

NATURE OF THE DECISION

Petitioner appeals a city council decision rezoning a portion of land currently occupied by a city park from Open Space/Public Facilities (OS/PF) to Urban High Density Residential (R-3).

BACKGROUND

Morrison Park is a city park that consists of three tax lots, Tax Lots 200, 600, and 700, which total 10.83 acres, all of which are largely undeveloped. The zone change pertains only to Tax Lot 700, which is comprised of approximately 5.33 acres.

This is the third time that this land use dispute has been before LUBA. A detailed understanding of the procedural history frames the issues and our dispositions in this appeal. In a decision dated May 22, 2017 (the 2017 decision), the city council concluded that a proposal to effectively eliminate Morrison Park as a city park was consistent with Hood River Comprehensive Plan (HRCP) Goal 8, Policy 1, which provides that “[e]xisting parks sites will be protected from incompatible uses.” *Crowley v. City of Hood River*, 77 Or LUBA 117, 124, *rev’d and rem’d*, 294 Or App 240, 430 P3d 1113 (2018) (*Crowley I*). The city council concluded that phrase is ambiguous, and narrowly interpreted it to require only that the city protect existing parks from incompatible uses on surrounding lands. *Id.*

1 On appeal in *Crowley I*, petitioner raised two assignments of error to
2 LUBA. In her first assignment of error, petitioner argued that rezoning Morrison
3 Park to allow it to be developed for high-density residential development fails to
4 “protect[]” Morrison Park from “incompatible uses.” *Id.* at 124. Petitioner argued
5 that the city council’s interpretation was inconsistent with the policy’s express
6 language, its purpose and underlying policy, and hence not affirmable under the
7 deferential standard of review that LUBA must apply to a governing body’s
8 interpretation of a local comprehensive plan provision, under ORS 197.829(1)
9 and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). *Crowley*
10 *I*, 77 Or LUBA at 125.

11 We affirmed the city’s decision. We denied petitioner’s first assignment of
12 error, and affirmed the city’s interpretation of HRCP Goal 8, Policy 1. *Id.* at 128.
13 We also denied petitioner’s second assignment of error, which challenged the
14 city’s findings under two code rezoning standards. Hood River Municipal Code
15 (HRMC) 17.08.040 governs quasi-judicial zone changes and authorizes the city
16 to rezone land based on findings that “[t]here is a public need for the change[,]”
17 or “[c]onditions have changed within the affected area, and the proposed zone or
18 plan change would therefore be more suitable than the existing zone or plan
19 designation.” HRMC 17.08.040(A)(2) and (3). The city processed the application
20 as a quasi-judicial zone change and found that both HRMC 17.08.040(A)(2) and
21 (3) justify the zone change to R-3, based on a “compelling and critical public
22 need” for affordable housing in the city. The city’s findings relied on three

1 documents to support those conclusions: (1) the HRCP Goal 10 element, (2) the
2 city's Buildable Lands Inventory (BLI) and Housing Needs Analysis (HNA),
3 adopted August 24, 2015 as an amendment to the HRCP, and (3) the Housing
4 Strategy document adopted on September 14, 2015.

5 In *Crowley I*, petitioner argued that (1) the Housing Strategy is not part of
6 the city's acknowledged comprehensive plan, and therefore cannot be relied upon
7 as a basis for the rezoning decision, and (2) the acknowledged comprehensive
8 plan provisions, including the BLI, the HNA, and the HRCP Goal 10 element, do
9 not support the proposed rezoning. Petitioner argued that the BLI, HNA, and the
10 HRCP Goal 10 element demonstrate that there is no need for additional R-3-
11 zoned land in the city, and provide no basis to rezone Morrison Park to meet the
12 city's need for affordable housing. *Crowley I*, 77 Or LUBA at 130.

13 We rejected petitioner's arguments and upheld the city's decision,
14 reasoning that the city found a deficit of affordable housing, not a deficit of R-3-
15 zoned land:

16 "The HNA identifies conversion of surplus city land as one strategy
17 to address the need for affordable housing. The city's findings
18 explain that the private sector housing market is unable to address
19 the public need for affordable housing, and that simply providing
20 additional R-3 zone land is not sufficient. The city council
21 concluded that what is needed is the contribution of public
22 resources, *i.e.*, donating public land and partnering with established
23 housing groups to develop affordable housing. Consequently, that
24 the BLI and the HNA indicates that the city's UGB includes an
25 adequate supply of R-3 zoned land to last for 20 years does not
26 undercut the city council's conclusion that there is a 'public need'

1 to rezone public land in order to facilitate the development of
2 affordable housing.” *Crowley I*, 77 Or LUBA at 132 (internal
3 citations omitted).

