

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 FRIENDS OF THE HOOD RIVER  
5 WATERFRONT, CORIE LAHR,  
6 and RICHARD DEREK BELL,  
7 *Petitioners,*

8  
9 vs.

10  
11 CITY OF HOOD RIVER,  
12 *Respondent,*

13  
14 and

15  
16 NBW HOOD RIVER, LLC,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2013-064

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from City of Hood River.

25  
26 Brent Foster, Hood River, filed the petition for review and argued on behalf of  
27 petitioners.

28  
29 Daniel Kearns, Portland, filed a joint response brief on behalf of respondent. With  
30 him on the brief was Reeve Kearns, PC.

31  
32 Stephen L. Naito, Portland, filed a joint response brief and argued on behalf of  
33 intervenor-respondent. With him on the brief was Tarlow Naito & Summers LLP.

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

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

38  
39 REMANDED 12/13/2013

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**

Petitioners appeal a city council decision that grants conditional use and preliminary site plan approval for (1) a 45,000 square foot, four-story, 88-room hotel, (2) a 20,000 square foot, two-story office building, and (3) parking for both the hotel and office building.

**MOTION TO ALLOW REPLY BRIEF**

Petitioners move for permission to file a reply brief. Respondent and intervenor-respondent (respondents) do not object to the motion, and it is allowed.

**FACTS**

The proposed hotel, office and parking are to be constructed on land immediately west of the mouth of the Hood River, on the City of Hood River Columbia River waterfront. The subject property lies next to Nichols Boat Basin, which is connected to the Columbia River and separated from the Hood River by a breakwater. The proposed office building would be built partially on land immediately adjacent to Nichols Boat Basin, and partially on piers that would be partially submerged at times of ordinary high water. Much of the proposed development is within the 100-year floodplain.

The city has two different sets of floodplain regulations. One set of floodplain regulations is codified at Hood River Municipal Code (HRMC) 15.44 (Flood Hazards). Title 15 of the HRMC is entitled “Buildings and Construction.” HRMC 15.44 applies “to all areas of special flood hazards within the jurisdiction of the city. HRMC 15.44.020. “Area of special flood hazard” is defined at 15.44.010 to mean “the land in the floodplain within a community subject to a one percent or greater chance of flooding in any given year.” That area is commonly referred to as the 100-year floodplain.

The second set of city floodplain regulations is the “Floodplain, ‘FP’ Combining Zone.” The FP Combining Zone is a bit of a misnomer, since as far as we can tell the FP Combining Zone regulations are located entirely in the Hood River Comprehensive Plan

1 (HRCP), rather than the City of Hood River Zoning Ordinance. We discuss the FP  
2 Combining Zone in more detail below. In a nutshell, petitioners argue that although the  
3 subject property has not been included in the FP Combining Zone, it is nevertheless subject  
4 to the FP Combining Zone regulations as well as some of the Hood River Comprehensive  
5 Plan Goal 7 requirements that appear immediately before the FP Combining Zone in the  
6 HRCP. Respondents contend that the HRCP and FP Combining Zone restrictions do not  
7 apply to the disputed proposal.

## 8 INTRODUCTION

9 The decision that is before us in this appeal is the city council’s decision following  
10 our remand in *Friends of Hood River Waterfront v. City of Hood River*, \_\_\_ Or LUBA \_\_\_  
11 (LUBA No. 2012-050, March 13, 2013) (*Friends of Hood River Waterfront I*).<sup>1</sup> We set out  
12 the relevant Goal requirements below and explain the basis for our remand in *Friends of*  
13 *Hood River Waterfront I*, before turning to petitioners’ assignments of error in this appeal.

### 14 A. Goal 7

15 The HRCP is hierarchical, with “Goals,” at the top of the hierarchy, followed by  
16 “Policies,” Implementation Strategies,” and “Land Use Designations and Strategies.”<sup>2</sup> Goals

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<sup>1</sup> The record in this appeal includes the two-volume record in *Friends of Hood River Waterfront I*. It also includes a one-volume record that the city compiled following our remand and a supplemental record. The supplemental record that the city compiled on remand was further supplemented twice with pages that have been inserted into the supplemental record. All citations to the record in this opinion are to the one-volume record compiled by the city on remand.

<sup>2</sup> The HRCP definitions of those terms are set out below:

“**GOALS**”: are intended to define what is to be the ideal situation; what is sought for.

“**POLICIES**”: are intended to be broad statements providing direction for public decisions concerning the goal.

“**STRATEGIES**”: are intended to set forth the means for implementing the Plan, i.e., adoption of regulations, special studies.

“**LAND USE DESIGNATIONS AND STANDARDS**”: are intended to define the extent of development and broad standards for such development in a given area.” HRCP 1.

1 are the highest level and most broadly worded provisions and Land Use Designations and  
2 Standards are the specific regulations that apply directly to implement the Goals, Policies and  
3 Strategies. We set out the relevant portions of Goal 7 below.

4 **“GOAL 7**  
5 **“NATURAL DISASTERS**

6 **“GOAL:** To protect life and property from natural disasters and hazards.

