, in response to petitioner's arguments under the third assignment of error that the city has not demonstrated that rezoning the airport to AU complies with Goal 12 and the TPR. As explained below, the TPR is concerned in part with plan and zoning amendments allowing uses that generate more traffic than uses allowed under unamended plan and zoning designations.

The comparisons in Appendix G can be understood to constitute legal arguments: the views of respondents' legal counsel regarding the legal effect of rezoning the airport. However, even if so understood, OAR 661-010-0030(4)(d) and OAR 661-010-0035(3) require, in effect, that argument in support of or in opposition to an assignment of error be set forth in the body of the brief, and does not provide for the attachment of *additional* argument in an appendix to the brief. One reason for that requirement is that OAR 661-010-0030(2)(b) restricts the body of the brief to 50 pages, while there is no restriction on the number of pages that can be attached in appendices. Here, however, the body of the response brief is 38 pages, while the two tables total 10 pages, which is seemingly consistent with the 50-page limit. Therefore, we treat respondents' violation of OAR 661-010-0030(4)(d) and OAR 661-010-0035(3) as a "technical violation" of our rules under OAR 661-010-0005 that will not

[2] Respondents do not argue that the DLCD notices of adoption are subject to official notice under ORS 40.090(2) and Oregon Evidence Code 202(2). We have previously expressed uncertainty whether a DLCD notice of adoption is subject to official notice. *Media Art v. City of Tigard*, 46 Or LUBA 61, 63 (2003), *aff'd* 192 Or App 602, 89 P3d 95 (2004). However, even assuming the DLCD notice is not subject to official notice, petitioners do not dispute that Ordinance 5926 is acknowledged to comply with the statewide planning goals, which is the proposition that respondents rely on Exhibit 2 to establish in this appeal. Therefore, for what it is worth, for purposes of this opinion we will assume that Ordinance 5926 is acknowledged.

affect our review unless that violation prejudices the substantial rights of the parties. Petitioners do not argue that treating the legal arguments in Appendix G as part of a 48-page response brief otherwise consistent with our rules prejudices their substantial rights, and we do not see that it does. Accordingly, we shall consider the arguments in Appendix G.

The motion to strike is sustained in part. The Board shall not consider Exhibit 2.

FIRST ASSIGNMENT OF ERROR

Ordinance 5926, creating the AU zone and ASCO zone, is codified at HZO chapters 135A and 135B. Petitioner argues that Ordinance 5935, the decision challenged in this appeal, rezones over 7,000 properties to make new development on those properties subject to HZO 135B and, in particular, subject to the obligation for the landowner to provide the Port of Portland with an avigation easement as a condition of development. According to petitioner, the HZO 135B easement requirement is facially inconsistent with the Fifth Amendment to the United States Constitution, which prohibits taking private property for public use, without just compensation, and with the similar provisions of Article I, section 18 of the Oregon Constitution.[3] Petitioner contends that in all circumstances in which the avigation easement is applied the city will violate the Takings Clauses.[4]

In advancing a facial constitutional claim to an ordinance, petitioner must demonstrate that the ordinance is incapable of any constitutionally permissible application. *Lincoln City Chamber of Comm. v. City of Lincoln City*, 164 Or App 272, 276, 991 P2d 1080

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[3] The Fifth Amendment of the United States Constitution provides in relevant part that "private property [shall not] be taken for public use, without just compensation." Similarly, Article I, section 18 of the Oregon Constitution provides as relevant here that "Private property shall not be taken for public use, * * * without just compensation."

[4] Petitioner also argues under the first assignment of error that the HZO 135B easement requirement is inconsistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution, the doctrine of "unconstitutional conditions," and Article I, section 20 of the Oregon Constitution. Because we agree with petitioners that the HZO 135B easement requirement is facially inconsistent with the federal and state Takings Clauses, we see no point in addressing petitioners' alternative theories of constitutional infirmity. *See West Coast Media, LLC v. City of Gladstone*, 192 Or App 102, 108, 84 P3d 213 (2004) (affirming LUBA's holding that the city's sign ordinance is inconsistent with Article 1, section 8 of the Oregon Constitution and, for that reason, declining to address challenges to LUBA's holdings with respect to Article 1, section 20).

(1999). If the disputed ordinance provision is capable of being applied in a constitutionally permissible manner, then that provision can be challenged only on an "as-applied" basis, and the ordinance cannot be declared invalid on its face. *Id.* (citing *Cope v. City of Cannon Beach*, 317 Or 339, 855 P2d 1083 (1993)).

HZO 135B requires a property owner in the ASCO zone to transfer a property interest, an avigation easement, as a condition of development approval. Petitioner argues that the city can avoid the obligation to pay just compensation for exacting that property interest only if the city demonstrates that (1) there is an "essential nexus" between the exaction and a substantial government purpose, under *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), and (2) the exaction is "roughly proportional" to the impacts of the proposed development, under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). According to petitioner, because in all circumstances in which the avigation easement is applied the exaction will have nothing to do with the impacts of proposed development of property in the ASCO zone, the HZO 135B avigation easement requirement fails both *Nollan* and *Dolan* and is unconstitutional on its face.

