

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

RESTORE OREGON, BOSCO-MILLIGAN FOUNDATION/
ARCHITECTURAL HERITAGE CENTER,
OREGON NIKKEI ENDOWMENT,
PORTLAND CHINATOWN HISTORY FOUNDATION/
PORTLAND CHINATOWN MUSEUM,
and PEGGY G. MORETTI,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

GUARDIAN REAL ESTATE SERVICES, LLC,
Intervenor-Respondent.

LUBA No. 2018-072

OSB2LAN IVON, LLC and HAITHEM TOULAN,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent.

LUBA Nos. 2018-073/086/087

FINAL OPINION
AND ORDER

Appeal from City of Portland.

1 Daniel H. Kearns, Portland, filed a petition for review and argued on behalf
2 of petitioners Restore Oregon *et al.* With him on the brief was Reeve Kearns, PC.

3
4 E. Michael Connors, Portland, filed a petition for review and argued on
5 behalf of petitioners OSB2LAN IVON, LLC and Haithem Toulan. With him on
6 the brief was Hathaway Larson LLP.

7
8 Linly F. Rees, Chief Deputy City Attorney, City of Portland, filed a
9 response brief and argued on behalf of respondent. With her on the brief was
10 Lauren A. King, Deputy City Attorney.

11
12 Timothy V. Ramis, Portland, filed a response brief and argued on behalf
13 of intervenor-respondent. With him on the brief was Jordan Ramis PC.

14
15 RYAN, Board Chair; ZAMUDIO, Board Member, participated in the
16 decision.

17
18 RUDD, Board Member, did not participate in the decision.

19
20 REMANDED

08/06/2019

21
22 You are entitled to judicial review of this Order. Judicial review is
23 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

In LUBA Nos. 2018-072, 2018-073 and 2018-086, petitioners Restore Oregon *et al.* (Restore Oregon) and OSB2LAN IVON, LLC and Haithem Toulan (together, OSB) appeal Ordinance 189000. In LUBA No. 2018-087, OSB appeals Ordinance 189002. Ordinance 189000 and 189002, together with a third ordinance (189001) that was not appealed, are part of a comprehensive amendment of the city’s Central City Plan, which is a part of the city’s comprehensive plan. The city and the parties refer to the three ordinances as Central City 2035 (CC 2035).

REPLY BRIEF

OSB moves to file a reply brief to respond to respondent’s response brief. There is no opposition to the motion, and it is allowed.

FACTS

The challenged ordinances adopted amendments to the Central City Plan, which was originally adopted in 1988 as part of the Portland Comprehensive Plan (PCP). CC 2035 made a number of changes to the existing Central City Plan. Petitioners in these appeals challenge, among other things, new building height limits that were adopted as part of CC 2035.

A. New Chinatown/Japantown Historic District

As relevant here, and as discussed in more detail in our resolution of Restore Oregon’s assignments of error, CC 2035 amended the height limits that

1 apply to new buildings in the New Chinatown/Japantown Historic District
2 (District), a ten square block area located west of the Willamette River and north
3 of the downtown area that is listed on the National Register of Historic Places for
4 its cultural and historical significance.

5 The District was established in 1989. The base zoning of property in the
6 District at the time it was established and today is Central Commercial Zone with
7 a downtown development overlay. At the time the District was established in
8 1989, the maximum allowed building height in the District under the Portland
9 City Code (PCC) was 350 feet plus a possible 75 feet of bonus height. New
10 development in the District is subject to discretionary Historic Resources Review
11 under PCC 33.846 and the city's adopted New Chinatown/Japantown Historic
12 Design Guidelines (Guidelines), first adopted in 2017.¹

13 CC 2035 decreased the existing height limits for four blocks on the
14 northern edge of the District, located between NW Everett and NW Glisan Street
15 and NW 5th and NW 3rd Avenue (North Blocks), from the previous limit of 425
16 feet (base 350 feet plus 75 feet of bonus height) to 200 feet of base height with
17 no bonus height available. CC 2035 also increased the height on one block in the
18 District, Block 33, located between NW Couch and NW Davis Street and NW
19 4th and NW 5th Avenue, from its previous maximum height of 100 feet to 125

¹ The city asks us to take official notice of Ordinance 188623, which was enacted in 2017 and adopted the Guidelines. There is no opposition to the city's motion, and we take official notice of the Ordinance that adopted the Guidelines.

1 feet of base height on the entire block, with an available affordable housing bonus
2 on the west half of Block 33, to allow a maximum height of up to 200 feet on the
3 west half of Block 33. Record 5566-68. Intervenor-respondent Guardian
4 Management Services LLC (Guardian) owns Block 33.

5 Restore Oregon challenges the new height limits as incompatible with the
6 PCP policies that apply in the District, and with newly adopted CC 2035 policies.

7 **B. Southern Triangle**

8 CC 2035 also amended the comprehensive plan and zoning map for other
9 areas of the central city, including the area that includes OSB's approximately
10 three-acre property located on the east side of the Willamette River, generally in
11 the area between the Tillikum Crossing Bridge and the Ross Island Bridge
12 (Southern Triangle). CC 2035 amended the plan and zoning map designations for
13 OSB's property from Heavy Industrial (IH) to Central Employment (EX), with
14 design and river overlays on the entire property, and river environmental and
15 scenic overlays on a portion of the property. The EX zoning applied to OSB's
16 property prohibits residential uses.