7 POLICIES:

8 “1. Floodplains will be maintained as natural drainageways. No  
9 permanent structures other than dams and bridges shall be permitted  
10 which inhibit flood stream flows or endanger other property.

11 “2. The City will continue participation in the Housing and Urban  
12 Development National [Flood] Insurance Program.

13 “\* \* \* \* \*

14 “4. In cases where detailed mapping of 100-year floodplains is not  
15 complete, the 100-year floodplain will be determined by at least one of  
16 the following methods:

17 “a. The natural stream bank drop—off to the current floodplain.

18 “b. A field inspection.

19 “c. HUD Special Flood Hazard area maps.

20 “d. Soil information from the Soil Conservation Service.

21 “e. Consultation with both the County Sanitarian and the Public  
22 Works Director or other applicable agencies.

23 “\* \* \* \* \*

24 “NATURAL DISASTER IMPLEMENTATION STRATEGIES

25 “\* \* \* \* \*

26 “3. Lands subject to flooding shall be identified on the zoning map and  
27 designated ‘FP’ (Floodplain) to implement the policies of this Plan.  
28 ‘FP’ is an overlay combining zone.

1 “4. No permanent structure shall be erected within a flood hazard area  
2 unless the structure or the area meets the criteria set forth in the ‘FP’  
3 overlay zone.

4 “\* \* \* \* \*

5 “[LAND USE DESIGNATIONS AND STANDARDS] FLOODPLAIN, ‘FP’  
6 COMBINING ZONE”<sup>3</sup>

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<sup>3</sup> The FP Combining Zone is one of three “Land Use Designations and Standards,” under Goal 7, and as explained in Natural Disaster Implementation Strategy 3, the FP Combining Zone, along with two other combining zones, were adopted “to implement the policies of this Plan.” The text of the FP Combining zone is set out below for ease of reference later in this opinion:

“The purpose of the ‘FP’ combining zone is to protect the public health, safety, and general welfare by demarcating flood-susceptible areas. The ‘F?’ designation is an overriding zone and is designed to be used with any existing base zones.

“1. Uses permitted in the ‘FP’ zone area as follows:

“a. Non-habitable structures, barns, or other structures.

“b. Boat docks and landings for recreational use, not including structures.

“c. Parks and playgrounds, not including incidental buildings.

“2. Site development standards shall be the same as required in the base zone. Planned Unit Development or on—site density transfer techniques are permitted on land within the floodplain in order to permit development to cluster outside the floodplain and retain flood hazard areas as open space.

“3. Uses not enumerated above which are permitted in the base zone may be established, altered, or enlarged subject to compliance with any or all of the following conditions:

“a. An architect or engineer, licensed in the State of Oregon, designs the structure to be flood—proof and the design is approved by the City Building Official.

“b. The proposed structure or land is protected if necessary from flooding by a dike designed by an engineer licensed in the State of Oregon.

“c. Proper access for emergency vehicles will be provided to the proposed site.

“d. No permanent structures or fill materials are permitted which would inhibit the stream flood flows or endanger other property.

“e. Containers holding chemical pesticides or herbicides or any other toxic chemicals shall not be stored within 300 feet of any stream way.

“4. Development or occupancy of any of the lands designated ‘F?’ (floodplain) will not be permitted without approval by the Hood River City Planning Commission. Before

1           **B.       *Friends of Hood River Waterfront I***

2           HRMC 17.06.030(4), one of the applicable City of Hood River conditional use  
3 approval criteria, requires that a conditional use must “be consistent with the Comprehensive  
4 Plan and the requirements of the Zoning Ordinance.”<sup>4</sup> ORS 197.175(2)(d) similarly provides  
5 that cities with acknowledged comprehensive plans and land use regulations must “make land  
6 use decisions \* \* \* in compliance with the acknowledged plan and land use regulations[.]” In  
7 *Friends of Hood River Waterfront I* petitioner took the position that a number of the Goal 7  
8 requirements set out above must be applied directly in granting conditional use approval for  
9 the proposed development. The city council rejected that position and took the position that  
10 the Goal 7 requirements do not apply directly. We explained the city’s position as follows:

11           “[I]t is reasonably clear that the city takes the position that the HRCP Goals,  
12 Policies and other provisions are for the most part implemented by the city’s  
13 acknowledged land use regulations, and the HRCP Goals, Policies and other  
14 provisions do not apply directly to individual applications for conditional use  
15 approval, *unless* the comprehensive plan provision at issue is written in  
16 ‘mandatory terms as an approval standard.’ \* \* \*” Slip op at 8 (emphasis in  
17 original).

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approval will be considered, proponents of the development will be required to submit a report that addresses, at a minimum, the following:

- “a.       A description of the proposed use.
- “b.       The impact on the area.
- “c.       A diagram of the proposed structure and the relation to the floodplain.
- “d.       Proposed mitigating measures.”

<sup>4</sup> As relevant, HRMC 17.06.030 provides:

“A conditional use shall be granted if the Planning Commission finds that the proposed use conforms, or can be made to conform through conditions, with the following approval criteria.  
\* \* \*

“\* \* \* \* \*

“4.       Plan Consistency: The proposal shall be consistent with the Comprehensive Plan and the requirements of the Zoning Ordinance.”