A. Collateral Attack

The city and intervenor respond, initially, that petitioner's constitutional challenge to the HZO 135B avigation easement requirement is in essence an impermissible "collateral attack" on Ordinance 5926, which is not before LUBA in this appeal. According to respondents, the decision that is before LUBA in this appeal, Ordinance 5935, simply amends the city's zoning map to apply the AU zone and ASCO zone to various properties within the city. Respondents argue that Ordinance 5935 did not amend HZO 135B in any way, and that petitioner cannot advance a facial constitutional challenge to HZO 135B in an appeal of Ordinance 5935. We understand respondents to argue that the HZO 135B avigation easement requirement could be challenged only by filing a timely appeal of

Ordinance 5926, or by appealing a quasi-judicial land use decision that actually applies HZO 135B to approve or deny an application to develop property within the ASCO zone.

We disagree with respondents that petitioner are precluded from advancing a facial constitutional challenge to the HZO 135B avigation easement requirement in the present appeal, as an impermissible "collateral attack" on Ordinance 5926. The only support that respondents cite for that proposition is *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, *aff'd* 195 Or App 763, 100 P3d 218 (2004), in which we held that in an appeal of a final subdivision plat decision the petitioner could not challenge the correctness of an earlier, final decision that modified the tentative subdivision plat approval. However, *Butte Conservancy* did not involve separate legislative decisions that adopt and then apply zoning regulations, nor constitutional challenges to such regulations. Respondents are correct that, because the ASCO zone is deemed acknowledged to comply with the statewide planning goals, if petitioner attempted in this appeal to argue that the ASCO zone is inconsistent with one or more statewide planning goals, such a challenge would be precluded by acknowledgment. However, acknowledgment of the ASCO zone does nothing to insulate that zone from challenge on statutory or constitutional grounds. We see no principled reason why such statutory or constitutional challenges cannot be advanced in an appeal of a subsequent legislative ordinance that, for the first time, applies the ASCO zone to specific properties in the city.

Further, adoption of new zones and associated zoning regulations can, as in the present case, be effected in two separate ordinances, one that adopts the new zone but does not apply it to any property, and a second that actually applies the new zone to specific properties. In that circumstance, the second decision is almost certainly the first time that the city notifies property owners that their property is now subject to the new zone and its requirements. ORS 215.503, also known as "Ballot Measure 56," requires counties to provide notice to affected property owners when "rezoning" their property. ORS 215.503

did not require the city to provide its citizens Ballot Measure 56 notice of Ordinance 5926, and the city presumably did not provide such notice. As a practical matter, then, an appeal of the ordinance that applies the new zone to specific properties is the first reasonable opportunity many affected or concerned persons affected would have to raise a facial constitutional challenge to the zone. Accordingly, we decline respondents' invitation to extend the reasoning in *Butte Conservancy*, because in many cases the consequences of that extension would be that affected persons would essentially be precluded from advancing a facial challenge to the new zone, and would be limited to as-applied challenges when the city ultimately applied the new zoning requirements to deny or condition proposed development.

B. The Applicability of *Dolan* to a Facial Takings Challenge

Respondents next argue that the "rough proportionality" test in *Dolan* cannot, by its nature, be applied in a facial takings claim. *See Garneau v. City of Seattle*, 147 F3d 802, 811 (9th Cir 1998) (the *Dolan* analysis cannot be applied in facial takings claims). According to respondents, much of petitioner's facial challenge to HZO 135B rests on the premise that the avigation easement required under that provision will not be "roughly proportional" to the impacts of proposed development of land allowed in the base zone, and thus the exaction of the easement will violate the requirements of *Dolan*.

We generally agree with respondents that because the *Dolan* "rough proportionality" analysis requires evaluation of the specific impacts of specific proposed development, the rough proportionality analysis will play little or no direct role in a facial takings challenge. That does not mean, however, that *Dolan* is completely inapposite to a facial takings challenge of the kind advanced here. *Dolan* is a refinement of the reasoning in *Nollan*, and is part of a closely related two-prong test for determining under what circumstances a local government can take private property for public use without paying the just compensation otherwise required by the federal Takings Clause. While petitioner relies on *Dolan* in part to argue that the HZO 135B avigation easement requirement facially violates the Takings

Clauses, because petitioner believes that in all cases in which it is exacted the easement will have no relationship to the impacts of any proposed development, that argument is based as much on *Nollan* as *Dolan*. To the extent the reasoning in *Dolan* illuminates the requirements of *Nollan* or otherwise has some bearing on a facial takings challenge in the posture of the case before us, we see no error in considering that reasoning.

C. Petitioner's Standing to Present a Facial Challenge

Although respondents do not dispute petitioner's standing to bring this appeal under ORS 197.620(1) and 197.830(2), respondents note that at no place in the record or in their brief does petitioner assert that Ordinance 5935 applies the ASCO zone to property she owns. Respondents argue that if petitioner does not own property subject to the ASCO zone, then petitioner's arguments based on *Dolan* are particularly inappropriate, since petitioner will never be subject to the requirement to provide an avigation easement and could never advance an as-applied challenge under *Dolan*. Further, we understand respondents to argue that, in order to advance a *facial* challenge to the HZO 135B avigation easement requirement, petitioner must demonstrate that she owns property subject to the ASCO zone and therefore is potentially subject to HZO 135B.