4 Petitioner appealed to the Court of Appeals, raising three assignments of
5 error. The court remanded LUBA’s decision based on petitioner’s first
6 assignment of error. *Crowley v. City of Hood River*, 294 Or App 240, 430 P3d
7 1113 (2018). The court concluded that the city’s interpretation of HRCP Goal 8,
8 Policy 1, did not “account for the text and context of the policy.” *Id.* at 241.
9 Petitioner’s second assignment of error to the court addressed consistency with
10 Statewide Planning Goal 2 (Land Use Planning) and petitioner’s third assignment
11 of error to the court argued that LUBA erred in affirming the city’s reliance on
12 Statewide Planning Goal 10 (Housing) to avoid the effect of comprehensive plan
13 policies implementing Statewide Planning Goal 8 (Recreational Needs). *Id.* at
14 241; *Crowley v. City of Hood River*, ___ Or LUBA ___, ___ (LUBA No 2017-
15 071, Jan 24, 2019) (*Crowley II*) (slip op at 5 n 2). The court did not reach
16 petitioner’s second and third assignments of error. *Id.*

17 On remand from the Court of Appeals, we changed our disposition and
18 sustained the first assignment of error and remanded the decision to the city “for
19 further proceedings, specifically for the city to adopt a sustainable interpretation
20 of Goal 8, Policy 1, and apply that policy, as interpreted, to the application before
21 it.” *Crowley II*, ___ Or LUBA at ___ (slip op at 7). In *Crowley II*, we reasoned
22 that the court’s opinion did not require us to revisit our denial of petitioner’s

1 second assignment of error in *Crowley I. Crowley II*, ___ Or LUBA at ___ (slip
2 op at 7).

3 On remand, the city held public hearings limited to evidence in the original
4 2017 local record and argument addressing the narrow issue on remand. The city
5 described the narrow scope of the remand in its decision:

6 “The sole legal issue in this remand is the proper meaning of Goal
7 8, Policy 1 as it applies to [Tax Lot (TL)] 700, which is just a portion
8 of today’s Morrison Park site and an even smaller portion of the
9 original Morrison Park site. All other criteria addressed in the
10 Council’s original decision and findings adopted therein were either
11 appealed and affirmed by LUBA or were not challenged. As such,
12 all findings on all criteria other than HRCP Goal 8, Policy 1 are
13 regarded as ‘law of the case’ and are not at issue in this remand
14 proceeding. In particular, we incorporate herein by reference our
15 findings related to Goal 10 from our prior decision because it is our
16 balancing of our Goal 10 affordable housing objectives against Goal
17 8 that compels our decision today.” Record 9.¹

18 On April 22, 2019, the city adopted Ordinance No. 2048, which approves
19 a quasi-judicial zone change and map amendment of the property from OS/PF to
20 R-3 and finds that, as conditioned, the decision is consistent with HRCP Goal 8,
21 Policy 1. The decision includes conditions of approval that (1) a maximum of
22 2.76 acres of the approximately five-acre property may be developed as

¹ In pre-briefing pleadings regarding the contents of the record in this appeal, petitioner argued that the city council committed procedural error in limiting the scope of the remand proceeding and rejecting testimony outside that limited scope. *Crowley v. City of Hood River*, ___ Or LUBA ___, ___ (LUBA No 2019-054, Order, Nov 20, 2019). Petitioner does not raise those same issues in the petition for review.

1 affordable housing and (2) the city shall work with a housing agency to develop
2 affordable housing on the property.² This appeal followed.

3 **SECOND ASSIGNMENT OF ERROR**

4 On review in post-remand proceedings, petitioners are foreclosed from
5 raising issues at LUBA that were “conclusively decided against them by the first
6 final and reviewable LUBA decision.” *Beck v. City of Tillamook*, 313 Or 148,
7 150, 831 P2d 678 (1992). That rule is commonly referred to as “the law of the
8 case.” *See also Green v. Douglas County*, 63 Or LUBA 200 (2011) (under *Beck*,
9 a party at LUBA fails to preserve an issue for review if, in a prior stage of a single

² The conditions of approval provide:

“1. A maximum of 2.76 contiguous acres of Tax Lot 700 may be developed as affordable housing, (households earning 80% AMI or less). The balance of Tax Lot 700 shall be retained and used only for park uses, including recreational amenities, and related public facilities that support park use. The park use of Tax Lot 700 north of Wasco, shall be contiguous.

“2. The City shall work with the Mid-Columbia Housing Authority, Columbia Cascade Housing Corporation, or a successor agency as a partner in developing a maximum of 2.76 acres of Tax Lot 700 for affordable housing (households earning 80% AMI or less). Any such development shall be integrated with and incorporate the undeveloped balance of Tax Lot 700 as an amenity usable by the residents of this development, the surrounding neighborhood, and general public. If such an affordable housing project does not occur, the City shall retain ownership of the land.” Record 6.

1 proceeding, that issue is decided adversely to the party or that issue could have
2 been raised and was not raised).

3 In the second assignment of error, petitioner argues that the city erred by
4 finding a conflict between HRCP Goal 10 (Housing) and HRCP Goal 8
5 (Recreational Needs) and balancing the need for affordable housing against the
6 HRCP Goal 8 policy of protecting existing public park sites from incompatible
7 uses. The city responds that petitioner's second assignment of error attempts to
8 reargue issues that were conclusively resolved in *Crowley I*. The city further
9 argues that petitioner "waived" the issue because petitioner did not appeal the
10 Court of Appeals' decision to the Supreme Court. Response Brief 36. Petitioner
11 replies that, because the Court of Appeals did not reach her assignments of error
12 that challenged LUBA's denial of her second assignment of error in *Crowley I*,
13 the court's opinion did not include a "decision" on the second assignment of error
14 for petitioner to appeal to the Supreme Court.