1 We indicated in *Friends of Hood River Waterfront I* that the city’s understanding about how  
2 to go about determining whether particular comprehensive plan requirements apply directly  
3 to individual permit decisions was consistent with a long line of LUBA decisions. *Id.* (citing  
4 *Save our Skyline v. City of Bend*, 48 Or LUBA 192, 209-10 (2004)). But in *Friends of Hood*  
5 *River Waterfront I* we ultimately concluded that the city failed to consider the text and  
6 context of the Goal 7 requirements that petitioners argued the city should have applied in this  
7 case:

8 “The city council’s findings appear to address Goal 7 itself, rather than the  
9 Goal 7 Policies, Implementation Strategy and Land use Designation and  
10 Standards set out above. Goal 7 itself only requires that the city ‘protect life  
11 and property from natural disasters and hazards.’ Based on the [city’s]  
12 findings, we cannot tell whether the city council even considered the text of  
13 the Goal 7 Policies, Implementation Measure and Land Use Designation and  
14 Standards set out above.

15 “\* \* \* \* \*

16 “\* \* \* On remand, the city must directly address the question of whether,  
17 based on the text of the cited HRCP Goal 7 provisions, viewed in context,  
18 those HRCP Goal 7 provisions are mandatory approval criteria or  
19 considerations that the city council is required to address in granting  
20 conditional use approval for the disputed proposal. If they are, the city must  
21 demonstrate that the proposal is consistent with those HRCP Goal 7  
22 provisions.” Slip op at 11-13.

23 There are three important points that we probably should have made more clearly in  
24 *Friends of Hood River Waterfront I*. Those points have an important bearing on many of the  
25 parties’ arguments in this appeal of the city’s decision on remand.

26 First, ORS 197.175(2)(d) and HRMC 17.06.030, which parrots the statute, require  
27 that land use decisions be “in compliance with” or “consistent with” the city’s acknowledged  
28 comprehensive plan. But neither the statute nor HRMC 17.06.030 dictate *how* that  
29 compliance or consistency is to be achieved or demonstrated. One way to satisfy that  
30 compliance/consistency requirement would be to apply all applicable comprehensive plan  
31 requirements directly as permit approval criteria at the time permits are approved. That is

1 essentially what petitioners believe is required here, and absent other considerations  
2 discussed below, that is essentially what ORS 197.175(2)(d) requires. However, given the  
3 way most comprehensive plans are written, with overlapping and conflicting goals and  
4 policies, sifting through the comprehensive plan for potentially applicable approval criteria  
5 can easily become an onerous and problematic chore.

6 Another possible way to satisfy that consistency/compliance requirement is to show  
7 that the permit application complies with land use regulations that were adopted to *fully*  
8 implement the comprehensive plan. Where the text of the comprehensive plan supports a  
9 conclusion that a city's land use regulations *fully* implement the comprehensive plan and  
10 displace the comprehensive plan entirely as a potential source of approval criteria,  
11 demonstrating that a permit application complies with the city's land use regulations is  
12 sufficient to establish consistency/compliance with the comprehensive plan. *Save Our*  
13 *Skyline v. City of Bend*, 48 Or LUBA 211-12; *Murphy v. City of Ashland*, 19 Or LUBA 182,  
14 199 (1990); *Miller v. City of Ashland*, 17 Or LUBA 147, 169 (1988); *see Durig v.*  
15 *Washington County*, 35 Or LUBA 196, 202 (1998) (explicit supporting language is required  
16 to establish that land use regulations entirely displace the comprehensive plan as a source of  
17 potentially applicable approval criteria for land use decisions). In that circumstance the  
18 comprehensive plan is implemented solely through the implementing land use regulations  
19 and the plan does not apply directly. However, in this circumstance, land use regulations  
20 typically are not written to include a permit requirement that permit applications be  
21 "consistent" with the comprehensive plan, as does HRMC 17.06.030, because such an  
22 express permit requirement suggests that at least some comprehensive plan provisions will  
23 potentially apply directly as permit approval criteria.

24 Finally, the more common situation, and the situation presented in this appeal, is  
25 where acknowledged land use regulations were adopted to implement the comprehensive  
26 plan, but neither the comprehensive plan nor the land use regulations foreclose the possibility



1 that some comprehensive plan requirements may continue to apply directly to individual land  
2 use decisions. In this more common situation, while it may be that some of a city's land use  
3 regulations generally implement and displace the comprehensive plan as directly applicable  
4 permit approval criteria, the text and context of potentially applicable comprehensive plan  
5 requirements must be examined to determine if the plan requirement is one that must be  
6 applied directly as an approval standard in granting approval of the permit. *Stewart v. City of*  
7 *Brookings*, 31 Or LUBA 325, 328 (1996); *Friends of Indian Ford v. Deschutes County*, 31  
8 Or LUBA 248, 258 (1996); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 254-55 (1990).