As explained above, the reasoning in *Dolan* may have some bearing in evaluating a facial challenge based on *Nollan*, even if the *Dolan* rough proportionality test is not itself applicable. We are not sure what to make of respondents' suggestion that petitioner's failure to allege that she owns property that is subject to the ASCO zone precludes her from advancing a facial takings challenge to HZO 135B. Respondents cite to *Carson Harbor Village, Ltd. v. City of Carson*, 37 F3d 468, 476 (9th Cir 1994), for the proposition that persons bringing a facial takings challenge must demonstrate that they owned property subject to the challenged regulations at the time the regulations were enacted. Subsequent cases have recognized standing even for later purchasers. *Guggenheim v. City of Goleta*, 582 F3d 996, 1005-06 (9th Cir 2009). However, respondents are generally correct that, in order to

invoke an Article III Court's jurisdiction over a facial challenge under the federal Takings Clause, the challenger must usually show that a justiciable controversy exists, *i.e.*, that the disputed legislation causes the challenger to suffer an injury, the invasion of a legally protected interest. *Id.* at 1004.

LUBA is not a court and is not necessarily subject to the same standing requirements that may limit judicial review. *See Just v. City of Lebanon*, 193 Or App 132, 147, 88 P3d 312 (2004) (LUBA's review and standing to invoke review is governed by statute, and those statutes do not require LUBA to apply justiciability doctrines applicable to courts, such as the requirement that the person invoking review demonstrate that review will have a practical effect on that person). Standing to appeal a post-acknowledgment plan amendment to LUBA is governed by statute, specifically, ORS 197.620(1), which requires only that the petitioner participate in the proceedings below. Respondents cite to no statute or other authority imposing standing requirements on a petitioner advancing a claim that a land use decision is unconstitutional, or that limits LUBA's review of such claims. Absent a more developed argument, respondents have not demonstrated that petitioner's failure to allege that she owns property subject to the ASCO zone means that she has not established standing before LUBA to advance a facial takings challenge to HZO 135B.

D. HZO 135B Avigation Easement

Turning to the merits, respondents argue first that petitioner has not demonstrated either that adoption of Ordinance 5935 resulted in the taking of any property interest or that, as applied in all future circumstances, HZO 135B will take property without just compensation, contrary to the Takings Clauses. Therefore, respondents argue, petitioners have not demonstrated that the HZO 135B avigation easement requirement is invalid on its face.

Respondents cite *Carson Harbor Village, Ltd.*, again, for the proposition that a facial takings claim can succeed only if the challenger demonstrates that the mere *enactment* of the

legislation itself results in a taking of private property for public use. 37 F3d at 476. Because neither the initial adoption of the ASCO zone nor the zoning map amendment that applied the zone to private property in themselves exacted an avigation easement from any property owner or otherwise effected any taking of property, respondents argue that petitioner's facial challenge must fail.

Carson Harbor Village, Ltd. is a regulatory takings case in which the plaintiffs argued that ordinances limiting mobile home park rents and imposing other restrictions constituted a facial taking of property from park owners. In analyzing the park owners' standing to bring a facial takings claim, the Ninth Circuit concluded that because the park owners acquired the property after the enactment of the ordinances, they could not demonstrate injury to themselves, and therefore did not have standing to challenge the ordinances. *Id.* As explained above, standing requirements that govern the jurisdiction of an Article III court do not apply to LUBA's review. In addition, it is not clear to us that the proposition cited in *Carson Harbor Village, Ltd.* applies outside the context of a regulatory takings challenge, where the landowner argues that the challenged law constructively "takes" property by *regulating* the landowner's use of the property to such a degree that little or no economically beneficial use remains. In the present case, petitioners argue that the HZO 135B avigation easement requirement will, in every case in which it is applied, result in an actual "taking" of property, the legal acquisition of property interests, in a manner inconsistent with the state and federal Takings Clauses. We are cited to no cases suggesting that, where a law is challenged on such grounds, the petitioner must demonstrate that the mere enactment of the law itself results in a taking of property.

On the contrary, at least where Article I, section 18 of the Oregon Constitution is concerned, the Court of Appeals has allowed a facial challenge to an ordinance in circumstances where the mere adoption of the ordinance itself clearly did not immediately result in a taking of private property. *Ferguson v. City of Mill City*, 120 Or App 210, 852

P2d 205 (1993), involved a declaratory judgment action against a city ordinance that required property owners to (1) obtain a city permit and connect to city sewers, by installing an interceptor tank on their property, and (2) grant the city an easement to accommodate and maintain the city-owned interceptor tank and related sewer lines. The Court held that the ordinance mandated a "physical occupation" of private property for public use, without provision for just compensation, and therefore facially violated Article I, section 18. *Id.* at 214-15 (citing *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 US 419, 102 S Ct 3164, 73 L Ed 2d 868 (1982). While the present case does not involve a "physical occupation," that is, exclusive occupation of private property by or at the behest of government as in *Loretto* and *Ferguson*, petitioner alleges that the avigation easement requires a similar "physical invasion" of private property, and the actual acquisition of private property. We agree that a facial challenge to a law that allegedly requires physical invasion of private property and acquisition of property is similar to the "physical occupation" challenge advanced in *Ferguson*. In such circumstances, we do not believe a facial challenge to such a law fails unless the challenger demonstrates that the mere enactment of the law itself effects a physical invasion or acquisition of property.

Finally, respondents argue that petitioners have not demonstrated that, in every circumstance in which the HZO 135B avigation easement is required as a condition of development, that exaction of property will violate the state or federal Takings Clauses. Respondents argue:

> "To the extent the City must demonstrate rough proportionality if an avigation easement is required in a future development proposal, the City will have a range of options available to it. First, it may find based upon the facts in a given case that the requirement would be roughly proportional. Second, an applicant could seek a variance to the standard. Third, the City could elect not to apply the standard. *See Columbia Riverkeepers v. Clatsop County*, 58 Or LUBA 235 (2009) (When *Dolan* applies, it can function as a variance, and a local government may choose not to exact property as a condition of development approval that it would otherwise be entitled to exact under its land use regulations, as an alternative to compensating the landowner for the

taking). Finally, the City and/or the Port could compensate the landowner." Response Brief 13.

As we understand it, petitioner's arguments are based as much or more on the *Nollan* essential nexus requirement as they are on the *Dolan* rough proportionality requirement. Petitioner contends that there is no "nexus between the impacts of the developing property owner and the easement requirements." Petition for Review 11. Under *Nollan*, it is insufficient that an exaction of property serve some governmental objective. The exaction must in some way mitigate the impacts of proposed development *on* the identified governmental objective. In *Nollan*, the Coastal Commission required a lateral public easement along a private property's ocean frontage between mean high tide and a seawall, allegedly to mitigate the impacts of the proposed dwelling on the public's ability to view the ocean from vantage points landward of the dwelling. The Court held that, while the Commission might have constitutionally required some easement or exaction of property right that in fact mitigated such visual impacts, such as providing a public viewing point on the property, the lateral beach easement required in that case had nothing to do with mitigating such visual impacts, or the governmental interest in preserving public views of the beach from upland viewing spots, and therefore the Commission could not take the beach easement without providing just compensation.

In the present case, petitioners argue that in all conceivable applications of the HZO 135B avigation easement, there will be a similar disconnect between the easement, the impacts of development and the governmental objective, because the easement is not intended to mitigate, and does nothing to mitigate, the impacts of any development on the city's presumed governmental interest in protecting airport operations.

On appeal, respondents argue that the avigation easement requirement is intended to address airport compatibility issues and avoid land use conflicts in areas surrounding

airports.[5] Reducing land use conflicts with the airport is certainly a legitimate governmental objective. The avigation easement requirement presumably attempts to further that objective by requiring as a condition of development that surrounding property owners convey a property interest to the Port, allowing, among other things, the Port "free and unobstructed passage of aircraft through the airspace over the property" above a certain height, and the "right to subject the property to noise, vibrations, fumes, dust and fuel particle emissions associated with normal airport activity."[6] However, as in *Nollan*, the exaction of property does not advance the purported governmental interest, because granting the Port an easement to physically invade private property would do nothing to actually reduce conflicts between the Airport and surrounding land uses. The same conflicts (noise, etc.) would exist to the exact same degree, with or without the easement. The only arguable effect of requiring property owners to grant such an easement as a condition of land use approval is to make it more difficult for property owners to advance a successful inverse condemnation or other legal action against the Port, based on trespass or the externalized impacts of the airport

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[5] The purpose of the ASCO zone is to "establish compatibility and safety standards to promote air navigational safety and reduce potential safety hazards for persons living, working or recreating near the Hillsboro Airport, thereby encouraging and supporting its continued operation and vitality." HZO 135B(A).

[6] We repeat the definition of "avigation easement" at HZO 135B(C)(6):

> "[1] A right-of-way for free and unobstructed passage of aircraft through the airspace over the property at any altitude above a surface specified in the easement (set in accordance with Federal Aviation Regulations Part 77 criteria).
>
> "[2] A right to subject the property to noise, vibrations, fumes, dust, and fuel particle emissions associated with normal airport activity.
>
> "[3] A right to prohibit the erection or growth of any structure, tree, or other object that would penetrate the imaginary surfaces as defined in this ordinance.
>
> "[4] A right-of-entry onto the property, with proper advance notice, for the purpose of marking or lighting any structure or other object that penetrates the imaginary surfaces as defined in this ordinance.
>
> "[5] A right to prohibit electrical interference, glare, misleading lights, visual impairments, and other hazards to aircraft flight as defined in this ordinance from being created on the property."

operations on surrounding uses. We think it highly doubtful that taking private property for that purpose constitutes a legitimate government objective.[7]

Moreover, requiring an easement to allow for passage of aircraft over the property and the right to subject the property to airplane noise, etc., appears to have no connection whatsoever to the development of property surrounding the airport or the impacts of development. It is difficult to understand how allowing the Port to externalize adverse impacts onto property surrounding the airport could be "roughly proportional," or related at all, to the impacts of any kind of development on that property. Respondents offer no scenario or argument under which such an exaction could possibly be proportional to the impacts of *any* potential development allowed in the base zone and ASCO zone.

In sum, we conclude that at least the first two elements of an avigation easement required under HZO 135B are facially inconsistent with the state and federal Takings Clauses, under the reasoning in *Nollan* and *Dolan*, and are incapable of any constitutionally permissible application. Whether the three remaining elements of an avigation easement are also unconstitutional for the reasons set out above is less clear, since those elements arguably function to actually reduce airport/land use conflicts, have some bearing on the city's presumed objective in reducing land use conflicts, and could have, at least in some cases, some relationship to the impacts of developing property. If the avigation easement requirement included only those three elements, we might well conclude that it would survive a facial challenge, and could be challenged only on an as-applied basis. However, the avigation easement requires all five elements, and therefore even if an easement that included only the three remaining elements would pass facial scrutiny, the avigation easement required under HZO 135B is still unconstitutional.

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[7] *See McCarran Int'l Airport v. Sisolak*, 122 Nev 645, 661, 137 P3d 1110 (2006) (requiring an uncompensated avigation easement as a condition of development was improper and therefore no defense to an inverse condemnation action).

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that several provisions of HZO 135A governing the AU zone violate Article I, section 21 of the Oregon Constitution, which prohibits the delegation of legislative authority.

In relevant part, Article I, section 21 prohibits passing any law "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Article I, section 21 has been construed to prohibit laws that delegate the power of amending legislation to another governmental entity, so-called "prospective" delegation. *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 981 P2d 368 (1999). In *Advocates*, the Court of Appeals addressed a citizen initiative that characterized "hazardous substance" as any substance that was included on several lists of federally-regulated hazardous materials, as well as "any substances added, subsequent to the effective date of this Act, to the lists described." *Id.* at 295-96. The plaintiffs argued that the initiative violated Article I, section 21 because it prospectively delegated authority to amend city legislation to the federal government. The Court agreed, holding that municipal legislation cannot incorporate into its definitions federal regulations not promulgated at the time the legislation is adopted.

Respondents argue, initially, that the Article I, section 21 delegation doctrine does not apply to legislative decisions amending comprehensive plans and zoning ordinances, but should be limited to the context addressed in *Advocates*, that of initiative amendments to city charters. Respondents cite to *Allison v. Washington County*, 24 Or App 571, 548 P2d 188 (1976), which addressed whether legislative actions related to comprehensive plans and zoning ordinances are subject to initiative and referendum, to argue that zoning ordinance amendments are different from initiatives and referenda, and therefore not subject to Article I, section 21. However, in *Advocates* the Court of Appeals addressed the inverse of that argument, holding that Article I, section 21 applied to an initiative that amended a city

charter, because a city charter is a "law" and thus subject to Article I, section 21. The Court rejected the argument that Article I, section 21 applies only to legislative acts such as statutes adopted by the legislature or "an ordinance adopted by a city council." 160 Or App at 312. Respondents have not cited any authority suggesting that zoning ordinance amendments are not "laws" for purposes of Article I, section 21.

A. HZO 135A(D)(7) "Environmental Laws"

HZO 135A(D)(7) identifies "Hazardous Substance" in part as "[a]ny and all substances *** in or under any Environmental Laws." In turn, HZO 135A(D)(6) defines "Environmental Laws" to include "[a]ny and all federal, state and local statutes, regulations, rules, permit terms and ordinances now *or hereafter in effect, as the same may be amended from time to time*, which in any way govern materials, substances, regulated substances and wastes, emissions, pollutants, animals or plants, noise, or products and/or relate to the protection of health, safety or the environment." (Emphasis added.) Petitioner contends that in requiring compliance with environmental laws as they "may be amended from time to time," HZO 135A(D)(6) clearly violates the prohibition on prospective delegation, as explained in *Advocates*.

Respondents argue that HZO 135A(D)(7) should be narrowly construed to avoid any constitutional violation, by understanding the provision to require compliance only to environmental laws that are in effect on the date the ordinance was enacted, and not to require compliance with laws that may be adopted by other governmental bodies in the future. According to respondents, the Court of Appeals recently took that approach in *Olson v. State Mortuary and Cemetery Board*, 230 Or App 376, 388, 216 P3d 325 (2009). *Olson* concerned a statute providing a cause for disciplinary action against funeral services providers that fail to comply with "regulations adopted by the Federal Trade Commission regulating funeral industry practices." The Court held that that language did not violate

Article I, section 21 because it could be construed to refer only to the federal rule "as it was then written" and not to future regulations that may be adopted. *Id.* at 388.

Petitioner argues, and we agree, that the present circumstance are much closer to those in *Advocates* than to those in *Olson*. The statute at issue in *Olson* included no references to prospective amendments to another entity's regulations, while the legislation at issue in both *Advocates* and in the present case explicitly and unambiguously require compliance with other entity's regulations as they may subsequently be amended. It is impossible to construe the language of HZO 135A(D)(6) to require compliance only with environmental regulations in effect when the ordinance was adopted. HZO 135A(D)(6) expressly requires compliance with future regulations not promulgated at the time of adoption, and therefore violates the Article I, section 21 prohibition on delegation of the power to amend the city's legislation.

B. HZO Section 135A(K) – "Currently Applicable" Standards

HZO Section 135A(K) provides:

> "All uses and activities permitted outright within the AU Airport Use Zone shall be reviewed for compliance with, *and shall comply with currently applicable Port of Portland standards* as follows:
>
> "1. Hillsboro Airport Standards for Development;
>
> "2. General Aviation Minimum Standards for the Hillsboro Airport; and
>
> "3. Wildlife Hazard Management Plan for the Hillsboro Airport" (Emphasis added.)

Petitioner argues that HZO Section 135A(K) also violates Article I, section 21, by requiring that the city evaluate land use applications for uses and activities permitted within the AU Airport Zone for compliance with the "currently applicable Port of Portland standards," as they exist at the time approval is being sought.

The city and intervenor respond that the phrase "currently applicable" should be understood to refer only to the three listed sets of Port of Portland standards and plans as they

"currently" existed on the date HZO 135A(K) was adopted, not as they may exist at the time development approval is sought. Respondents argue that, because HZO 135A(K) can be interpreted in a manner that does not run afoul of Article I, section 21, under *Olson* LUBA should so interpret the code provision and thus avoid any problem with prospective delegation.

HZO 135A(K) is less explicit than HZO 135A(D)(6), and can be read to refer only to Port standards as they existed on the date the code provision was adopted. The clause "shall comply with currently applicable Port of Portland standards" is part of a compound sentence the first element of which provides that "[a]ll uses and activities permitted outright within the AU Airport Use Zone shall be reviewed for compliance with" Port standards. Because that first element of the sentence is clearly referring to a post-adoption time frame when land use applications are filed, an inference arises that the second element of the sentence is also referring to the same time frame, the standards that are applicable when land use applications are filed. On the other hand, when the city intends to refer to standards as they may be amended from time to time, as it explicitly did in HZO 135A(D)(6), it knows how to express that intent unambiguously. Because the city chose to use different language in HZO 135A(K), that suggests a different intent. Although it is a close call, we agree with respondents that the narrowing construction applied in *Olson* should be extended to circumstances where, as here, the text of the code language can be interpreted to refer to legislation as it exists on the date the code language is adopted. This subassignment of error is denied.

C. HZO Section 135A(E)(2) – Uses and Activities Permitted Outright within the Master Plan for the Hillsboro Airport

HZO 135A(E) sets out the uses permitted outright in the AU zone. HZO 135A(E)(2) provides for "[a]ir passenger and air freight services and facilities that are consistent with levels identified in the most current, adopted Master Plan for the Hillsboro Airport." Petitioner notes that at the present time no air passenger or air freight services are present at

the Hillsboro Airport and those services are not identified in the existing airport master plan, which means that any future expansion of the airport to allow such uses will require an amendment to the airport master plan. According to petitioner, the airport master plan is not a city planning document, but a document that the Port has adopted for its own purposes and that the Port can amend at its discretion. Again, petitioner argues that the city has violated Article I, section 21 by simply delegating to the Port the ability to determine what uses are allowed at the airport, and at a what level of intensity.

Respondents offer no specific response to petitioner's arguments regarding HZO 135A(E)(2). As noted, Article I, section 21 prohibits passing any law "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." We agree with petitioner that HZO 135(E)(2) presents an even clearer violation of Article I, section 21 than the provisions discussed above. Under HZO 135(E)(2), the city has delegated to the Port not only the authority to effectively *amend* the city standards that govern land uses in the AU zone (prospective delegation), the city has actually delegated to the Port the authority to determine what uses are in fact allowed in the AU zone. Because the existing Port master plan apparently does not provide for air passenger or air freight services, under HZO 135A(E)(2) those uses are not allowed at all, unless and until the Port amends its plan to provide for them. In the words of Article I, section 21, the city has made the "taking effect" of HZO 135(E)(2) depend upon the authority of the Port. Respondents do not argue that that delegation of authority is provided for under the Oregon Constitution, or any other basis to conclude that HZO 135(A)(E)(2) does not violate Article I, section 21.

D. Severance

As a final general defense, respondents argue that if LUBA concludes that any provisions of HZO 135A violate Article I, section 21, LUBA should simply sever those provisions. Respondents note that in an appeal of the decision on remand in *Advocates*, the Court of Appeals held that even where there is no express severability clause included in an

ordinance, the law provides a presumption of severability, which may be overcome based on three considerations. *Advocates for Effective Regulation v. City of Eugene*, 176 Or App 370, 376, 32 P3d 228 (2001) (*Advocates II*).[8] Respondents argue that because the three considerations discussed in *Advocates II* are not present here, LUBA should apply the presumption of severability, sever any offending provisions from HZO 135A, and thus deny the second assignment of error.

The doctrine of severance does not work in the manner respondents argue, at least for purposes of LUBA's review. In *Advocates I*, the Court of Appeals remanded the decision to the circuit court to consider, among other things, whether the offending provisions could be severed. On remand, the circuit court applied the severance doctrine and severed the disputed provisions. In *Advocates II*, the Court of Appeals rejected challenges to the decision on remand and therefore ultimately affirmed the circuit court's decision. However, respondents do not cite to any case where the Court of Appeals or LUBA applied the severance doctrine to the decision on appeal, severed offending provisions, and thereby denied the assignment of error and affirmed the decision. On the contrary, in the only LUBA decision we find in which the Board has applied the severance doctrine, LUBA used the doctrine only to determine whether the Board must reverse as unconstitutional the challenged ordinance *in its entirety*, or whether LUBA could go on to address sub-constitutional

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[8] The Court in *Advocates II* explained:

> "If there is no express severability clause, the law provides a presumption of severability, which may be overcome only if (1) the enactment provides that the remaining parts shall not remain in effect; (2) the remaining parts are so dependent on the invalid part that the remaining parts would not have been enacted without the invalid part; or (3) the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with legislative intent. ORS 174.040." Id at 376.

The Court noted that the same severability principles embodied in ORS 174.040 also apply to municipal ordinances, citing *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 16, 994 P2d 1205 (2000).

challenges to the remaining portions of the ordinance that were not subject to severance. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466, 470 (1993).[9]

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioner argues under this assignment of error that Ordinance 5935, which applies the AU zone to the airport property, fails to comply with Goal 12 and the Transportation Planning Rule (TPR), at OAR 660-012-0060.[10] According to petitioner, in rezoning the airport property from industrial uses to AU, the city authorized new uses that must be analyzed under the TPR, because those new uses could have a "significant effect" on the

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[9] Our reasoning in *Riverbend Landfill Company* was likely unnecessary since ORS 197.835(11)(a) expressly authorizes LUBA to consider all issues "when reversing or remanding a land use decision." Identical statutory authority was codified at ORS 197.835(9)(a) (1993) when *Riverbend Landfill Company* was decided in 1993.

[10] OAR 660-012-0060(1) provides:

> "Where an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation would significantly affect an existing or planned transportation facility, the local government shall put in place measures as provided in section (2) of this rule to assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. A plan or land use regulation amendment significantly affects a transportation facility if it would:
>
> "(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);
>
> "(b) Change standards implementing a functional classification system; or
>
> "(c) As measured at the end of the planning period identified in the adopted transportation system plan:
>
> "(A) Allow land uses or levels of development that would result in types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;
>
> "(B) Reduce the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan; or
>
> "(C) Worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or comprehensive plan."

city's transportation system. However, petitioner argues, the city did not address or consider compliance with the TPR.

As a threshold issue, respondents assert that the third assignment of error fails, because it is limited to an argument that the city was required to adopt findings addressing the TPR and failed to do so, and fails to contend that adoption of Ordinance 5935 in fact "significantly affects" any transportation facility and thus triggers compliance with the TPR. Respondents note, correctly, that Ordinance 5935 is a legislative decision, and that there is no generally applicable requirement that legislative decisions be supported by findings demonstrating compliance with applicable approval standards. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435, 451, *aff'd* 185 Or App 408, 61 P3d 281 (2002); *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 563-64 (1994). *But see Home Builders Association v. City of Eugene*, 59 Or LUBA 116, 133 (2002) (citing *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16, n 6, 38 P3d 956 (2002) (even without a findings obligation for legislative decisions, to allow LUBA and the appellate courts to perform their review function, there must be enough in the way of findings or accessible material in the legislative record to show that applicable criteria were applied and that required considerations were indeed considered).

Petitioner replies, and we agree, that fairly read the third assignment of error includes a substantive challenge that Ordinance 5935 triggers the need to demonstrate compliance with TPR and the city failed to do so. The third assignment of error is that "The City's Decision Ignored Applicable Law and Failed to Comply with Goal 12 and the Transportation Planning Rule." Petition for Review 21. Petitioner argues in relevant part that rezoning the Airport property from the MP and M-2 zones, which do not allow an airport and under which the existing airport is a nonconforming use, to AU, which according to petitioner allows airports at greater levels of intensity than the existing airport, might allow uses with increased traffic impacts sufficient to "significantly affect" surrounding transportation

facilities within the meaning of OAR 660-012-0060(1). Although petitioner's argument understandably focuses on the complete absence of findings addressing the TPR, we decline to read the third assignment of error as challenging merely the absence of findings.

On the merits, respondents argue that rezoning the airport property to AU in fact represents a "down-zone" in the intensity of uses allowed on the airport property compared to the previous MP and M-2 zones, and therefore the rezoning could not possibly allow land uses whose traffic impacts could "significantly affect" any transportation facility within the relevant planning period. However, respondents cite to nothing in the record supporting their view that the effect of rezoning the Airport from MP and M-2 to the new AU zone represents a "down-zone" with respect to potential for impacts on transportation facilities near the airport, and therefore the TPR is not triggered. As noted above, to allow meaningful review, there must be enough in the way of findings or accessible material in the legislative record to show that applicable criteria were applied and required considerations were indeed considered. Respondents' arguments rest entirely on Appendix G to the Response Brief. As far as the *record* reflects, the city apparently gave no consideration to the TPR during the legislative proceedings below. In that circumstance (*i.e.*, a legislative decision that does not consider the TPR and includes no findings addressing the TPR), we believe that the city can avoid remand on this issue only if it can demonstrate, essentially as a matter of law, that the TPR does not apply to the challenged rezoning, in other words, that the TPR is not a "required consideration." *Citizens Against Irresponsible Growth*, 179 Or App at 16, n 6.

The response brief falls short of making that demonstration. The AU zone is the only city zone that allows an airport and airport related facilities. The challenged decision applies the AU zone to property developed with a regional airport that is a nonconforming use under the preexisting zoning. Generally, restrictions apply to expansions or alterations of nonconforming uses. *See* HZO 99 (allowing expansion of a nonconforming use in cases of "practical difficulty or unnecessary hardship"). An airport is an outright permitted use in the

AU zone and, as discussed above, the city has largely delegated to the Port of Portland the ability to determine what intensity of airport uses is allowed. Under that view, rezoning the Airport property to AU certainly could allow new or expanded airport operations, with consequent traffic impacts that might well "significantly effect" nearby transportation facilities over the relevant planning period, within the meaning of OAR 660-012-0060(1).

The city's argument that the TPR does not apply as a matter of law is based on a comparison of the most-intensive uses potentially allowed in the MP and M-2 zones against the most-intensive uses allowed in the AU zone (an airport). The MP and M-2 zones allow a number of potentially traffic-intensive uses, including drive-in restaurants, stores, offices, etc. The city argues that if the airport property were redeveloped with such traffic-intensive commercial uses, the impacts on nearby transportation facilities would necessarily be greater than an airport allowed under AU zone. The city is correct that determining whether a zoning map amendment "significantly affects" a transportation facility can often be accomplished by comparing the most traffic-intensive uses allowed in the old zone against the most-traffic intensive uses allowed in the new zone. If the record supports a determination that a reasonable "worst-case" scenario based on the uses allowed under the new zone would result in fewer impacts on transportation facilities than the reasonable "worst-case" scenario based on uses allowed under the old zone, such a determination could support a conclusion that that the rezoning does not "significantly affect" a transportation facility under OAR 660-012-0060(1)(c).

The presumption underlying that comparison approach is that the local government's acknowledged transportation system plan (TSP) was originally developed with the goal of accommodating the transportation needs potentially generated by uses allowed under the old zone, within the relevant planning period. The TSP obviously would not take into account rezonings that allow new uses with potentially more significant traffic impacts. Hence, a hypothetical comparison of reasonable worst-case traffic scenarios between the uses allowed

under the old and new zones can be a reliable and appropriate method of making a threshold determination whether a rezoning decision triggers the TPR. In Appendix G and in supporting argument, respondents attempt to conduct just such a hypothetical comparison. However, it is not clear to us in the present circumstances that a hypothetical comparison of the relative traffic-intensity of uses allowed in the MP, M-2 and AU zones is necessarily an appropriate and reliable method of determining whether the TPR is triggered. That is because the airport property has long been developed with an important regional airport, and it seems highly unlikely that the city's TSP was developed with the understanding that the airport would be demolished during the planning period and the airport property redeveloped with various commercial uses nominally allowed on that property under the MP and M-2 zones. It seems far more likely that the surrounding transportation system is planned and designed to accommodate the existing airport, notwithstanding that it is a nonconforming use in the MP and M-2 zones. In other words, the hypothetical "worst-case" scenario posited by respondents under the prior industrial zoning may well not be a *reasonable* scenario under these circumstances, which casts into doubt whether a simple comparison of uses nominally allowed in the MP, M-2 and AU zones would yield a meaningful determination that the TPR is or is not triggered. The most meaningful approach in the present case, as petitioner suggests, may be a comparison of the airport use as planned under the city's TSP and comprehensive plan, with the airport as it may reasonably be expanded under the AU zone.

In sum, we cannot tell from the present record and pleadings whether the TPR is a "required consideration" in rezoning the airport to AU, and the present record does not include any indication that the city in fact considered whether the rezoning triggers the TPR.

The third assignment of error is sustained.

CONCLUSION

For the reasons set out under the first and second assignments of error, the adoption of Ordinance 5935 is unconstitutional, and the city cannot lawfully apply the AU zone and

ASCO zone to property within the city unless and until the city amends HZO 135A and 135B to remove the unconstitutional provisions identified in this opinion. Under that reasoning, the proper disposition is reversal of Ordinance 5935. OAR 661-010-0071.[11] If the county elects to readopt Ordinance 5935 after removing from HZO 135A and 135B the unconstitutional provisions identified in this opinion, it will also need to address our disposition of the third assignment of error.

The city's decision is reversed.

Holstun, Board Chair, concurring.

In relevant part, Article I, section 21 of the Oregon Constitution prohibits passing any law "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." In section C under the second assignment of error, the majority concludes that HZO 135A(E) runs afoul of Article I, section 21. Among the uses permitted outright in the AU zone are "[a]ir passenger and air freight services and facilities that are consistent with levels identified in the most current, adopted Master Plan for the

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[11] OAR 661-010-0071 provides:

"(1) The Board shall reverse a land use decision when:

"(a) The governing body exceeded its jurisdiction;

"(b) The decision is unconstitutional; or

"(c) The decision violates a provision of applicable law and is prohibited as a matter of law.

"(2) The Board shall remand a land use decision for further proceedings when:

"(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);

"(b) The decision is not supported by substantial evidence in the whole record;

"(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or

"(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law."

Hillsboro Airport." I do not believe that language in HZO 135A(E) runs afoul of the Article I, section 21 prohibition against the city delegating its lawmaking power.

City land use regulations commonly allow specified development but require that development first be served by sewer or water—services that are often provided by a special district or other governmental unit. That is not a delay or delegation of the "taking of effect" of the regulation. Rather, such regulations immediately take effect and authorize applications for approval of the specified development but require certain factual predicates (availability of water and sewer) before such development can be approved by the city. Such regulations do not delegate to the sewer or water district or other governmental unit the power to determine when the regulation will "take[] effect," within the meaning of Article I, section 21.

Similarly, a regulation like HZO 135A(E) that requires that any air freight services and facilities in the AU zone must be consistent with the "levels identified" in the airport master plan simply imposes a condition predicate to development of air freight services and facilities in the AU zone. The precise meaning of "levels identified' in the airport master plan is not clear to me, but presumably it requires that construction of air freight services and facilities in the AU zone must be consistent with the demand for such facilities identified in the airport master plan. While I will concede it may be possible to characterize that understanding of HZO 135A(E) as unlawfully delegating lawmaking authority to the port, it is also possible to characterize HZO 135A(E) as doing something different. The condition predicate in HZO 135A(E) (that air passenger and freight services be consistent with the "levels identified" in the airport master plan) is not unlike zoning standards that are commonly encountered and require a "public need" for development before the development authorized in a zoning district may be approved. Just as the city may have little or no control over the "levels" of air freight services and facilities identified in the airport master plan, a city may have little or no control over the level of public need for development. In neither

case is there an improper delegation of lawmaking power under Article I, section 21. I would reject petitioner's challenge to HZO 135A(E)(2) under the second assignment of error.