15 LUBA is an administrative agency with a narrowly defined scope of
16 review. We review final land use decisions. ORS 197.825. We have no authority
17 to review or issue opinions about whether or how an issue should or could be
18 reviewed in the appellate courts. The only issue properly before us under the
19 second assignment of error is whether the issues that petitioner raises in this
20 appeal are the same issues that were decided in *Crowley I*, or that could have been
21 but were not raised in *Crowley I*. We conclude that the issues raised in petitioner's
22 second assignment of error either are issues that LUBA conclusively decided

1 adversely to petitioner in *Crowley I*, or issues that could have been but were not
2 raised before LUBA during the initial appeal in *Crowley I*. Accordingly, we do
3 not reach or decide the second assignment of error.

4 **MOTION TO STRIKE AND MOTION TO FILE OVERLENGTH BRIEF**

5 Our conclusion on the second assignment of error renders moot
6 petitioner’s motion to strike the appendixes attached to the city’s response brief
7 and the substantive argument in those appendixes that the city incorporated by
8 reference in the city’s response brief. In the response brief, the city stated that “If
9 LUBA does not reject the Second Assignment under the law of the case doctrine,
10 the City incorporates herein by this reference its response to petitioner’s Second
11 Assignment to LUBA and its response to petitioner’s Third Assignment to the
12 court of appeals in *Crowley I*. The relevant portions of the City’s LUBA and court
13 of appeals briefs in *Crowley I* are attached as Appendices 3 & 4, respectively.”
14 Response Brief 36–37.

15 Petitioner moves to strike Appendixes 3 and 4, arguing that the city’s
16 attempt to incorporate the argument in the *Crowley I* by reference in the response
17 brief as a substantive response to petitioner’s second assignment of error
18 constitutes an unapproved overlength brief, which, if allowed, petitioner argues
19 would prejudice her substantial rights before LUBA. Petitioner also argues that
20 “[t]hose appendices consist entirely of documents not otherwise present on the
21 record containing legal argument.” Motion to Strike 1.

1 The city opposes the motion to strike, arguing that Appendixes 3 and 4
2 “are appropriately included to document the fact that petitioner raised these issues
3 in *Crowley I*, the City responded to these issues, LUBA and the court of appeals
4 rejected both or at least did not grant relief based on either issue, and neither issue
5 can be resurrected again in this second appeal based on Law of the Case.”
6 Response to Motion to Strike 2. In the alternative, the city requests that LUBA
7 grant permission “to expand the page limit of the City’s Response Brief to include
8 these appendices in the event it [*sic*] necessary for the Board to consider the
9 substance (legal argument) of these appendices in deciding the merits of this
10 appeal.” *Id.* at 1.

11 For purposes of our analysis under *Beck*, above, we need not and do not
12 consider what was argued to the Court of Appeals or what parts of the Court of
13 Appeals’ opinion is subject to a petition for review in the Supreme Court. Instead,
14 we review what was or what could have been argued to LUBA in *Crowley I*. We
15 have determined from review of our two prior decisions in petitioners’ initial
16 LUBA appeal, *Crowley v. City of Hood River*, 77 Or LUBA 117, *rev’d and*
17 *rem’d*, 294 Or App 240, 430 P3d 1113 (2018) (*Crowley I*), and on remand from
18 the Court of Appeals, *Crowley v. City of Hood River*, ___ Or LUBA ___ (LUBA
19 No 2017-071, Jan 24, 2019) (*Crowley II*), that the issues petitioner raises in her
20 second assignment of error in this appeal either were decided adversely to
21 petitioner in *Crowley I*, or could have been but were not raised in *Crowley I*.

1 Thus, those issues are not properly before us in this appeal and we do not reach
2 the merits of those issues.

3 The city's incorporation by reference to the legal arguments in Appendixes
4 3 and 4 and the city's alternative motion to file an overlength response brief are
5 contingent on LUBA reaching and deciding the merits of the second assignment
6 of error. We do not reach the merits of the second assignment of error.
7 Accordingly, the city's incorporation by reference to the legal arguments in
8 Appendixes 3 and 4 and the city's alternative motion to file an overlength
9 response brief have no effect and we do not review the city's Appendixes 3 and
10 4 for any purpose. Petitioner's motion to strike is moot.

11 **FIRST ASSIGNMENT OF ERROR**

12 **A. HRCP Goal 8 Inventory – OS/PF Implementing Zone**

13 In *Crowley I*, we summarized the inventory and zoning history related to
14 Morrison Park:

15 “The city acquired the property along with adjoining areas in the
16 1930s, and has used it ever since as a city park. In 1976, the city
17 zoned the site Open Space, and in the early 1980s rezoned it to
18 OS/PF as part of a larger comprehensive planning process. As part
19 of that process, the city adopted and incorporated into its
20 comprehensive plan the ‘Background Report for the City of Hood
21 River Comprehensive Plan, May 1983’ (Background Report). The
22 Background Report includes the inventories and findings supporting
23 the elements of the Hood River Comprehensive Plan (HRCP),
24 including its Goal 8 Recreational Resource element. That element
25 implements the city's obligations under Statewide Planning Goal 8
26 (Recreation). The Goal 8 Recreational Resource Inventory in the
27 Background Document includes Morrison Park on the list of the

1 city’s recreational resources. The Background Document states that
2 the resource inventory ‘contains a list of existing park sites and
3 comments concerning quality and suggested improvements.’