17 CC 2035 adopted a Central City Scenic Resources Protection Plan as an
18 update to the previously adopted (in 1991) city-wide Scenic Resources Protection
19 Plan. The new area-specific plan added two scenic resources sites and adopted
20 an Economic, Social, Environmental and Energy (ESEE) analysis. As part of the
21 ESEE analysis, the city mapped and evaluated views and viewpoints within the
22 resource sites, and grouped them into rankings based on quality and quantity. A

1 view of Mt. Hood from the Tillikum Crossing bridge was identified as SW46.
2 The city's ESEE analysis determined to protect the views of Mt. Hood from
3 SW46 by limiting building height on OSB's property and some surrounding
4 properties to 60 feet, and by limiting surrounding properties with similar height
5 restrictions. Approximately two acres of OSB's property are subject to the 60-
6 foot height limit, with one acre of OSB's property subject to a height limit of 100
7 feet with available bonus heights of up to 250 feet. Record 656, 662.

8 In its appeal, OSB challenges these new height limits.

9 **FIRST ASSIGNMENT OF ERROR (RESTORE OREGON)**

10 At the outset, we note that Restore Oregon's petition for review does not
11 comply with the requirement in OAR 661-010-0030(4)(d) that it include a section
12 addressing LUBA's standard of review. LUBA's standard of review of a decision
13 that amends a comprehensive plan is set out at ORS 197.835(6). LUBA is
14 required to reverse or remand the amendment if "the amendment is not in
15 compliance with the goals." *Id.* LUBA is also required to reverse or remand a
16 decision that amends a land use regulation if, as relevant here, "[t]he regulation
17 is not in compliance with the comprehensive plan." ORS 197.835(7)(a).

18 Because the challenged decision is a legislative rather than a quasi-judicial
19 decision, there is no generally applicable requirement that the decisions be
20 supported by findings, although the decision and record must be sufficient to
21 demonstrate that applicable criteria were applied and "required considerations
22 were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179

1 Or App 12, 16, n 6, 38 P3d 956 (2002). With respect to evidence, Statewide
2 Planning Goal 2 (Land Use Planning) requires that a decision that amends a
3 comprehensive plan or land use regulation must be supported by an adequate
4 factual base. An “adequate factual base” is equivalent to the requirement that a
5 quasi-judicial decision be supported by substantial evidence in the whole record.
6 *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff’d*,
7 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists to support a
8 finding of fact when the record, viewed as a whole, would permit a reasonable
9 person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855
10 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262
11 (1988).

12 Restore Oregon argues that the city’s findings in support of the 200 foot
13 maximum height on the North Blocks and the west half of Block 33 (through
14 bonus height) are inadequate to explain why the 200-foot height limit satisfies
15 PCP Policies 4.48 and 4.49, and three newly adopted provisions of CC 2035: CC
16 2035 Policies 5.19 (Historic resources and districts), and Old Town/Chinatown
17 Policies 1.OT-3 (cultural assets) and 5.OT-1 (surface parking), which were first
18 adopted as part of the challenged decision. Restore Oregon also argues that the
19 city’s decision to allow 200-foot tall buildings is not supported by an adequate
20 factual base, in violation of Goal 2. Finally, Restore Oregon argues that the 200-
21 foot height limits that CC 2035 adopts for the District do not comply with PCP
22 Policies 4.48 and 4.49, or with new CC 2035 Policies 5.19, 1.OT-3 and 5.OT-1.

1 For the reasons explained below, we agree with Restore Oregon that the city's
2 findings in support of the 200-foot height limit are inadequate to explain why the
3 200-foot height limit complies with the applicable PCP policies, and that the city
4 has not pointed to evidence in the record that support the city's decision to allow
5 200-foot-tall buildings in some parts of the District. We first describe the process
6 that led to the city council's ultimate adoption of the 200-foot height limits on
7 various blocks in the District.

8 **A. The City's Process**

9 The 200-foot height limit was proposed at the end of an almost ten-year
10 process that, in part, considered new height limits in the District. The city's
11 planning staff initially developed a concept plan for updates to the existing
12 Central City Plan. The concept plan became a discussion draft of the CC 2035
13 plan, and the city's Planning and Sustainability Commission (PSC) held two
14 public hearings and nine work sessions on the draft plan. That process resulted in
15 the PSC's recommended draft plan in June 2017, which recommended for the
16 entire District 125-foot maximum building heights with no bonuses available.

17 The city council held several public hearings on the draft plan between
18 September 2017 through April 2018. During the March 22, 2018 city council
19 meeting, the city council accepted public testimony on the proposed CC 2035
20 height limits. Prior to that meeting, height limits of 125 feet had been the focus
21 of much of the discussion, although some discussion focused on 160-foot height
22 limits. Record 6482, 6496, 7268-71. The mayor proposed an amendment (C1) to

1 the previously proposed plan to increase the maximum building height limit on
2 the west half of Block 33 to 160 feet. Thereafter, a city commissioner proposed
3 an amendment (C2) to increase the maximum building height on the west half of
4 Block 33 to 200 feet, and to increase the Floor Area Ratio (FAR) on the entire
5 block from 6:1 to 9:1. No vote was called on either motion.

6 At the next city council meeting on April 4, 2018, another commissioner
7 proposed an amendment (C3) to increase the maximum height on the west half
8 of Block 33 to 160 feet through bonus height available through an affordable
9 housing bonus. At the conclusion of that meeting, the city council passed the C1
10 amendment that adopted a maximum building height on the west half of Block
11 33 of 160 feet.

12 A further amendment that would allow maximum building heights of 200
13 feet was noticed on the agenda for the city council's May 24, 2018 meeting.
14 Opponents of the proposed new amendment and a 200-foot height limit submitted
15 letters in opposition, but no public testimony was taken at the May 24, 2018
16 meeting. Record 7712-17, 7720-30. At that meeting, the same commissioner who
17 proposed the C2 amendment proposed a new amendment that would (1) allow a
18 maximum building height of 200 feet on the North Blocks, with no bonus height
19 available, and (2) allow base building height for Block 33 of 125 feet but allow
20 an affordable housing bonus building height of up to 200 feet on the west half of
21 Block 33, and increase the base FAR to 9:1 on all of Block 33 if all floors above
22 the ground floor on the west half of the block are developed with a residential

1 use. An oral vote was taken and the amendment passed. At its meeting on June
2 6, 2018, the city council voted to adopt CC 2035.