9 A second important point is that it is not enough for petitioner to identify  
10 "mandatory" language in a comprehensive plan policy. The text and context of the  
11 comprehensive plan must establish both (1) that the plan requirement is mandatory (rather  
12 than hortatory or aspirational) *and* (2) that the mandate must be applied directly as a permit  
13 approval standard. The second qualification is necessary, because a mandatory  
14 comprehensive plan policy may have been incorporated into implementing land use  
15 regulations, thereby fully implementing the plan policy and making direct application of the  
16 policy duplicative and unnecessary. *Warren v. City of Aurora*, 23 Or LUBA 507, 511 n 3  
17 (1992).

18 A third important point is that in applying ORS 197.175(2)(d) and HRMC 17.06.030  
19 to determine whether HRCP requirements must be applied as approval criteria in granting the  
20 request for conditional use approval, the city is performing a function quite similar to the  
21 function the city was performing in *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776  
22 (2010). In *Siporen* the development ordinance required that development comply "with the  
23 applicable provisions of all city ordinances," and the issue was whether a development  
24 ordinance requirement that prohibited approval of development where streets were not  
25 operating at a minimum level of service was "applicable" to an application for site plan and  
26 architectural review approval. *Id.* at 252-53. In the decision that is before us in this appeal,

1 the city was required to determine whether the plan requirements petitioners identified are  
2 “applicable” as conditional use approval criteria. The city’s interpretations of its  
3 comprehensive plan to determine which plan requirements are applicable as conditional use  
4 approval criteria are entitled to deference so long as its interpretations are “plausible.” *Id.* at  
5 266. If the city’s interpretation is plausible, LUBA must defer, even if LUBA believes there  
6 is a better interpretation.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner’s first assignment of error concerns Goal 7, Policy 1, which provides as  
9 follows:

10 “Floodplains *will* be maintained as natural drainageways. No permanent  
11 structures other than dams and bridges *shall* be permitted which inhibit flood  
12 stream flows or endanger other property.” (Emphases added.)

13 The words “will” and “shall” are mandatory.<sup>5</sup> However, it is possible that Goal 7, Policy 1 is  
14 fully implemented by a mandatory land use regulation. In rejecting petitioners’ argument that  
15 Goal 7, Policy 1 applies directly in this matter, the city council findings essentially took that  
16 position, finding:

17 “\* \* \* The city adopted (i) Land Use Designations and Standards in the  
18 Floodplain ‘FP’ Combining Zone and (ii) Chapter 15.44 of the Hood River  
19 Municipal Code – Flood Hazards in response to this policy statement. These  
20 two provisions are designed to regulate development in floodplains and we  
21 find that they were adopted to address the concerns cited in Policy 1.

22 “We find that the HRCF Goal 7 and the zoning map contemplate two different  
23 floodplain areas. The first are floodplains as defined in Policy 4 and HRMC  
24 Chapter 15.44. The second are a subset of the Chapter 15.44 floodplains that  
25 are located in the ‘FP’ Combining Zone \* \* \*. We find that references to  
26 ‘flood hazard areas’ in Goal 7 refers to floodplains within the ‘FP’ zone. The  
27 ‘FP’ zone includes the Indian Creek and Phelps Creek areas and portions of  
28 the Hood River. We find that the concerns in Policy Statement 1 were  
29 implemented in the Land Use Designation and Standards in the Floodplain

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<sup>5</sup> The HRCF provides:

“**Shall or Will:** Statements which are mandatory requirements.” HRCF 5.

1 'FP' Combining Zone. For example the second sentence of Policy 1 is set out  
2 as a mandatory approval criterion in the Floodplain 'FP' Combining Zone  
3 paragraph 3(d): 'No permanent structures or fill materials are permitted which  
4 would inhibit the stream flows or endanger other property.' Other sections of  
5 the Floodplain 'FP' Combining Zone limit development so that floodplains  
6 will be maintained as natural drainageways. Thus, although Policy 1 contains  
7 mandatory term[s] such as 'Floodplains will be maintained' and [']No  
8 permanent structures ... shall be permitted' we find that this mandatory  
9 language was implemented through the Floodplain 'FP' Combining Zone  
10 sections of the comprehensive plan. \* \* \* Record 10.

11 The city's interpretation that the HRCP "contemplate[s] two different floodplain  
12 areas" is at the heart of the parties' dispute. We return to that part of the city's interpretation  
13 in our discussion of Goal 7, Policy 4 and Goal 7, Implementation Strategy 4 later in this  
14 opinion. This assignment of error is directed solely at Goal 7, Policy 1. The city's  
15 interpretation that the floodplain regulations at HRMC 15.44 and the FP Combining Zone  
16 were enacted to fully implement the requirements of Goal 7, Policy 1, so that Goal 7, Policy 1  
17 does not apply directly when granting conditional use approval is consistent with the text of  
18 the HRCP and within the deference the city is entitled under *Siporen*.

19 As we noted earlier, Goal 7, Implementation Strategy 3 expressly states the FP  
20 Combining Zone was adopted "to implement the policies of this Plan."<sup>6</sup> Section 3(d) of the  
21 FP Combining Zone is set out below followed by the second sentence of Goal 7, Policy 1  
22 which it clearly was adopted to implement.