4 “The HRCP Goal 8 element, adopted in 1983, states that the city’s
5 goal is to ‘satisfy the recreational needs of the citizens of the
6 community and visitors to the area.’ * * * HRCP Goal 8, Policy 1
7 provides in relevant part that ‘[e]xisting parks sites will be protected
8 from incompatible uses[.]’” 77 Or LUBA at 119 (internal citations
9 omitted).

10 In the first assignment of error, second subassignment, petitioner argues
11 that the city cannot rezone the property from OS/PF to R-3 while it is listed on
12 the city’s Goal 8 inventory, found in the Background Report.³ Petitioner argues
13 that inventoried parks must remain zoned OS/PF unless and until the parks
14 inventory is revised through a comprehensive plan text amendment.

15 The city responds that that issue was raised and rejected in *Crowley I*, and
16 thus cannot be raised again in this appeal. Alternatively, the city argues, that issue
17 was not raised, but could have been raised in *Crowley I*. Response Brief 32–33.
18 The city’s two alternative positions contradict each other. However, if we agree
19 with either position, then *Beck* precludes our review of that inventory issue.

³ The HRCP explains: “The Comprehensive Plan is actually two separate documents: the Background Report and the Comprehensive Plan Text and Maps. The Background Report contains inventory, needs, and assessments information and findings of fact concerning each subject element of the Plan. This material provides the basis by which the Plan statements were prepared.” HCRP 1 (underscoring in original).

1 *Beck* does not preclude LUBA review of an issue raised on appeal of a
2 decision on remand, if the issue is substantially the same as an issue raised in an
3 unresolved assignment of error in the appeal of the original decision. *Wal-Mart*
4 *Stores, Inc. v. City of Hood River*, 72 Or LUBA 1, *aff'd*, 274 Or App 261, 363
5 P3d 522 (2015). Petitioner argues that she raised the inventory/comprehensive
6 plan amendment issue in *Crowley I*, but that LUBA failed to resolve the issue;
7 hence, it is live for this appeal. Petitioner asserts that the issue was raised during
8 the original proceeding before the city and during the city proceeding on remand.
9 Petition for Review 13–14. Petitioner also contends that she argued the issue “on
10 the written and oral record” before LUBA in *Crowley I*. Petition for Review 14–
11 15. Specifically, petitioner points to petitioner’s reply brief and oral argument in
12 *Crowley I*.⁴

13 In *Crowley I*, we observed in a footnote that, in the 2017 decision, the city
14 concluded that rezoning Morrison Park to R-3 does not require that the park first
15 be removed from the inventory because the R-3 zone allows public parks.
16 *Crowley I*, 77 Or LUBA at 134 n 8. We affirmed the city’s rezone decision, which
17 resulted in a LUBA decision allowing the city to rezone the property without first
18 amending the HRCPP to remove Morrison Park from the park inventory. However,
19 we disagree with the city that our decision in *Crowley I* actually addressed or

⁴ At oral argument in this appeal, the Board asked petitioner to specifically identify where the issue was raised in *Crowley I*. Petitioner cited the reply brief and oral argument in *Crowley I*.

1 resolved that inventory issue. That issue was not properly presented to the Board
2 for a decision in *Crowley I*. Petitioner has not directed us to any argument in the
3 petition for review in *Crowley I* that asserts the same error alleged in this appeal.
4 We accept petitioner’s assertion that she raised the issue in the original city
5 proceeding and that she argued the issue in the reply brief and at oral argument
6 in *Crowley I*. However, that is not sufficient to avoid the *Beck* doctrine and secure
7 that issue for our review in this appeal after remand.

8 Petitioner’s argument on this point appears to us to confuse preservation
9 and waiver principles, which require that an issue be sufficiently raised before
10 the local government, with the *Beck* doctrine, which requires that the issue be
11 raised on appeal to LUBA. LUBA does not review the entire record of a local
12 proceeding to identify issues that could potentially lead to reversal or remand of
13 the challenged decision. Instead, LUBA reviews the parties’ arguments
14 challenging the local decision in the briefs submitted to LUBA. Those challenges
15 are presented as assignments of error in the petition for review or cross-petition
16 for review. LUBA will not address arguments that arise for the first time in the
17 reply brief or at oral argument. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012)
18 (to the extent the reply brief includes arguments that purport to advance a new
19 assignment of error or new basis for reversal or remand, LUBA will not consider
20 such arguments); *DLCD v. Polk County*, 31 Or LUBA 69, *aff’d*, 142 Or App 311,
21 920 P2d 181, *rev den*, 342 Or 322 (1996) (LUBA will not consider arguments
22 made for the first time at oral argument before the Board).

1 Common policies underlie preservation and law of the case doctrines—
2 namely, fairness and finality. Issues must be timely presented with sufficient
3 specificity and opportunity for response, thus, ensuring fairness and efficiency
4 within the expedited adversarial system of land use decision making and
5 appellate review. Issues that are raised for the first time in a reply brief or at oral
6 argument do not provide an opposing party an adequate opportunity to respond.