3 **B. Applicable Portland Comprehensive Plan Policies**

4 As noted, the city is required to demonstrate that CC 2035 complies with
5 the applicable provisions of the PCP. Restore Oregon argues that the city’s
6 findings are inadequate to explain why the height limits adopted by CC 2035
7 comply with PCP Policies 4.48 and 4.49, and with three newly adopted
8 provisions of CC 2035: Policies 5.19, 1.OT-3 and 5.OT-1. We set out each
9 provision and the city’s findings below.

10 **1. PCP Policy 4.48**

11 PCP Policy 4.48 provides:

12 “Continuity with established patterns. Encourage development that
13 fills in vacant and underutilized gaps within the established urban
14 fabric, while preserving and complementing historic resources.”

15 The city found:

16 “224. The Plan responds to the policy through new goals and
17 policies specific to the Central City that call for: the rehabilitation
18 and reuse of historic structures; historic district protection measures;
19 and, incentives to encourage seismic upgrades and other
20 rehabilitation measures for historic resources.

21 “ * * * * *

22 “226. The maximum heights within historic districts have generally
23 been reduced, and in most cases bonus height provisions have been
24 repealed to result in new development that is compatible with the
25 existing scale and character of the Central City’s historic districts.

1 “227. For instance, in the New Chinatown/Japantown Historic
2 District heights in the northern four blocks have been reduced from
3 a maximum of 350 feet, and the ability to bonus an additional 75
4 feet in height to a maximum of 425 feet, has been eliminated. Now
5 the maximum height in that area is 200 feet with no ability to bonus
6 to a greater height. Although one block in the district received bonus
7 height to a maximum of 200 feet on the west half of the block and
8 125 feet on the eastern half of the block, it should be noted that the
9 greater heights allowed on the west half of the block are adjacent to
10 parcels that may build to 460 feet. Further, the new maximum height
11 limits create a step down from these greater height allowances to the
12 west of the New Chinatown/Japantown Historic District down to
13 100 feet maximum to the east of the site in question, and then
14 eventually down to 75 feet to the properties located just east of the
15 district.

16 “228. Following Council proposing this amendment, testimony was
17 received for and against the increased height. Some testifying was
18 concerned that these heights would not be consistent with the rest of
19 the scale of development elsewhere in the district. However, others
20 noted that the block in question had long been underutilized and that
21 redevelopment of the site would be a catalyst for investment
22 throughout the district, following decades of neglect. In the end,
23 council decided: 1) the heights proposed would still result in a step
24 down from the urban form surrounding the district; 2) the increased
25 height was necessary to incent redevelopment of a catalytic site; and
26 3) the issue of consistency was best left to the Landmarks
27 Commission who remain charged with reviewing future
28 development proposals on that site and elsewhere in the historic
29 district.

30 “Thus, on balance, these amendments in New
31 Chinatown/Japantown Historic District and all other Central City
32 Historic Districts further the objectives of Policy 4.48 above.”
33 Amended Record 75.

34 Restore Oregon argues that the city’s findings are inadequate to explain
35 how CC 2035 complies with PCP Policy 4.48 because the findings do not

1 describe the “established urban fabric” of the District, do not describe how 200-
2 foot-tall buildings would “preserv[e] and complement[]” the District’s historic
3 resources, describe those historic resources, and do not acknowledge the height
4 of existing buildings in the District, with the tallest existing building at 75 feet.
5 Restore Oregon argues that the finding that determines that 200-foot maximum
6 heights are lower than the 350- and 425-foot maximum heights previously
7 allowed by the base zoning in the District, which was in place when the District
8 was created, is not adequate to explain how 200-foot maximum heights satisfy
9 PCP Policy 4.48. Restore Oregon argues that all new development approved after
10 the District was created in 1989 was required to comply with the Historic
11 Resources Review provisions of PCC 33.846.060(F), with review by the
12 Landmarks Commission, and that such review assessed building height on a case
13 by case basis. Differently, here, we understand Restore Oregon to argue that if
14 the city council determines that the maximum building heights allowed by CC
15 2035 comply with PCP Policy 4.48, *i.e.*, they “preserv[e] and complement[] the
16 [District’s] historic resources,” the Landmarks Commission will lack discretion
17 to deny, or approve with conditions that require lower height, a building that
18 proposes a maximum height allowed by the base zoning, even if the Landmarks
19 Commission otherwise determines that the maximum building height is not the
20 appropriate height and mass for the District, or otherwise does not comply with
21 the historic review standards and Guidelines. Restore Oregon Petition for Review
22 13-14.

1 Finally, Restore Oregon argues that the city’s findings regarding PCP
2 Policy 4.48 are not supported by an adequate factual base, and that the
3 uncontroverted evidence in the record supports only a conclusion that 200-foot
4 height limits do not “preserv[e] and complement[] historic resources.” Restore
5 Oregon Petition for Review 28.

6 We agree with Restore Oregon that the city’s findings are inadequate to
7 explain why the adopted maximum height limits comply with PCP 4.48. The
8 findings do not describe “the established urban fabric” of the District, do not
9 describe the existing historic resources, and do not explain how 200-foot tall
10 buildings would “preserv[e] and complement[]” those existing historic resources.
11 Rather, the findings focus on the importance of creating incentives for
12 development of vacant parcels in the District, determine that the maximum
13 heights in the District are lower than adjacent properties that lie outside the
14 District boundary, and conclude that “the issue of consistency was best left to the
15 Landmarks Commission who remain charged with reviewing future development
16 proposals on that site and elsewhere in the historic district.” Amended Record 75.
17 Those findings are not adequate to explain that the maximum height limit of 200
18 feet in the District “preserv[es] and complement[s] historic resources.” Because
19 CC 2035 adopts base and bonus maximum height limits that apply as of right to
20 all new development across the District, the question of whether those base and
21 bonus maximum heights “preserv[e] and complement historic resources,” and
22 thus comply with PCP Policy 4.48, is a question that the city council must answer.

1 It may not be deferred to discretionary historic resources review of individual
2 development proposals for compliance with the PCC criteria and the Guidelines.

3 The city responds to Restore Oregon’s argument that the 200-foot
4 maximum height limits lack an adequate factual base with citations to a number
5 of record pages. City’s Response Brief 15. We have reviewed those citations. The
6 material cited by the city is largely focused on maintaining the pre-designation
7 height limits in the North Blocks to encourage development in the District,
8 adopting new height limits to “re-vitalize the area,” and arguing that the District
9 is less of an architectural district and more a “cultural” district. Record 14973-
10 78, 6320, 49651, 48059, 48140, 48189, 24096, 24253, 15023, 7731-32. However,
11 none of that evidence addresses the subject of PCP Policy 4.48, which is to
12 “[e]ncourage development that fills in vacant and underutilized gaps within the
13 established urban fabric, *while preserving and complementing historic*
14 *resources.*” (Emphasis added.) Stated differently, the materials cited by the city
15 are evidence that supports the city’s findings regarding the “[e]ncourage [infill]
16 development” prong of PCP Policy 4.48, but do not address the “within the
17 established urban fabric” or the “while preserving and complementing historic
18 resources” prongs. In particular, the city does not point to any focused evidence

1 that supports a conclusion that the 200-foot maximum height limit “preserve[es]
2 and complement[s]” District resources.²

3 **2. PCP Policy 4.49**

4 PCP Policy 4.49 provides:

5 “Resolution of Conflicts. Adopt and periodically update design
6 guidelines for unique historic districts. Refine base zoning in
7 historic districts to take into account the character of the historic
8 resources in the district.”

9 The city found:

10 “Consistent with this policy, the plan includes an action item calling
11 for an update of various district specific historic design guideline
12 packages, including those for the East Portland/Grand Avenue and
13 Russell Street Conservation Districts.” Amended Record 75.

14 We understand Restore Oregon to argue that the city’s findings are inadequate
15 because the findings do not describe or consider the character of the District’s
16 historic resources.

17 The city responds that findings are not required, and the city may
18 demonstrate in its brief and through citations to the record that CC 2035 complies
19 with Policy 4.49. The city also argues that CC 2035 complies with Policy 4.49
20 because Policy 4.49 requires the city to update its design guidelines and the city
21 updated the design guidelines for the District. The city also considered whether

² As explained in detail above, the 200-foot maximum height limit was introduced and discussed at the very end of a multi-year planning process, prior to which nearly all of the focused testimony focused on a maximum 125 or 160-foot height.

1 the existing base zoning of Central Commercial with a design overlay is
2 appropriate, and decided not to change the base zoning. Amended Record 149-
3 50. According to the city, nothing more is required.

4 We agree. The city has demonstrated that “required considerations were
5 * * * considered” with regard to PCP Policy 4.49, and that CC 2035 complies
6 with PCP Policy 4.49. *Citizens Against Irresponsible Growth v. Metro*, 179 Or
7 App at 16 n 6.

8 **3. CC 2035 Policies 5.19, 1.OT-3 and 5.OT-1**

9 CC 2035 adopted new Policies 5.19, 1.OT-3 and 5.OT-1 for the first time.
10 The policies were not yet in effect when CC 2035 was adopted, and the city was
11 not required to adopt findings addressing these new policies. Restore Oregon
12 argues that the city’s findings are inadequate because the findings do not yet
13 address those not yet in effect policies. The city and Guardian respond, and we
14 agree, that failure to adopt findings regarding new policies not yet in effect
15 provides no basis for reversal or remand of the decision.

16 Restore Oregon also argues that there is not an adequate factual base to
17 establish that the city’s decision to adopt maximum building heights of 200 feet
18 complies with these new policies. However, Restore Oregon has not established
19 that the city must demonstrate that the maximum building height of 200 feet
20 complies with these new policies that were not yet in effect at the time the
21 maximum building heights were adopted, in the same decision that adopts the
22 new policies for the first time.

1 **C. Conclusion**

2 Remand is required for the city to adopt findings that are adequate to
3 explain why the 200-foot height limit complies with PCP Policy 4.48. That
4 decision must be supported by an adequate factual base. Accordingly, we do not
5 address Restore Oregon’s arguments that a 200-foot maximum height limit
6 categorically fails to comply with PCP Policy 4.48.

7 Restore Oregon’s first assignment of error is sustained, in part.

8 **SECOND ASSIGNMENT OF ERROR (RESTORE OREGON)**

9 Statewide Planning Goal 1 (Citizen Involvement) requires in relevant part
10 that the city adopt a citizen involvement program. The city has adopted a citizen
11 involvement program that is implemented in part through provisions of the
12 Portland Zoning Code. The PCP also includes citizen involvement goals and
13 policies.

14 In their second assignment of error, we understand Restore Oregon to
15 argue that the city’s decision fails to comply with PCP Goals 2.C and 2.E.³ The

³ PCP Goals 2.C and 2.E provide:

“Goal 2.C: Value community wisdom and participation. Portland values and encourages community and civic participation. The City seeks and considers community wisdom and diverse cultural perspectives, and integrates them with technical analysis, to strengthen land use decisions.

“Goal 2.E: Meaningful participation. Community members have meaningful opportunities to participate in and influence all stages of planning and decision making. Public processes engage the full

1 crux of Restore Oregon’s argument, as we understand it, is that the city failed to
2 comply with Goal 2.E when it did not allow public testimony during the May 24,
3 2018 city council hearing at which the 200-foot maximum building height was
4 re-introduced, discussed by the city council, and ultimately adopted.

5 The city responds, and we agree, that the city council implicitly interpreted
6 Goal 2.E to not require the city to accept public testimony in response to every
7 motion or amendment made on a legislative proposal in order to satisfy the
8 requirement to allow “meaningful participation.” Amended Record 42. Nothing
9 in Goal 2.E suggests that closing the final hearing on a legislative amendment to
10 the comprehensive plan to testimony is inconsistent with Goal 2.E.

11 We also understand Restore Oregon to argue that the city council failed to
12 comply with Goal 2.C, for similar reasons. The city responds, again, that nothing
13 in Goal 2.C requires the city to accept public testimony in a legislative
14 proceeding, in response to a motion or amendment. We agree.

15 Accordingly, Restore Oregon’s second assignment of error provides no
16 basis for reversal or remand of CC 2035.

17 Restore Oregon’s second assignment of error is denied.

diversity of affected community members, including under-served
and under-represented individuals and communities. The City will
seek and facilitate the involvement of those potentially affected by
planning and decision making.”

1 **FIRST ASSIGNMENT OF ERROR (OSB)**

2 OSB’s first assignment of error contains multiple subassignments of error.
3 Before turning to the subassignments of error, we set out and explain the
4 applicable Statewide Planning Goal 5 (Open Spaces, Natural Resources and
5 Historic Resources) rules and the city’s actions.

6 **A. The Goal 5 Rule and the City’s Scenic Resources Inventory**

7 OAR 660-023-0230(2) provides that when a local government amends its
8 acknowledged comprehensive plan to adopt or amend an inventory of its scenic
9 resources, the local government must comply with OAR 660-023-0030
10 (inventory process), OAR 660-023-0040 (ESEE process), and OAR 660-023-
11 0050 (program to achieve the goal). As part of CC 2035, the city adopted the
12 Central City Scenic Resources Protection Plan, which identifies two scenic
13 resource sites for protection.⁴ The resource site at issue in this appeal is identified
14 as the “Viewpoint Boundary,” which consists of the central city area and areas
15 contiguous to the central city where scenic views could be affected by heights of
16 buildings within the Central City Plan District. After identifying the Viewpoint
17 Boundary as a resource site, the city mapped and evaluated scenic resources
18 within the Viewpoint Boundary based on quality and quantity criteria. Record
19 18002-18044. Within the Viewpoint Boundary, the scenic view of Mt. Hood from

⁴ OAR 660-023-0010(10) defines “resource site” as “a particular area where resources are located. A site may consist of a parcel or lot or portion thereof or may include an area consisting of two or more contiguous lots or parcels.”

1 the Tillikum Crossing bridge received the highest rank. That scenic view was
2 assigned the moniker SW46.

3 As part of complying with OAR 660-023-0040, the city is required to
4 identify uses that could conflict with the scenic resource, and conduct an analysis
5 of the Economic, Social, Environmental and Energy (ESEE) consequences of
6 decisions to allow, limit, or prohibit conflicting uses. The rule requires the local
7 government to determine, based on the ESEE analysis, whether to allow, limit,
8 or prohibit conflicting uses.

9 The city conducted an ESEE analysis to identify uses that conflict with
10 SW46. The ESEE identified building heights and FAR for undeveloped and
11 underdeveloped land within the view corridor from SW46 as a conflicting use.
12 The city then analyzed the ESEE impacts of a future decision to protect ten
13 different significant views of Mt. Hood from the Willamette River, within the
14 Viewpoint Boundary resource site. The ESEE analysis concluded that protecting
15 the view of Mt. Hood from SW46 would have the significant impacts on
16 economic development, but that the economic impacts of protecting the view
17 from SW46 were lower than the economic impacts of protecting all or most of
18 the ten significant views. Record 1836. The city determined that viewpoint SW46
19 should be protected from conflicting uses by limiting building heights and FAR
20 in the view corridor. The city's program to achieve that protection is through EX
21 zoning applied to certain properties and lower building heights than would
22 otherwise be allowed.

1 **B. ESEE Analysis**

2 In three subassignments of error under its first assignment of error, OSB
3 argues that the city’s ESEE analysis fails to comply with “Goal 5 and its
4 implementing rules.” OSB Petition for Review 14. Initially, we note, as the city
5 notes in its response brief, that OSB cites “OAR 660-016-0000 *et seq*” in support
6 of its assignment of error. OSB Petition for Review 2, 8, 12-13. OAR chapter
7 660 division 16 was the Land Conservation and Development Commission’s
8 (LCDC’s) first Goal 5 implementing administrative rule. We refer to that division
9 herein as the old Goal 5 rule. That administrative rule has largely been replaced
10 by OAR chapter 660, division 23. We refer to that division herein as the new
11 Goal 5 rule. OAR 660-023-0250(1). Accordingly, OAR 660-016-0000 *et seq.* do
12 not apply to the city’s decision to adopt CC 2035. Rather, the provisions of OAR
13 660-023-0000 *et seq.* apply.⁵ *See Beaver State Sand and Gravel v. Douglas*

⁵ OAR 660-023-0250 provides in relevant part:

(1) This division replaces OAR 660, division 16, except with regard to cultural resources, and certain PAPAs and periodic review work tasks described in sections (2) and (4) of this rule. Local governments shall follow the procedures and requirements of this division or OAR 660, division 16, whichever is applicable, in the adoption or amendment of all plan or land use regulations pertaining to Goal 5 resources. The requirements of Goal 5 do not apply to land use decisions made pursuant to acknowledged comprehensive plans and land use regulations.

“(2) The requirements of this division are applicable to PAPAs initiated on or after September 1, 1996. OAR 660, division 16

1 *County*, 43 Or LUBA 140, 149-150 (2002), *aff'd*, 187 Or App 241, 65 P3d 1123
2 (2003) (explaining some important differences between the old Goal 5 rule and
3 the new Goal 5 rule).

4 The city urges us to reject OSB’s first assignment of error based on its
5 mistaken citation to an inapplicable administrative rule. In its reply brief, OSB
6 replies that its mistaken reference to an inapplicable rule is harmless because the
7 overall approach in both versions of the rules (inventory, ESEE analysis,
8 program) is the same. In *Beaver State Sand and Gravel* we explained that the old
9 Goal 5 rule and the new Goal 5 rule differ in “pertinent ways.” 43 Or LUBA at
10 149. However, although the city takes the position that the rules in “division 23
11 contain different standards for conducting an ESEE analysis than the rules of
12 OAR 660, division 16,” the city does not identify those different standards or
13 explain why the different standards mean that OSB’s arguments made with
14 citation to the old Goal 5 rule do not provide a basis for reversal or remand. City’s
15 Response to OSB Brief 15. Accordingly, we proceed to address those arguments.

16 **1. Columbia Steel Castings**

17 In its first assignment of error, OSB first argues that the city’s ESEE
18 analysis is “deeply flawed and fails to comply with Goal 5 and its implementing
19 rules.” OSB Petition for Review 14. First, OSB argues that the city’s ESEE

applies to PAPAs initiated prior to September 1, 1996. For purposes of this section ‘initiated’ means that the local government has deemed the PAPA application to be complete.”

1 analysis impermissibly used an “area-wide approach” similar to the approach that
2 was rejected in *Columbia Steel Castings Co. v. City of Portland*, 314 Or 424, 840
3 P2d 71 (1992). Even assuming for purposes of this opinion only that the holding
4 in *Columbia Steel Castings* applies to ESEE analyses conducted under the new
5 Goal 5 rule, we reject OSB’s argument.

6 In *Columbia Steel Castings*, the Supreme Court rejected the city’s ESEE
7 analysis methodology that identified 36 specific resource sites, but proceeded to
8 analyze the ESEE consequences based on five large “sub-areas,” which were
9 essentially units of land that were much larger in some cases than the resource
10 sites identified for possible protection. Here, in contrast, the city’s ESEE analysis
11 identified a defined resource site, the Viewpoint Boundary, and then analyzed the
12 ESEE consequences that could result from a decision to limit conflicting uses by
13 evaluating the economic impacts within more defined areas within the resource
14 site, for groups of similar scenic resources and groups of similarly zoned
15 properties within the Viewpoint Boundary resource site. *Columbia Steel Castings*
16 is inapposite for that reason.

17 OAR 660-023-0040(4), which is part of the new Goal 5 rule that governs
18 the ESEE analysis requirement, provides in relevant part that:

19 “Local governments shall analyze the ESEE consequences that
20 could result from decisions to allow, limit, or prohibit a conflicting
21 use. The analysis may address each of the identified conflicting uses,
22 or it may address a group of similar conflicting uses. A local
23 government may conduct a single analysis for two or more resource
24 sites that are within the same area or that are similarly situated and

1 subject to the same zoning. The local government may establish a
2 matrix of commonly occurring conflicting uses and apply the matrix
3 to particular resource sites in order to facilitate the analysis. A local
4 government may conduct a single analysis for a site containing more
5 than one significant Goal 5 resource.”

6 To the extent that OSB challenges compliance with OAR 660-023-0040(4), the
7 city responds that the ESEE analysis is consistent with and complies with OAR
8 660-023-0040(4), which allows the city to conduct a single analysis for a resource
9 site containing more than one resource. We agree. The approach the city took in
10 the ESEE analysis for CC 2035 is nearly the opposite of what occurred in
11 *Columbia Steel Castings*. The ESEE analyzed ten separate districts or sub-areas,
12 including the Southern Triangle, within the single Viewpoint Boundary resource
13 site. Record 2002. OAR 660-023-0040(4) specifically allows that approach.

14 **2. ESEE Assumptions**

15 OSB next argues that the ESEE analysis impermissibly used different
16 assumptions for the Southern Triangle sub-area, resulting in an undervaluation of
17 the economic impacts to OSB’s property from the decision to protect the
18 viewpoint resource, and that the economic impacts are “artificially low due to the
19 unique approach applied to the Southern Triangle sub-area,” in the following
20 ways. OSB Petition for Review 24.

21 According to OSB, the city used a different methodology in its
22 assumptions about economic impacts to properties in the Southern Triangle that
23 would be impacted by protection of SW46 than it used for the rest of the central
24 eastside area of the central city. We understand OSB to argue that using a

1 different methodology for one sub-area and not others is inconsistent with the
2 rule that governs ESEE analyses.

3 First, we understand OSB to argue that the ESEE analysis improperly
4 assumed base height and FAR for its property and properties in the Southern
5 Triangle. We understand OSB to argue that the ESEE analysis improperly
6 assumed base height under the *existing* IH zoning instead of the maximum base
7 height for OSB's property under the *proposed* EX zoning (200 feet), and that in
8 addition the city should have assumed development under the bonus height
9 allowed under the proposed EX zoning—250 feet—rather than assuming a
10 maximum height of 200 feet under the base height for the proposed EX zoning.
11 OSB Petition for Review 18. Relatedly, OSB argues that in assuming maximum
12 building heights for properties in the Southern Triangle, the ESEE “deviated from
13 the approach for the remaining sub-areas in almost every respect.” OSB Petition
14 for Review 21-22. OSB also argues that the ESEE analysis improperly assumed
15 a FAR of 3:1 for the Southern Triangle that was different than the FAR assumed
16 for other areas of the central city. *Id.*

17 Second, OSB argues that the ESEE analysis undervalued the economic
18 impacts to OSB's property when it assumed lot coverage for OSB's property
19 based on an average lot coverage in the Southern Triangle of 80 percent.
20 Relatedly, OSB points out that the ESEE deviated from the approach for
21 determining lot coverage that was used for the rest of the central city. OSB
22 Petition for Review 22. Third, OSB argues that the city's assumptions for dollar

1 and jobs per square foot values are based on the entire central city and not based
2 on the Southern Triangle sub-area. OSB Petition for Review 19-20. In sum, we
3 understand OSB to argue that the city should have used site specific base and
4 bonus height, FAR, and lot coverage for each property affected by protection of
5 SW46.

6 The city responds in turn. For the assumed maximum building heights and
7 FAR, the city explains that the city used more conservative assumptions in the
8 ESEE for the Southern Triangle than for other sub-areas in the central city,
9 resulting in a higher estimate of economic impact to properties in the Southern
10 Triangle than if less conservative assumptions were used. For example, the city
11 explains that in the ESEE the city generally assumed a height of 90 feet and a 4:1
12 FAR for IH-zoned properties in the central eastside area of the central city, but
13 assumed a height of 200 feet and 3:1 FAR for IH-zoned properties in the Southern
14 Triangle. That assumption was based on the larger block sizes in the Southern
15 Triangle, using vacant and underdeveloped properties included on the city's
16 Buildable Lands Inventory and assuming that properties in common ownership
17 would develop as a single site.⁶ The city also explains that when assuming
18 maximum building height under the proposed EX zoning, the city assumed
19 development at the maximum base zone height (200 feet) because of the

⁶ According to the city, larger block sizes in common ownership could result in FAR being consolidated on one part of a site, allowing taller development on one part of the site.

1 uncertainty of the availability of bonus height that could allow up to 250 feet.
2 Similarly, the city assumed a FAR of 3:1 for the Southern Triangle, based on
3 industrial zoning, site size and development patterns that reflect low warehouse
4 buildings.

5 For the assumed lot coverage, the city explains that the ESEE's assumption
6 of 80 percent lot coverage in the Southern Triangle was based on existing
7 conditions, and that using 80 percent resulted in an estimate of greater economic
8 impact to properties in the Southern Triangle. Similarly, for the assumed lost
9 floor area and lost jobs, the ESEE calculated lost jobs based on a formula of one
10 job per 200 square feet, which converts to 218 jobs per acre.

11 We agree with the city that the ESEE analysis accurately estimated the
12 economic impact to properties in the Southern Triangle, including OSB's
13 property. OSB has not explained why the ESEE's assumptions regarding
14 maximum building height, FAR, lot coverage, and dollars and jobs lost are
15 incorrect or inaccurate for the Southern Triangle, or for OSB's property. In fact,
16 we agree with the city that the ESEE estimated the economic impact to properties
17 in the Southern Triangle that would be affected by protecting SW46 based on
18 assumptions that led to a conclusion of greater economic impact to those
19 properties than if the ESEE used different assumptions that were applied in other
20 areas of the central eastside.

1 Finally, we understand OSB to argue that the city failed to comply with
2 OAR 660-016-0020(2), an inapplicable administrative rule.⁷ We also understand
3 OSB to argue that the ESEE analysis is inaccurate and underestimated the
4 economic impacts from a decision to protect SW46 because the ESEE analysis
5 failed to consider substantial environmental remediation costs that will be
6 incurred to develop OSB's property. According to OSB, those remediation costs
7 mean that a 60-foot height limit and zoning that does not allow residential uses
8 will make any development of OSB's property cost-prohibitive, and the ESEE
9 analysis failed to account for this specific situation.

10 Nothing in OAR 660-023-0040(4), the rule that does apply, requires the
11 local government to consider the cost of environmental remediation for properties
12 with conflicting uses, or requires the level of specificity OSB argues is required.
13 In fact, the rule allows the city to analyze the ESEE consequences based on the
14 entire resource site. Accordingly, OSB's arguments provide no basis for reversal
15 or remand.

⁷ OAR 660-016-0020(2) provides:

“As the Goal 5 process progresses and more specificity about the nature of resources, identified conflicting uses, ESEE consequences and implementing measures is known, notice and involvement of affected parties will become more meaningful. Such notice and landowner involvement, although not identified as a Goal 5 requirement is in the opinion of the Commission, imperative.”

1 **C. The SW46 View Corridor**

2 CC 2035 adopted a zoning map that depicts the location of the view
3 corridor for SW46. Record 656. The map scale is 1:2,800 feet. In its final
4 subassignment of error, OSB argues that the final zoning map adopted by the city
5 council that depicts the extent of the view corridor that crosses OSB's property
6 contains an error. In its final subassignment of error under the first assignment of
7 error, we understand OSB to argue that the view corridor boundary line on the
8 map is farther north than it should be based on the criteria for view corridor
9 delineation and based on the location of existing towers and silos that partially
10 obstruct the Mt. Hood views, including the Ross Island Sand and Gravel silos.
11 Record 12976-77, 12981-82.

12 The city responds that the view corridor was mapped and delineated based
13 on protection of Mt. Hood views to 1,000 feet below the timberline. Record 1223,
14 1998. According to the city, the fact that the Ross Island Sand and Gravel silos
15 are included within the view corridor, although they partially obscure the Mt.
16 Hood view from SW46, does not mean that the view corridor was inaccurately
17 mapped or delineated. Rather, we understand the city to explain that the city
18 council understood that the existing silos partially obscure the view, and included
19 them anyway in the view corridor. The city points to evidence in the record that
20 maps the view corridor based on protection of 1,000 feet below the timberline.
21 Record 1998-1999. We agree with the city that the map at Record 656 is an
22 accurate depiction of the view corridor for SW46, based on evidence in the record

1 regarding the view corridor mapping criterion of protecting Mt. Hood views to
2 1000 feet below the timberline.

3 OSB's first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR (OSB)**

5 CC 2035 is required to comply with Statewide Planning Goal 10
6 (Housing), which requires local governments to inventory their supply of
7 buildable residential land and ensure that the supply is adequate to meet
8 anticipated housing needs. In 2016, as part of periodic review, the city adopted a
9 Buildable Lands Inventory (BLI) that demonstrated that the city has sufficient
10 residential capacity for the anticipated housing units, and more narrowly, that
11 existing zoning in the central city plan district provided adequate capacity to meet
12 anticipated housing need.⁸

13 The city council adopted findings concluding that CC 2035 will not affect
14 the city's compliance with Goal 10, and that CC 2035 would result in additional
15 housing capacity. As part of CC 2035, the city rezoned approximately 41 acres
16 of land in the central city from Central Residential (RX) to Central Commercial
17 (CX). The city's findings concluded that rezoning from RX to CX would not
18 affect the city's compliance with Goal 10 because mixed-use zones such as the
19 CX zone were considered "residentially-designated" in the BLI, pursuant to OAR

⁸ Metro allocated the city 123,000 housing units, and the BLI concluded that the city has overall residential capacity for 267,000 housing units. Record 5342.

1 660-007-0018(1).⁹ Amended Record 15. Also as part of CC 2035, the city
2 rezoned approximately 60 acres from industrial zones (IH, IG-1) to Central
3 Employment (EX). The EX zone generally allows residential uses, although the
4 EX zoning on OSB's property and some other EX zoned properties in the
5 Southern Triangle prohibits residential uses. The city's findings conclude that CC
6 2035 increases the central city's housing capacity by rezoning RX land to CX
7 and industrial-zoned land to CX, and thus complies with Goal 10. Amended
8 Record 13, 14, 16, 148, 153.

9 In its second assignment of error, OSB first challenges the city's reliance
10 on the BLI, which OSB and the city agree is not part of the record of Ordinance
11 189000. The city responds, and we agree, that the city is both entitled and
12 required to rely on its adopted, acknowledged BLI, which is part of the PCP. *1000*
13 *Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005).
14 The city also responds that the evidence in the record supports the city's
15 conclusion that rezoning property from RX to CX will not decrease residential
16 capacity. Record 23742. We agree.

17 Second, we understand OSB to argue the city failed to consider housing
18 capacity in light of the particular EX zoning that prohibits residential uses, and
19 height restrictions, placed on OSB's property. The city responds that the prior
20 zoning of OSB's property, IH, did not allow residential uses and accordingly,

⁹ In the CX zone, residential uses are allowed outright.

1 OSB's property was not included in the BLI for any residential capacity. We
2 agree with the city that the particular EX zoning and height restrictions on OSB's
3 property do not affect the accuracy of the city's Goal 10 analysis and conclusion
4 that the city has adequate residential capacity.

5 Next, OSB argues that the city was required but failed to adequately
6 explain why OSB's property received an EX zoning designation that prohibits
7 residential uses, while not restricting residential uses on adjacent EX-zoned
8 properties. The city responds that the city has an obligation to comply with
9 various goals, including Statewide Planning Goal 9 (Economic Development)
10 and must balance competing priorities in order to both provide housing capacity
11 and protect industrial uses under Goal 9. Accordingly, the city responds, its
12 choice to prohibit residential uses on some EX-zoned properties reflects a choice
13 to limit conflicts between residential uses and adjacent industrial and
14 employment uses, where the city has a surplus of land to meet housing needs and
15 limited land to meet employment needs. We agree with the city. OSB has not
16 established that Goal 10 obligates the city to allow residential uses on OSB's
17 property.

18 The second assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR (OSB)**

20 PCP Policies 3.2, 3.53, 3.58 and 3.59 generally encourage dense mixed-
21 use development, including employment and housing, in areas close to transit

1 stations.¹⁰ OSB’s property is adjacent to the OMSI Station transit area, which is
2 immediately to the north of the Southern Triangle. Record 2735. In the third
3 assignment of error, OSB argues that CC 2035’s decision to zone its property EX
4 but prohibit residential uses fails to comply with those PCP policies. OSB argues
5 that the findings that conclude that CC 2035 complies with PCP Policies 3.2.
6 3.53, 3.58 and 3.59 are inconsistent, because the OMSI Station area allows
7 residential development as a conditional use with an approved master plan, but
8 the Southern Triangle area prohibits residential development. OSB also argues

¹⁰ PCP Policies 3.2, 3.53, 3.58 and 3.59 provide:

“3.2 Growth and stability. Direct most growth and change to centers, corridors, and transit station areas, allowing the continuation of the scale and characteristics of Portland's residential neighborhoods.

“3.53. Transit-oriented development. Encourage transit-oriented development and transit supportive concentrations of housing and jobs, and multimodal connections at and adjacent to high-capacity transit stations.

“3.58. Transit neighborhood stations. Encourage concentrations of mixed-income residential development and supportive commercial services close to transit neighborhood stations. Transit neighborhood stations serve mixed-use areas that are not in major centers.

“3.59. Destination stations. Enhance connections between major destinations and transit facilities and strengthen the role of these station areas as places of focused activity.”

1 that the findings fail to adequately explain why its property and the area of the
2 Southern Triangle contain restrictions on residential development, while the area
3 adjacent to OMSI station allows residential development as a conditional use.

4 The city responds, again, that required considerations were indeed
5 considered, and points to evidence in the record that they were. *Citizens for*
6 *Irresponsible Growth*, 179 Or App at 16 n 6. The city council also adopted
7 findings explaining how CC 2035's zoning designations comply with these PCP
8 policies. Amended Record 50, 57-58. In essence, the city balanced competing
9 priorities for providing employment land and land for housing, and determined
10 that employment opportunities were the priority for the Southern Triangle due to
11 existing industrial uses in the Southern Triangle. OSB has not established that the
12 city failed to take into account any required considerations under PCP Policies
13 3.2, 3.53, 3.58 or 3.59.

14 OSB's third assignment of error is denied.

15 **DISPOSITION**

16 For the reasons explained in our resolution of Restore Oregon's first
17 assignment of error, Ordinance 189000 is remanded.