23 "No permanent structures or fill materials are permitted which would inhibit  
24 the stream flood flows or endanger other property." FP Combining Zone,  
25 Section 3(d).

26 "No permanent structures other than dams and bridges shall be permitted  
27 which inhibit flood stream flows or endanger other property." Goal 7, Policy  
28 7.

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<sup>6</sup> The complete text of Goal 7, Implementation Strategy 3 was set out earlier and is set out below:

"Lands subject to flooding shall be identified on the zoning map and designated 'FP' (Floodplain) to implement the policies of this Plan. 'FP' is an overlay combining zone."

1 FP Combining Zone, Section 3(d) is arguably more stringent than the Policy it was adopted to  
2 implement, since it regulates both “fill” and “structures,” whereas the Goal 7, Policy 1 is  
3 directed at structures only. And FP Combining Zone, Section 3(d) includes no express  
4 exception for dams and bridges from the requirement that structures must not “inhibit flood  
5 stream flows or endanger other property.” It is true that FP Combining Zone, Section 3(d)  
6 does not include the first sentence of Goal 7, Policy1, which provides “Floodplains will be  
7 maintained as natural drainageways.” But that sentence must be read in conjunction with the  
8 sentence that follows it in Goal 7, Policy 1. Read together, it is clear that Goal 7, Policy 1  
9 does not impose an independent and absolute obligation to maintain floodplains as natural  
10 drainageways. Rather the second sentence of Goal 7, Policy I identifies the way floodplains  
11 are to be maintained as natural drainageways, which is by permitting “[n]o permanent  
12 structures other than dams and bridges \* \* \* which inhibit flood stream flows or endanger  
13 other property.” The latter requirement is duplicated in the FP Combining Zone, and direct  
14 application of Goal 7, Policy 1—at least to floodplains where the FP Combining Zone has  
15 been applied—would serve no purpose. Of course, the question in the present case is what  
16 comprehensive plan requirements, if any, apply to development within 100-year floodplains  
17 that were not previously mapped, and thus are not (yet) subject to the FP Combining Zone.  
18 In our view, the answer to that question is provided by other provisions of Goal 7, discussed  
19 below. For present purposes, however, the city’s interpretation that the requirements of Goal  
20 7, Policy 1 do not apply directly to development on the subject property is consistent with the  
21 text of Goal 7, Policy 1 and Section 3(d) of the FP Combining Zone, and is affirmed.

22 The first assignment of error is denied.<sup>7</sup>

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<sup>7</sup> The city also adopted alternative findings in rejecting petitioners’ arguments that Goal 7, Policy 1 applies directly as a permit approval standard. We do not consider those alternative findings or petitioners’ challenges to those findings because even if they are erroneous, they would not provide a basis for remand.

1 **SECOND ASSIGNMENT OF ERROR**

2 Goal 7, Policy 4, was set out in full earlier in the introduction, and is set out again in  
3 part below:

4 “4. In cases where detailed mapping of 100-year floodplains is not  
5 complete, the 100-year floodplain will be determined by at least one of  
6 the following methods:

7 “\* \* \* \* \*

8 “b. A field inspection.

9 “\* \* \* \* \*

10 “e. Consultation with both the County Sanitarian and the Public  
11 Works Director or other applicable agencies.

12 The city found that although Goal 7, Policy 4 is not a mandatory approval standard, it  
13 is appropriate to follow its methodology to establish the location of the 100-year flood level  
14 in cases where there is no detailed mapping of the 100-year floodplain, which is the situation  
15 in the present case. The city agreed with petitioners that the US Army Corps of Engineers is  
16 the most knowledgeable entity regarding the level of the floodplain in this area and agreed  
17 that the 100-year flood level in this area is at 88.2 feet above sea level. However, the city  
18 found that Goal 7, Policy 4 did not operate as a mandatory approval standard to impose  
19 obligations on the city or an applicant beyond locating the 100-year floodplain.<sup>8</sup>

20 Focusing exclusively on the language of Goal 7, Policy 4, we agree with the city that  
21 Goal 7, Policy 4 is not a conditional use permit approval standard that the city was required  
22 to apply in this case. But it is an applicable mandatory requirement to identify the location of

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<sup>8</sup> The city’s findings include the following:

“This policy statement sets out the methodology the City would use to determine the 100-year floodplain when detailed mapping is not complete. The text of this policy statement does not contain mandatory approval criteria for granting a conditional use permit or site plan approval for the project. However, it may be considered because the detailed mapping of the 100-year floodplain at this site is incomplete.” Record 11.

1 the 100-year floodplain on the property, because detailed mapping of the 100-year floodplain  
2 on the property is not available. Now that the 100-year floodplain elevation on the property  
3 is known, it presumably will be a simple matter to map the 100-year floodplain.<sup>9</sup> On remand,  
4 the city will need to have the applicant prepare that map.

5 The second assignment of error is sustained in part.

### 6 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

7 The main dispute between the parties concerns the city's and applicant's obligations  
8 once the location of the 100-year floodplain is established. Presumably the city requires that  
9 the 100-year floodplain be identified for some purpose. We next turn to that question.

10 Goal 7, Policy 4 is followed by Goal 7, Natural Disaster Implementation Strategies 3  
11 and 4. Those strategies were set out in full in the introduction, and are set out again below:

12 "3. Lands subject to flooding shall be identified on the zoning map and  
13 designated 'FP' (Floodplain) to implement the policies of this Plan.  
14 'FP' is an overlay combining zone.

15 "4. No permanent structure shall be erected within a flood hazard area  
16 unless the structure or the area meets the criteria set forth in the 'FP'  
17 overlay zone.

18 Goal 7, Implementation Strategy 3 is not addressed by the city in its decision and is  
19 not the subject of any of petitioners' assignments of error. However, the city's findings  
20 regarding Goal 7, Policy 4 show that the city is proceeding based on an erroneous  
21 construction of Goal 7, Implementation Strategies 3 and 4.<sup>10</sup> We understand the city to take

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<sup>9</sup> Although Goal 7, Policy 4 requires that the 100-year floodplain be "determined," and does not explicitly require that a map be prepared to show the 100-year floodplain, it would seem that a map will be required. Respondents apparently concede that Goal 7, Policy 4 requires that the 100-year floodplain be mapped, in cases where the policy applies: "Thus the only act mandated by [Goal 7] Policy 4 is to map an unmapped 100-year floodplain by one of the cited methods." Joint Response Brief 13.

<sup>10</sup> Those findings are set out below:

"We find that the HRCF Goal 7 and the zoning map contemplate two different floodplain areas. The first are floodplains as defined in [Goal 7] Policy 4 and HRMC Chapter 15.44. The second are a subset of the Chapter 15.44 floodplains that are located in the 'FP' Combining Zone \* \* \*." Record 10.

1 the position that the 100-year floodplains that are identified under Goal 7, Policy 4 are subject  
2 to the floodplain regulations set out in HRMC 15.44, but are not subject to the FP Combining  
3 Zone until action is taken by the city to apply the FP Combining Zone. On that point, we  
4 agree with the city as far as it goes. The city’s zoning map would have to be amended to  
5 apply the FP Combining Zone, which would require a post-acknowledgment land use  
6 regulation amendment under ORS 197.610. The FP Combining Zone could not be applied by  
7 the conditional use permit and site review decision that is the subject of this appeal, since it is  
8 not a post-acknowledgment land use regulation amendment. But the city’s apparent  
9 understanding that the FP Combining Zone need not be applied to property that is found to be  
10 in the 100-year floodplain pursuant to Goal 7, Policy 4, and that those 100-year floodplains  
11 are subject to regulation solely under HRMC 15.44, is simply not supported by any of the text  
12 of the HRCP or HRMC 15.44.

13 The HRCP and HRMC 15.44 are consistent in their inconsistency in how they refer to  
14 the 100-year floodplain, referring to “[f]loodplains” (Goal 7, Policy 1), “100-year  
15 floodplains” (Goal 7, Policy 4), “[l]ands subject to flooding,” (Goal 7, Implementation  
16 Strategy 3), “flood hazard areas” (Goal 7, Implementation Strategy 4), “flood-susceptible  
17 areas” (FP Combining Zone), and “[a]rea of special flood hazard” (HRMC 15.44.010(C)).<sup>11</sup>  
18 But there is nothing in that text that can be read to support the city’s theory that there are  
19 “two different floodplain areas” of the suggested character or how the city goes about  
20 determining whether a newly identified 100-year floodplain should not be subject to the FP  
21 Combining Zone.

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<sup>11</sup> One clear example of the drafters of the HRCP’s propensity for referring to the 100-year floodplain in different ways is located in the Floodplain Combining Zone. Section 2 of the FP Combining Zone, *see* n 3, provides “on-site density transfer techniques are permitted on land within the *floodplain* in order to permit development to cluster outside the *floodplain* and retain *flood hazard areas* as open space.” (Emphases added.) That language seems to refer to floodplains and flood hazard areas as the same thing.

1           Goal 7, Implementation Strategy 3 says in part “[l]ands subject to flooding shall be  
2 identified on the zoning map and designated ‘FP’ \* \* \*.” Goal 7, Implementation Strategy 3  
3 admittedly does not say *when* lands subject to flooding must be designated FP following their  
4 identification, but it clearly says that such lands *shall* be designated FP. The reference to  
5 “[l]ands subject to flooding” would have been clearer if the reference had been to “100-year  
6 floodplains.” But the HRCP defines “[f]loodplain” as follows: “The area adjoining a stream,  
7 tidal estuary, or coast that is subject to regional flooding.” HRCP 44. Lands located within  
8 the 100-year floodplain are lands that are “subject to flooding,” and under Goal 7,  
9 Implementation Strategy 3 those lands are to be added to the FP Combining Zone.  
10 Petitioners do not argue the city was required to amend its zoning map in this proceeding to  
11 apply the FP Combining Zone to the disputed property, and we would reject that argument if  
12 it had been made. Applying the FP Combining Zone to these newly identified 100-year  
13 floodplain areas will require future action by the city to amend the zoning map.