7 Petitioner did not raise the inventory issue until her reply brief and oral
8 argument in *Crowley I*, which was too late for LUBA to consider and decide that
9 issue. Thus, Petitioner has not established that the inventory issue raised in this
10 appeal was properly raised and unresolved in the appeal of the original decision
11 in *Crowley I*. We agree with the city’s alternative argument that the inventory
12 issue could have been, but was not raised in *Crowley I*. Accordingly, the
13 inventory issue is precluded from our review by the law of the case doctrine in
14 *Beck*, and we do not review or reach it.

15 **B. Goal 8, Policy 1 Interpretation**

16 HRCP Goal 8, Policy 1, provides that “[e]xisting parks sites will be
17 protected from incompatible uses.” The city interpreted HRCP Goal 8, Policy 1,
18 to allow a portion of the park site be rezoned for residential use. The city reasoned
19 that the term “protect” does not prohibit the city from using the park site for non-
20 park uses. The city reasoned, “as a matter of general policy, we do not interpret
21 any of the Goal 8 policies as prohibiting the Council from making the policy
22 decision that a portion of particular park property is suited to a non-park use and

1 rezoning it for a future non-park development, so long as that non-park use is
2 suitably conditioned to render it compatible and protect the park.” Supplemental
3 Record (Supp) 10.⁵

4 We are required to affirm a local governing body’s interpretation of its own
5 land use regulations if the interpretation is not inconsistent with the express
6 language, purpose, or policy of the comprehensive plan or land use regulations.
7 ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010)
8 (applying ORS 197.829(1) standard).⁶ Petitioner argues in her first assignment of
9 error, first subassignment, that the city’s interpretation is inconsistent with the

⁵ The original record transmittal omitted even-numbered pages of the challenged decision. The supplemental record includes those omitted pages and is paginated as “Supp.”

⁶ ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

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

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

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 text, purpose, and underlying policy of HRCF Goal 8, Policy 1, and thus not
2 affirmable even under the deferential standard of review that LUBA must apply
3 under ORS 197.829(1) and *Siporen*.

4 **1. Protect**

5 According to petitioner, maintaining a portion of the park and rezoning a
6 portion for residential development does not “protect” the park site from
7 incompatible uses. The city interpreted the term “protect” as follows:

8 “[T]he operative term ‘protect’ is defined in the Comprehensive
9 Plan to mean ‘Save or shield from loss, destruction, or injury or for
10 future intended use.’ We do not interpret the term ‘protect’ to mean
11 the prohibition of non-park uses because the code clearly anticipates
12 that certain non-park uses are appropriate for park sites and are even
13 allowed in the City’s primary park zone (OS/PF). This is why Policy
14 1 requires existing park sites to be ‘protected’ from incompatible
15 uses and does not simply prohibit all non-park uses. Also, the
16 definition of ‘protect’ anticipates the need to protect park sites for
17 future intended uses, which we interpret to include future intended
18 park as well as non-park uses. From this, we conclude that some
19 non-park uses are appropriate ‘future intended uses’ and can be
20 made compatible with underlying park uses. As such, the focus of
21 the protection requirement is on incompatible non-park uses and not
22 on all non-park uses generally. Moreover, if the term ‘protected’
23 meant to prevent or prohibit all non-park uses on existing park sites
24 it would say so. Instead, Policy 1 specifies that park sites are to be
25 protected only from incompatible uses. We construe this directive
26 to call for measures that achieve the policy’s protection objective,
27 which we conclude allows the imposition of mitigating conditions
28 designed to render a potentially incompatible non-park use
29 compatible with the general park use of the site. Accordingly, we
30 adopt limiting conditions as part of this rezone to provide the
31 requisite measure of protection for Morrison Park and which make
32 an affordable housing project compatible with this existing park site.

1 These conditions limit the type of non-park use allowed on TL 700
2 to an affordable housing project only, and we limit the amount of
3 land that can be devoted to such a non-park use to a maximum of
4 2.76 acres of TL 700. Conditions also require the balance of TL 700
5 and the rest of the Morrison Park site to improve the park with the
6 construction of pedestrian and bicycle connections through TL 700
7 to other city parks and pathways. We find that, through the
8 imposition of these conditions, Morrison Park will be ‘protected’
9 from incompatible uses as required by Goal 8, Policy 1.” Supp 9
10 (underscoring in original).

11 Petitioner argues that the city’s interpretation is inconsistent with the
12 meaning of the term “protect.” Petitioner argues that the term “save,” which is in
13 the city’s definition of “protect,” is defined in the dictionary as “maintain” and
14 “preserve.” Therefore, petitioner argues, “protect” includes the HRCF definitions
15 of “preserve” and “maintain,” which are:

16 **“MAINTAIN:** Support, keep, and continue in an existing state or
17 condition without decline.” HRCF 44 (boldface in original).

18 **“PRESERVE:** To save from change or loss and reserve for a special
19 purpose.” HRCF 45 (boldface in original).

20 Petitioner argues that the “existing state” of Morrison Park is a public park and
21 the “special purpose” of Morrison Park is for public recreational use.
22 Accordingly, petitioner argues, the city’s interpretation that allows rezoning park
23 property for a non-park residential use is inconsistent with the term “protect.”

24 The city concedes that petitioner’s interpretation of “protect” is plausible.
25 However, the city argues that the term “protect” is susceptible to more than one
26 plausible interpretation. The city argues that the city’s interpretation is

1 “plausible” because it accounts for the text, context, purpose, and policy of HRCP
2 Goal 8, Policy 1.

3 The city council interpreted “protect,” as defined in the comprehensive
4 plan, to allow rezoning of a portion of the park property. The city determined that
5 the comprehensive plan definition of “protect” anticipates the need to protect
6 park sites “for future intended use,” which the city interpreted includes non-park
7 uses. In other words, in the city’s interpretation, public park sites will be protected
8 for public park use, unless and until the city determines that a portion of the park
9 site should be used for a different, non-park use, and that non-park use can be
10 made compatible with the remaining park uses.

11 Petitioner cites *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96,
12 *aff’d*, 238 Or App 439, 243 P3d 82 (2010) (*Bradwood II*) for the proposition that
13 where an applicable policy protects a discrete resource area, incompatible uses
14 must be entirely prohibited, not simply mitigated or designed in a manner to make
15 the uses compatible. In *Bradwood II*, the county adopted a comprehensive plan
16 map and zone change allowing a liquefied natural gas terminal and pipeline to be
17 developed at the former Bradwood Mill site along the Columbia River. As part
18 of the terminal project, the intervenors proposed to provide a turning area for
19 large ships by dredging a river channel and depositing the dredged material on
20 the shore.

21 The Bradwood Mill site is within the Columbia River Estuary planning
22 area and contains estuarine shorelands. Statewide Planning Goal 16 (Estuarine

1 Resources) sets out policies for the regulation of development that affects
2 estuaries. Statewide Planning Goal 17 (Coastal Shorelands) contains related
3 policies for the regulation of shorelands adjacent to estuaries. Two Clatsop
4 County Comprehensive Plan (CCCP) policies implement Goals 16 and 17.⁷
5 CCCP Policy 20.2(1) requires that “[t]raditional fishing areas shall be protected

⁷ Statewide Planning Goal 16 (Estuarine Resources) is:

“To recognize and *protect* the unique environmental, economic, and social values of each estuary and associated wetlands; and

“To *protect*, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon’s estuaries.” (Emphases added.)

Statewide Planning Goal 17 (Coastal Shorelands) is:

“To conserve, *protect*, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and

“To reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon’s coastal shorelands.” (Emphasis added.)

1 when dredging, filling, pile driving or when other potentially disruptive in-water
2 activities occur.” CCCP Policy 20.8(1) provides that “[e]ndangered or threatened
3 species habitat shall be protected from incompatible development.” In approving
4 the comprehensive plan amendment and zone change, the county interpreted the
5 meaning of “protect”:

6 “Protection is provided by avoiding those areas to the extent
7 possible and making development sensitive to the environment
8 where it does in fact occur, so that estuarine and coastal shoreline
9 values are maintained.” 61 Or LUBA at 109.

10 On review, we observed that “protect” is defined in the statewide planning
11 goals for purposes of Goal 16. We analyzed the term “protect” within the context
12 of Goal 16, which “requires protection of the environmental, economic, and
13 social values, diversity and benefits of estuaries, and allows estuarine
14 development and restoration only ‘where appropriate’” and prioritizes “[u]ses
15 which maintain the integrity of the estuarine ecosystem.” *Bradwood II*, 61 Or
16 LUBA at 110 (quoting Goal 16). We concluded that the county’s interpretation
17 of “protect” was incorrect. We did not afford any deference to the county’s
18 interpretation because our review required an interpretation of state law,
19 particularly, Goal 16. *See Kenagy v. Benton County*, 115 Or App 131, 838 P2d
20 1076, *rev den*, 315 Or 271 (1992) (a local government interpretation of a local
21 code provision that implements state law is not subject to deference).

22 Petitioner correctly observes that the HRCP definition of “protect” is
23 identical to the applicable Goal 16 definition of “protect” that we interpreted in

1 *Bradwood II*. However, the context of Goal 16 that informed our interpretation
2 in *Bradwood II* is inapplicable to our review of the city’s interpretation of the
3 term “protect” in HRCP Goal 8, Policy 1.

4 One purpose of the HRCP is “to comply with State land use goals and
5 related requirements.” HRCP 2. Statewide Planning Goal 8 (Recreation) is:

6 “To satisfy the recreational needs of the citizens of the state and
7 visitors and, where appropriate, to provide for the siting of necessary
8 recreational facilities including destination resorts.”

9 HRCP Goal 8 is “To satisfy the recreational needs of the citizens of the
10 community and visitors to the area.” HRCP 19. Statewide Goal 16 requires
11 conservation and protection of estuaries because estuaries provide unique natural
12 resource values. Differently, Statewide Goal 8 does not protect a specific unique
13 natural resource or specific recreation areas; instead, Goal 8 requires local
14 government to attempt to satisfy peoples’ recreational needs. The city was not
15 required to interpret “protect,” in the context of its HRCP Goal 8 policy,
16 consistent with the use of that specific term in Statewide Goals 16 and 17, as
17 defined in the Goals and Guidelines. City government planning and preservation
18 of city parks is one way to satisfy recreational needs, but city parks are not
19 “protected” by Goal 8 in the same manner that estuaries and coastal shorelands
20 are protected by Goals 16 and 17.

21 Statewide Planning Goal 8 provides, in part:

22 “The requirements for meeting such needs, now and in the future,
23 shall be planned for by governmental agencies having responsibility

1 for recreation areas, facilities and opportunities: (1) in coordination
2 with private enterprise; (2) in appropriate proportions; and (3) in
3 such quantity, quality and locations as is consistent with the
4 availability of the resources to meet such requirements. State and
5 federal agency recreation plans shall be coordinated with local and
6 regional recreational needs and plans.”

7 In interpreting HRCP Goal 8, Policy 1, the city relied on the abundant
8 recreational opportunities surrounding the city:

9 “[O]ur view of what are appropriate uses for city parks and the range
10 of compatible uses that includes suitably conditioned urban density
11 affordable housing projects, is consistent with the range of
12 recreational opportunities surrounding (outside of) the city. Few
13 cities in the country are blessed with the outdoor recreational
14 opportunities that Hood River has. The City is surrounded by
15 thousands of acres of public recreational land – the Mt. Hood
16 National Forest, the Columbia River, and Columbia River Gorge
17 National Scenic Area, Mt. Adams to the north, designated
18 wilderness areas and Wild and Scenic Rivers associated with both
19 mountains – all open and available for a broad range of outdoor
20 recreation. It is unreasonable to suggest that outdoor recreational
21 opportunities will be significantly diminished by an affordable
22 housing development that might occupy a portion of this city park.
23 In the context of the City’s existing and remaining city parks, trails,
24 rivers and streams, the substantial park resources managed by the
25 Hood River Parks and Recreation District, the Port of Hood River,
26 not-for-profit land trusts, and the vast area of undeveloped public
27 land outside the city, all available for recreation, we reject the
28 argument that Goal 8, Policy 1 prohibits all non-park development
29 of city parks or that all city parks must be preserved solely and
30 entirely for park uses. Goal 8, Policy 1 is not worded in such
31 absolute or comprehensively proscriptive terms, and we decline to
32 interpret it that way.” Record 11.

33 Importantly, unlike *Bradwood II*, we are required to apply a deferential
34 standard of review in this case, where the city is interpreting a term in the limited

1 context of its own comprehensive plan. The city may interpret that term
2 differently than we did in *Bradwood II*. We defer to the city’s interpretation of
3 “protect” under the deferential standard of review in ORS 197.829(1).⁸

4 2. **Incompatible**

5 The city interpreted the term “incompatible” as follows:

6 “[W]hile the affordable housing project that is envisioned for a
7 portion of Morrison Park is a non-park use, we find that it is not
8 ‘incompatible’ with use of TL 700 as a city park, especially when
9 conditioned to ensure that it is compatible with park uses on the
10 balance of TL 700. Several other Goal 8 policies provide important
11 context and support this conclusion. In particular, Goal 8, Policy 2
12 requires that ‘recreational opportunities and park sites will be
13 located so as to be accessible to a maximum number of people.’
14 Policy 3 calls for the ‘development of parks which are accessible by
15 means of walking or bicycling.’ Our reliance on these Goal 8
16 policies as context for the application of Policy 1’s protect principle
17 are informed by the geographic reality that city parks, such as
18 Morrison Park, are inherently urban in nature, located on urban land,
19 in an urban context, where people live and work in relatively high
20 urban densities. The fundamentally urban nature of parks within the
21 city limits is a legal reality and requirement of Oregon’s land use

⁸ We distinguish *Bradwood II* because (1) LUBA was not required to apply a deferential standard of review in *Bradwood II* because the local code provisions in that case implemented state law, and (2) the statewide planning goals that the local code provisions implemented expressly require protection of specific resources. Our decision in *Bradwood II* does not confine the city’s discretion to interpret the same definition of “protect” differently in the sole context of the city council’s interpretation of HRCF Goal 8, Policy 1. Our conclusion is limited to the city council’s interpretation of HRCF Goal 8, Policy 1, and we express no opinion about our whether we could uphold a similarly divergent and less stringent interpretation of the term “protect” in other contexts.

1 program that Hood River implements through its Comprehensive
2 Plan and zoning regulations. It is critical, in our view, that urban
3 density housing, such as the affordable housing project anticipated
4 for part of this site, be located in close proximity to and integrated
5 with city parks such as this one. City parks are supposed to be an
6 amenity used by urban dwellers, and the population that city parks
7 are supposed to serve includes low income residents, whose
8 recreational opportunities are limited by an inability to afford other
9 high cost options. As the Council aptly observes, the users of
10 Morrison Park may change as a result of this decision, but overall
11 more people with limited means will be served by this urban park if
12 they live adjacent to the remaining park space that will be integrated
13 into the non-park use. Our decision today limits the extent of non-
14 park development in the Morrison Park site to 2.76 acres of TL 700
15 and requires the balance of TL 700 to be retained for park use. By
16 limiting the extent of non-park development to 2.76 acres, we
17 achieve Goal 8, Policy 1’s directive to protect today’s 10.83-acre
18 Morrison Park site from incompatible uses, and, consistent with
19 Policies 2 and 3, this affordable housing project will be integrated
20 with this existing park site to foster walking and bicycle use by the
21 future residents, improving the park’s accessibility to meet the
22 recreational needs of Hood River’s citizens and visitors. We also
23 note that TL 100, the 2.71-acre portion of the original Morrison Park
24 site remains developed today as the City’s skate park. As
25 conditioned below, we find that such a housing project will be
26 compatible with use of the Morrison Park site, the adjacent skate
27 park on TL 100, and the remainder of TL 700 as a park, along with
28 other Hood River urban parks through the connected trail system
29 consistent with Goal 8, Policy 1.” Supp 9–10.

30 Petitioner argues that private residential use is “*per se* ‘incompatible’” with
31 public park use. Petition for Review 25. Petitioner observes that the area of
32 Morrison Park that will be rezoned R-3 and ultimately developed with multi-
33 family housing will no longer be accessible for public use. Petitioner argues that
34 it does not matter that a majority of the park will be maintained for public use;

1 instead, the entire existing park site must be maintained for public use. Petitioner
2 emphasizes a dictionary definition of “incompatible” as “incapable of coexisting
3 together.” Petition for Review 30. Petitioner has not identified any particular
4 aspects of affordable housing development that are incompatible with public park
5 use on the remaining portion of the park site. Instead, petitioner focuses her
6 opposition on the fact that affordable housing development precludes public park
7 use of the 2.76 acres of current park land area that will be zoned and developed
8 for residential use. Differently, the city concluded that residential use and park
9 use can coexist on the same site.

10 The city responds that the purpose of HRCP Goal 8 is “[t]o satisfy the
11 recreational needs of the citizens of the community and visitors to the area.”
12 According to the city, HRCP Goal 8 permits preserving park areas for
13 recreational use and integrating residential development. The city reserved 8.07
14 acres of Morrison Park for public park use. The 2.76 acres for residential use is
15 conditioned to be compatible with park use on the remaining park property. The
16 city emphasizes that siting multi-family affordable housing adjacent to the park
17 will facilitate use of the park by residents of the affordable housing development,
18 thus promoting HRCP Goal 8 policies of making parks accessible to a maximum
19 number of people and developing parks that are accessible by walking or
20 bicycling.⁹ Viewing HRCP Goal 8, Policy 1, in context with HRCP Goal 8,

⁹ HRCP Goal 8, Policies 2 and 3 provide:

1 Policies 2 and 3, the city’s interpretation of “incompatible” is consistent with the
2 policy’s express language, its purpose, and underlying policy. We affirm the
3 city’s interpretation of “incompatible.”

4 **3. Park Site**

5 Petitioner argues that diminishing the land area of Morrison Park by
6 rezoning a section of the park does not “protect” the “park site.” Petitioner argues
7 that the policy that the “park site” be protected requires that the entire land area
8 of Morrison Park must remain zoned and used as a public park. Petitioner argues
9 that the city’s interpretation impermissibly inserts terms such as “portion” “part”
10 “remainder” and “balance” that modify and diminish the term “park site.”

11 The city responds that the city’s determination that the “park site” could
12 be protected by retaining a portion of the existing Morrison Park land area and
13 rezoning a portion of it is plausible and should be affirmed. In other words, the
14 “park site” can be protected without maintaining the entire land area of Morrison
15 Park for public park use. We agree. Given that the park site is protected from
16 *incompatible* uses, some *compatible* uses are presumably allowed, suggesting
17 that some compatible non-park uses are allowed.

“2. When feasible, recreational opportunities and park sites will be located so as to be accessible to a maximum number of people.

“3. The development of parks which are accessible by means of walking or bicycling is encouraged.” HRCP 19.

1 “Park site” and “site” are not defined in the HRCP. “Site” is sometimes
2 used in land use regulations to define the location or placement of particular
3 development. *See, e.g., Kamps-Hughes v. City of Eugene*, ___ Or LUBA ___
4 (LUBA No 2019-115, Feb 26, 2020) (slip op at 14), *aff’d*, 305 Or App 224, ___
5 P3d ___ (2020) (describing “site” as the location or placement of a structure on
6 a property). In that context, the “site” is less than the total land area of the
7 particular parcel or lot. That meaning of “site” is used elsewhere in the HRCP.
8 For example, in HRCP Goal 4 (Forest Land), the HRCP states: “There are a few
9 forested spots inside the City which are located in parks or open space areas,
10 floodplains, and other environmentally protected areas. These limited sites will
11 continue to be protected by the zoning applied to those lands.” HRCP 9. In that
12 passage, the term “site” refers to a “forested spot” that could be an area less than
13 the entire parcel or lot to which protective zoning is applied. While in some
14 instances, “site” can refer to an entire bounded land area such as a legal lot, in
15 other instances, “site” can refer to less than an entire land area.¹⁰ The city’s
16 interpretation of “park site” is not inconsistent with the express language of the
17 HRCP.

¹⁰ For example, HRMC 17.01.060 defines “building site” as “one or more lots or parcels grouped together to form a tract of land to be used for building one or more structures. The building site lines shall be those lines, which bound the total area, exclusive of any public dedicated street.”

1 In sum, petitioner has not established that the city’s interpretation of HRCP
2 Goal 8, Policy 1, is inconsistent with the express language, purpose, or policy of
3 the HRCP. We conclude that the city’s interpretation of HRCP Goal 8, Policy 1,
4 accounts for the text, context, purpose, and policy of HRCP Goal 8, