BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON AVIATION WATCH,
MICHELLE BARNES, JIM LUBSCHER,
and RUTH WARREN,
Petitioners,

vs.

CITY OF HILLSBORO,
Respondent.

LUBA No. 2012-098

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

Sean Malone, Eugene, filed the petition for review and argued on behalf of petitioners.

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

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

DISMISSED 04/17/2013

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

Petitioners appeal an ordinance that repeals Hillsboro Municipal Code (HMC) Subchapter 8.32, which was adopted to regulate the operation of aircraft over the city.

FACTS

In 1963, the city adopted Ordinance No. 1953, entitled "[a]n Ordinance Regulating the Operation of Aircraft Over the City of Hillsboro * * *." Respondent's Brief App 2-3. In relevant part, Ordinance No. 1953 prescribed a minimum height limit for aircraft operations over the city, and prohibited acrobatic flying and the dropping of items from aircraft. Ordinance No. 1953 was codified at HMC 8.32.

In 1977, the city adopted its first comprehensive plan, and submitted the comprehensive plan to the Land Conservation and Development Commission (LCDC) for acknowledgment. In 1984 LCDC acknowledged the city's comprehensive plan and zoning regulations to comply with the statewide planning goals. The LCDC acknowledgment order does not reference HMC 8.32.

In 1979, the city adopted Ordinance No. 2968-1-79, entitled "[a]n Ordinance Regulating the Operation of Aircraft In and Over the City of Hillsboro * * *," which repealed Ordinance No. 1953 and replaced it with a similar scheme that also set a minimum height limit for aircraft operations over the city, and prohibited acrobatic flying and the dropping of items from aircraft. In addition, Section 3 of Ordinance No. 2968-1-79 prohibited the operation of any aircraft from any area of the city other than an "approved airport." Section 3 further provided that "[a]pplications for approval shall be made in writing to the City Council" and that the city council "may condition or restrict such approval in any manner it deems appropriate." Ordinance No. 2968-1-79 included definitions of "aircraft" and "airport." Ordinance No. 2968-1-79 was codified in HMC chapter 8, concerning "Vehicles

and Parking," under HMC subchapter 8.32. The definitions in Ordinance No. 2968-1-79 were codified in HMC 1.01.020.

The city's zoning and land use regulations are contained in Ordinance 1945, known as the Zoning Ordinance or HZO. In 2009, the city amended its comprehensive plan and the HZO to implement the recommendations of the Hillsboro Airport Compatibility Study. The Hillsboro Airport, owned and operated by the Port of Portland, is the only airport in the city. Among other things, the city amended the HZO to include two new zones, the Airport Use (AU) and Airport Safety and Compatibility Overlay (ASCO) zones. The AU zone is the only city zone that allows an airport or aviation-related land uses. The city applied the AU zone to the Hillsboro Airport, and the ASCO zone to lands surrounding the airport.

In 2011, the city completed a municipal code audit, which in relevant part concluded that HMC 8.32 is "obsolete," because the "use of aircraft in regard to minimum height, low altitude flying, and dropping of articles is now controlled by the Federal Aviation Administration." Record 54. Consequently, the city recorder recommended repeal of HMC 8.32.

On December 4, 2012, the city council adopted the ordinance challenged in this appeal, Ordinance No. 6037. The ordinance's two "whereas clauses" state that the HMC includes regulations governing the operation of aircraft in Hillsboro in regard to minimum height, low altitude flying and dropping of articles, and federal law has preempted local government regulation with respect to airspace use and management, traffic control, safety and the regulation of aircraft noise. Accordingly, Ordinance No. 6037 repeals HMC 8.32 in its entirety, and also repeals the definition of "aircraft" in HMC 1.01.020.

This appeal followed.

JURISDICTION

LUBA's jurisdiction is limited, in relevant part, to review of land use decisions. ORS 197.825(1) provides that LUBA has exclusive jurisdiction to review "any land use decision."

A local government decision is a "land use decision" if it meets either (1) the statutory definition in ORS 197.015(10)[1] or (2) the significant impact test described in *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982).