14           We now turn to the key issue presented under the third and fourth assignments of  
15 error. Once the city followed the guidance provided by Goal 7, Policy 4 and required the  
16 applicant to take the steps necessary to identify the 100-year floodplain on the subject  
17 property, what legal significance does identification of the 100-year floodplain on the subject  
18 property have? Again, Goal 7, Implementation Strategy 4 requires that “[n]o permanent  
19 structure shall be erected within a flood hazard area unless the structure or the area meets the  
20 criteria set forth in the ‘FP’ overlay zone.” Petitioners contend that to comply with Goal 7,  
21 Implementation Strategy 4, the city must ensure that any structures it approves on the subject  
22 property that are located within the 100-year floodplain meet “the criteria set forth in the ‘FP’  
23 overlay zone.” The city rejected petitioners’ argument as follows:

24           “Friends argue that the plain text of Implementation Strategy 4 makes it an  
25 applicable approval criterion for this project even though the project is not in  
26 the ‘FP’ Zone. In other words if a project is in a floodplain, then whether or  
27 not the project is in the ‘FP’ Zone it must still meet the requirements of the  
28 ‘FP’ Zone. *This interpretation would effectively read the ‘FP’ Zone off the*



1            *zoning map and give it no effect.* We reject this interpretation and instead  
2 interpret the term ‘flood hazard area’ to mean an area within the ‘FP’ Zone.  
3 This interpretation gives effect to all parts of the comprehensive plan and the  
4 zoning map and is consistent with two types of floodplains contemplated in  
5 our interpretation of HRCP Goal 7 Policy 1 above.

6            “Based upon the text of HRCP Goal 7 Implementation Strategy 4, read in  
7 context with the other provisions of *Goal 7, Strategy 4 only applies to*  
8 *properties within the ‘FP’ Zone* and as such is not intended to be a mandatory  
9 approval criteria or a consideration that the City Council is required to address  
10 in granting a condition[al] use permit and site plan approval for the project  
11 because it is not located in the ‘FP’ Zone.” Record 11 (emphasis added).

12            We do not understand the italicized text quoted above. Property that is already  
13 subject to the FP Combining Zone would have to be developed in accordance with the limits  
14 imposed by the FP Combining Zone, with or without Goal 7, Implementation Strategy 4.  
15 Therefore, under the city’s interpretation, Goal 7, Implementation Strategy 4 (that it only  
16 applies to property that is already zoned FP) has no effect and runs afoul of the ORS 174.010  
17 rule that “where there are several provisions or particulars such construction is, if possible, to  
18 be adopted as will give effect to all.” The city’s interpretation of Goal 7, Implementation  
19 Strategy 4 also reads in the limitation “already zoned FP,” and thereby “insert[s] what has  
20 been omitted” in violation of the same statute. The city’s interpretation is therefore  
21 implausible and is not entitled to deference under *Siporen*.

22            Goal 7, Implementation Strategy 4 appears shortly after Goal 7, Policy 4, which  
23 requires identification of the 100-year floodplain when “detailed mapping of the 100-year  
24 floodplains is not complete.” Identification of the 100-year floodplain in that context will  
25 frequently if not invariably occur in the context of applications for development permits for  
26 property that is not already located in the FP Combining zone. Goal 7, Implementation  
27 Strategy 4 seems to have been adopted to apply in that circumstance, so that the requirement  
28 to identify the 100-year floodplain has some purpose under the HRCP. That purpose is to  
29 require that the FP Combining Zone limits on construction of structures applies, even though  
30 the newly identified 100-year floodplain has not yet been subjected to the FP Combining

1 Zone. That gives meaning to both the existing FP Combining Zone (which applies to some  
2 floodplains, but not to those for which mapping is incomplete) and to Goal 7, Implementation  
3 Strategy 4 (which extends the protections of the FP Combining Zone to properties that are  
4 located within the 100-year floodplain, but have not yet been adequately mapped and zoned  
5 FP Combining Zone.

6 The city seems to take the position that the 100-year floodplain identification required  
7 by Goal 7, Policy 4 does have legal effect, because the other set of flood regulations at  
8 HRMC 15.44 would apply to such lands. However, there is nothing in the text of Goal 7,  
9 Policy 4, Goal 7 Implementation Strategy 4 or HRMC 15.44 that supports the county's  
10 interpretation that 100-year floodplains that are identified under Goal 7, Policy 4 are subject  
11 only to the HRMC 15.44 floodplain regulations and are not subject to the remaining  
12 requirements of Goal 7 and the FP Combining Zone. In fact, the HRCP makes no reference  
13 to the HRMC 15.44 floodplain regulations. Goal 7, Implementation Strategy 4 is directed at  
14 "flood hazard" areas and HRMC 15.44 applies to "all areas of special flood hazards."  
15 HRMC 15.44.020. And as we noted earlier, "areas of special flood hazard" is defined as the  
16 100-year floodplain. HRMC 15.44.010(C).<sup>12</sup> Therefore it is entirely consistent with the text  
17 of Goal 7, Implementation Policy 4 to conclude that it is directed at the same "flood hazard"  
18 areas that HRMC 15.44 is directed at, *i.e.* the 100-year floodplain. And given the text and  
19 context of Goal 7, Implementation Strategy 4, it is entirely consistent with that text and  
20 context to interpret Goal 7, Implementation Strategy 4 to apply to lands that have been  
21 identified as being located in the 100-year floodplain pursuant to Goal 7, Policy 4, but have  
22 not yet been zoned FP pursuant to Goal 7, Policy 3. And there is simply no text in either the  
23 HRCP or the HRMC that supports the city's contrary interpretation that there are two types of

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<sup>12</sup> HRMC 15.44.010(C) provides:

“‘Area of special flood hazard’ means the land in the floodplain within a community subject to one percent or greater chance of flooding in any given year. \* \* \*”

1 100-year floodplains—one type of floodplain subject to HRMC 15.44 only and one type of  
2 floodplain that is subject to both HRMC 15.44 and the FP Combining Zone.

3 On remand, the city must ensure that the proposal complies with Goal 7,  
4 Implementation Strategy 4, which requires that: “No permanent structure shall be erected  
5 within a flood hazard area unless the structure or the area meets the criteria set forth in the  
6 ‘FP’ overlay zone.”

7 The third and fourth assignments of error are sustained.<sup>13</sup>

8 **FIFTH ASSIGNMENT OF ERROR**

9 ORS 197.829(1) provides in part:

10 “The Land Use Board of Appeals shall affirm a local government’s  
11 interpretation of its comprehensive plan and land use regulations, unless the  
12 board determines that the local government’s interpretation:

13 “(a) Is inconsistent with the express language of the comprehensive plan or  
14 land use regulation;

15 “(b) Is inconsistent with the purpose for the comprehensive plan or land use  
16 regulation;

17 “(c) Is inconsistent with the underlying policy that provides the basis for  
18 the comprehensive plan or land use regulation[.]”

19 Under their fifth assignment of error, petitioners argue “[t]he City’s interpretation of  
20 the HRCP’s Goal 7’s Policy 1, Policy 4, Implementation Strategy 4 and Floodplain ‘FP’  
21 Combining Zone criteria are inconsistent with both the purpose and underlying policy behind  
22 the HRCP’s flood hazard protections and is therefore not entitled to deference.” Petition for  
23 Review 35.

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<sup>13</sup> Respondents raise waiver defenses under the third assignment of error and in response to the fourth assignment of error argue that based on LUBA’s decision in *Friends of Hood River Waterfront I* the city on remand was required only to consider section 4 of the FP Combining Zone. For the reasons set out in petitioner’s reply brief, we reject the waiver defenses. Our resolution of the third assignment of error requires that the city consider any applicable criteria in the FP Combining Zone, not just section 4.

1 We have already agreed with petitioners that the city’s interpretations of Goal 7,  
2 Policy 4, Goal 7, Implementation Strategy 4 and the FP Combining Zone criteria are  
3 inconsistent with the express language of those requirements. It is therefore unnecessary for  
4 us to go further and determine if the city’s interpretations are also inconsistent with the  
5 purpose and underlying policy of those provisions. With regard to Goal 7, Policy 1, we  
6 rejected petitioners’ Goal 7, Policy 1 challenge in denying the first assignment of error. In  
7 doing so, we concluded that Goal 7, Policy 1 is fully implemented by the FP Combining Zone  
8 and therefore need not be applied directly. The city’s interpretation that Goal 7, Policy 1  
9 does not apply directly for that reason is correct, consistent with the express language of the  
10 provision, and consistent with the purpose and policy of the regulation.

11 The fifth assignment of error is denied.

12 **SIXTH ASSIGNMENT OF ERROR**

13 HRMC 17.06.030(4) requires that a conditional use “proposal shall be consistent with  
14 the Comprehensive Plan and the requirements of the Zoning Ordinance.” Similarly, ORS  
15 197.175(2)(d) requires that a city must “make land use decisions \* \* \* in compliance with the  
16 acknowledged plan and land use regulations[.]” Petitioners fault the city for not adopting  
17 findings that address HRMC 17.06.030(4) and ORS 197.175(2)(d) explicitly.

18 HRMC 17.06.030(4) and ORS 197.175(2)(d) require that the city identify and address  
19 applicable approval standards in its comprehensive plan; they are not approval standards  
20 themselves. Our remand in *Friends of Hood River Waterfront I* was based in large part on  
21 HRMC 17.06.030(4) and ORS 197.175(2)(d), and we remanded the city’s initial decision so  
22 that it could consider, based on the text of the HRCP, whether parts of the city’s  
23 comprehensive plan apply directly to the proposal as petitioners argued they do. On remand  
24 the city adopted findings explaining its position that none of the cited HRCP requirements  
25 apply directly to the disputed proposal. In this appeal we have agreed with some of those  
26 findings and disagreed with others. The city was not required to go further and adopt

1 findings to address the local and statutory requirements themselves, and we are not sure what  
2 purpose such findings would serve or what they would look like.

3           The sixth assignment of error is denied.

4           The city's decision is remanded.