The city moves to dismiss this appeal, arguing that the challenged ordinance is not a land use decision under either the statutory definition or the significant impacts test Petitioners have the burden to establish the LUBA's jurisdiction. *Rohrer v Crook County*, 38 Or LUBA 8, 11, *aff'd* 169 Or App 587, 9 P3d 163 (2000); *Billington v. Polk County*, 299 Or 471, 479, 703 P2d 232 (1985); *City of Portland v. Multnomah County*, 19 Or LUBA 468, 471 (1990); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260 (1987). For the reasons set out below, we agree with the city that petitioners have not established that the challenged ordinance is land use decision under either the statutory definition or the significant impact test.

A. Statutory Land Use Decision

Petitioners contend that the challenged ordinance is a land use decision, within the meaning of ORS 197.015(10)(ii) or (iii), because the ordinance (1) amends, through repeal, a "land use regulation," specifically HMC 8.32, or (2) concerns the application of several comprehensive plan provisions. *See* n 1. We address each contention in turn.

[1] ORS 197.015(10)(a)(A) defines "land use decision" as:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> " * * * * *
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

1. HMC 8.32 is not a "land use regulation."

ORS 197.015(11) defines a "land use regulation" as "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan." In some cases it will be clear that an ordinance was adopted to establish "standards for implementing a comprehensive plan." For example there is rarely any question that zoning ordinances, community development codes, design review ordinances, special area or purpose plans, and similar ordinances or plans are adopted to establish "standards for implementing a comprehensive plan" and for that reason constitute as land use regulations.[2] For example the City of Hillsboro has enacted a comprehensive plan, zoning ordinance, development standards and design guidelines and a separate transportation system plan that is part of the city's comprehensive plan. What other documents the city may have adopted as land use regulations will depend on whether the text and context of the ordinance demonstrates that the ordinance was adopted to establish "standards for implementing a comprehensive plan." Sometimes that intent is clear; sometimes it is not. If there is dispute on this point, we have held that such ordinances are "land use regulations," notwithstanding that they are not codified with or as part of the zoning, subdivision, land development or other ordinances that clearly qualify as land use regulations, if there is a clear connection between the comprehensive plan and the ordinance requirements, and the inference that the ordinance implements the comprehensive plan is unavoidable. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282, 288, *aff'd* 175 Or App 419, 28 P3d 1229 (2001); *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995).

[2] As might be expected in a state with large and small counties and cities, there is quite a variety in the numbers and types of land use regulations enacted by those very different local governments and the names that are applied to them.

HMC 8.32.010, 8.32.030, and 8.32.040 proscribe three types of aircraft operations in the airspace over the city. Petitioners argue first argue that HMC 8.32.010, 8.32.030, and 8.32.040 are land use regulations, because HMC 8.32.010, 8.32.030, and 8.32.040 implement the following policies and goals of the Hillsboro Comprehensive Plan (HCP):

- "To maintain and improve the quality of the air, water and land resources," HCP Section 7 (Air, Water and Land Resource Quality) Goal;
- "Provide a safe and healthy living environment." HCP Section 12 (Public Facilities and Services) Goal C.
- "Develop and maintain a safe City transportation system." HCP Section 13 (Transportation) Goal A.
- "Build, maintain and/or support a well-defined and safe transportation system within the City for pedestrian, bicycle, transit, motor vehicles, air and rail travel." HCP Section 13 (Transportation) Policy A.1.
- "The [Hillsboro] airport shall be maintained and used as, but not expanded beyond the capacity of, a 'general aviation reliever facility.' The City shall encourage and work with airport authorities to decrease airport-related problems to a level compatible with surrounding land uses and the urban area." HCP Section 13 (Transportation) Policy III.H.2.a.

We note initially that the prohibitions on certain flight activities embodied in HMC 8.32.010, 8.32.030, and 8.32.040 were originally adopted, in more or less the same form, in 1963, well before the city adopted its comprehensive plan in 1977. It seems highly unlikely that the city intended those prohibitions to "implement" a comprehensive plan that did not exist at the time they were adopted.

That problem aside, petitioners have not established that there is a clear connection between the proscriptions in HMC 8.32.010, 8.32.030, and 8.32.040 and the five comprehensive plan provisions quoted above. There is no basis to infer that HMC 8.32.010, 8.32.030, and 8.32.040 are intended to implement those comprehensive plan provisions. The cited comprehensive plan provisions are broadly worded policy statements, with no clear or direct connection to the prohibitions on flight activities reflected in HMC 8.32.010, 8.32.030, and 8.32.040.

Next, petitioners focus on HMC 8.32.020, which was added to the HMC in 1979, and which prohibits operation of an aircraft in the city other than from an approved airport. HMC 8.32.020 further provides that applications for airport approval must be made in writing to the city council, which may approve the application with or without any conditions or restrictions it deems appropriate, or which may deny the application entirely. Petitioners argue that HMC 8.32.020 is a land use regulation because it authorizes the city to approve an application for an "airport," which clearly is a use of land. According to petitioners, HMC 8.32.020 presumably implements ORS 836.600 to 836.630, which authorize local governments to approve airports subject to local approval standards consistent with rules adopted by LCDC, or similar statutes and administrative rules governing the approval of airports.

ORS 836.600 to 836.630 was first enacted in 1995, so it cannot be the case that HMC 8.32.020 was adopted to implement those statutes. Presumably, the city complied with ORS 836.600 to 836.630 and any applicable administrative rules when it amended its comprehensive plan and HZO to regulate airports in a manner consistent with the statutes and implementing administrative rules, specifically by adopting the AU and ASCO zones. In any case, the key question under ORS 197.015(11) is whether HMC 8.32.020 was adopted to implement a comprehensive plan provision. The city adopted its comprehensive plan in 1977, and submitted it that year to LCDC for acknowledgment, so as a temporal matter it is *possible* that HMC 8.32.020, adopted in 1979, was intended to establish standards to implement some comprehensive plan provision. However, petitioners have not established that HMC 8.32.020 was intended to implement any comprehensive plan provision. No comprehensive plan provision cited to us is concerned with city council approval of new airports.

Further, it does not appear that LCDC acknowledged HMC 8.32.020 as part of the city's land use legislation, because the 1984 acknowledgment order does not mention HMC

8.32.020.[3] The 1984 acknowledgment order lists the documents that the city submitted to LCDC for review. The city points out that that list does not include HMC 8.32.020 or its underlying ordinance, Ordinance No. 2968-1-79. Further, the LCDC acknowledgment order does not reference or rely upon HMC 8.32.020 or Ordinance No. 2968-1-79. The complete omission of HMC 8.32.020 from the 1984 acknowledgment order suggests that the city did not intend, and LCDC did not understand, HMC 8.32.020 to implement any comprehensive plan policy or otherwise to function as a land use regulation. *Compare Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453, 458 (2002) (a tree ordinance codified elsewhere than under the city's zoning ordinance is nonetheless a land use regulation, where LCDC relied upon the tree ordinance to acknowledge the city's program to preserve natural resources under Statewide Planning Goal 5 and its comprehensive plan).

2. The decision does not concern the application of comprehensive plan provisions

A local government decision "concerns" the "application" of a comprehensive plan provision if (1) the decision maker was required by law to apply approval standards in its comprehensive plan to that decision, but did not, or (2) the decision maker in fact applied plan provisions as approval standards. *Dorall v. Coos County*, 53 Or LUBA 32, 34 (2006)

[3] The city requests that we take official notice of the 1984 acknowledgment order. Petitioners do not dispute that the acknowledgment order is subject to judicial notice under ORS 40.080 and Oregon Evidence Code (OEC) 202, because it is a "[p]ublic and private official act[] of the state legislative, executive or judicial departments[.]" However, petitioners object to taking notice of any "adjudicative facts" contained in the acknowledgment order, pursuant to ORS 40.060 and OEC 201 (providing that a court may take judicial notice of "adjudicative facts." Petitioners note, correctly, that LUBA has long held that it lacks authority to take notice of "adjudicative facts" under ORS 40.060 and OEC 201 to resolve a material factual dispute in an appeal. According to petitioners, it is a question of fact rather than law whether the city submitted HMC 8.32.020 in support of acknowledgment or whether LCDC relied upon HMC 8.32.020 to acknowledge the city's plan and zoning code. However, the present question is whether HMC 8.32.020 is a "land use regulation" as defined at ORS 197.015(11), which is a question of law. Taking notice of the absence of reference to HMC 8.32.020 in the 1984 acknowledgment order to help resolve that question of law does not use "facts" outside the record to "adjudicate" an evidentiary issue. The city's request to take official notice of the 1984 acknowledgment order is granted.

(citing *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004)); *Bradbury v. City of Independence*, 18 Or LUBA 552, 559 (1989).

Petitioners argue the city should have applied the five comprehensive plan goals and policies quoted above, and determined whether the deletion of HMC subchapter 8.32 is consistent with those goals and policies. According to petitioners, the cited comprehensive plan goals and policies constitute "approval criteria" relating to transportation, public facilities, air, water, and land resources that apply directly to a decision to delete HMC subchapter 8.32.

Specifically, petitioners argue that the challenged ordinance will result in failure to comply with the HCP Section 7 Goal to maintain and improve the quality of the air, water and land resources, and the HCP Section 12 Goal to provide a safe and healthy living environment, because deletion of HMC subchapter 8.32 eliminates the city's ability to regulate flight activities over the city that cause pollution. Similarly, petitioners argue that deletion of HMC subchapter 8.32 is inconsistent with the HCP Section 13 Goal to "[d]evelop and maintain a safe City transportation system," and with the HCP Section 13 Policy to "[b]uild, maintain and/or support a well-defined and safe transportation system within the city for pedestrian, bicycle, transit, motor vehicles, air and rail travel," because the city has limited its ability to regulate flight activities and the approval of new airports. Finally, petitioners argue the challenged ordinance is inconsistent with HCP Section 13 Policy H.2.a, to "work with [the Hillsboro] airport authority to decrease airport related problems," because the city has abdicated its authority to regulate flight operations.

The city responds, and we agree, that none of the five cited HCP goals and policies apply to the challenged ordinance as approval standards. The first four HCP goals and policies, involving environmental quality and a safe transportation system, are very broadly worded goals and policies that have only the most tenuous, if any, connection to flight activities or the approval of new airports. As noted, HMC subchapter 8.32 is part of the

city's municipal code that deals with "Vehicles and Parking," and that chapter includes a diverse array of regulations governing traffic operations, speed limits, etc. If the cited environmental and transportation goals and policies apply as approval standards to deletion of the HMC subchapter 8.32 regulations on aircraft operations, as petitioners argue, it is difficult to see why those goals and policies would not also apply as approval standards to deletion or amendment of regulations governing motor vehicle operations under other HMC chapter 8 regulations. We decline to read the cited HCP goal and policy language so broadly that any amendment to the city's municipal traffic code converts such amendments into "land use decisions" under ORS 197.015(10)(a).

By contrast, the fifth comprehensive plan policy, HCP Section 13 Policy H.2.a, directly concerns an airport, the Hillsboro airport, and airplane operations. Policy H.2 has two sentences. The first limits the Hillsboro airport to the capacity of a "general aviation reliever facility." Petitioners do not argue that this first sentence applies as an approval standard for the challenged ordinance. The second sentence states that the "The City shall encourage and work with airport authorities to decrease airport-related problems to a level compatible with surrounding land uses and the urban area." Petitioners concede that the requirement that the city "encourage" airport authorities to decrease airport-related problems does not constitute a mandatory approval standard. However, petitioners argue that the requirement to "work" with airport authorities to decrease airport-related problems applies as a mandatory approval standard with respect to deletion of HMC subchapter 8.32. We understand petitioners to argue that, by deleting HMC subchapter 8.32 the city has reduced its leverage to "work" with the Hillsboro airport to decrease airport-related problems, and therefore the city should have considered and applied Policy H.2.a in determining whether to delete HMC subchapter 8.32.

We disagree with petitioners that the Policy H.2.a requirement for the city to "work" with Hillsboro airport authorities to decrease airport-related problems should have been

applied to the challenged ordinance as a mandatory applicable approval standard. A requirement to "work" with the airport is hardly more mandatory than to "encourage" the airport. Further, the connection between deletion of HMC subchapter 8.32 and the Policy H.2.a. requirement to work with the airport to decrease airport-related problems is simply too tenuous to conclude that Policy H.2.a. constitutes an approval standard that should have been applied in adopting the challenged ordinance.

In sum, petitioners have not established that any provision of HMC 8.32.020 implements a comprehensive plan provisions or that any cited comprehensive plan provision applies directly to the challenged ordinance. Ordinance No. 6037 is therefore not a statutory land use decision subject to LUBA's jurisdiction.

B. Significant Impact Land Use

In the alternative, petitioners argue that if the challenged ordinance is not a statutory land use decision, it is nonetheless subject to LUBA's jurisdiction under the "significant impact" test described in *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982). In *Kerns*, the Oregon Supreme Court held that if a local government decision has a "significant impact" on present or future land uses, that decision constitutes a decision subject to LUBA review. To qualify as a land use decision under the significant impact test, the local government decision must create an actual, qualitatively or quantitatively significant impact on present or future land uses and the expected impacts must be likely as a result of the decision, and not speculative. *Carlson v. City of Dunes City*, 28 Or LUBA 411 (1994).

Petitioners contend that repeal of HMC 8.32.010, 8.32.030 and 8.32.040 will have a significant impact on present and future land uses, because the repeal eliminates the city's authority to regulate flight activities, such as low-altitude flying and dropping of objects, that could impact land uses in the city. Further, petitioners argue that repeal of HMC 8.32.020 will have a significant impact on future land uses, because it eliminates the city's ability to approve a new airport.

The city responds, and we agree, that eliminating the city's code regulations governing certain flight activities in the airspace over the city had no significant impacts on present or future uses of land. Repeal of HMC 8.32.010, 8.32.030 and 8.32.040 caused no change at all to the use of land in the city; the status quo with respect to what uses are allowed or can be developed in the city's zones remained exactly the same. That the city no longer chooses to attempt to regulate aircraft movement and activities in airspace over the city, and that repeal of such regulations might allow flight activities that could result in negative impacts on persons living on the ground (in the form of additional noise, pollution, etc.), does not mean that repeal of those regulations "significantly impact" present and future land *uses* within the meaning of *Kerns*.

Repeal of HMC 8.32.020 presents a closer question, since that code provision nominally addresses a potential use of land, an airport, rather than the use of airspace. As noted, HMC 8.32.020 prohibited the operation of any aircraft from any area of the city other than an "approved airport." HMC 8.32.020 further provided that "[a]pplications for approval of a proposed airport must be made in writing to the council" and that the city council "may approve with or without conditions or restrictions it deems appropriate," or deny the application entirely.

Petitioners argue that repeal of HMC 8.32.020 significantly impacts future land uses in the city, because absent HMC 8.32.020 the city no longer has any code authority to approve a future airport. The city responds, and we agree, that repeal of HMC 8.32.020 has no impact on the city's ability to approve a future airport, because an application for a future airport would be comprehensively governed by the HZO. According to the city, if an application for a new airport is submitted, the city would either (1) rezone the property to the AU zone and approve any proposed development accordingly, or (2) in the absence of a zone change, the city would approve or deny a proposed airport under the current applicable zoning, pursuant to all applicable regulations in the HZO. As far we can tell or petitioners

have established, HMC 8.32.020 added nothing to the city's zoning ordinance approval standards applicable to a new airport, and its repeal therefore has no impact—certainly no significant impact—on approval of new airports or any future land use.

For the reasons explained above, petitioners have not established that the challenged decision is a land use decision under either the statutory definition of land use decision or the significant impact test. Therefore, petitioners have not met their burden of establishing the challenged decision is subject to LUBA's jurisdiction.

The appeal is dismissed.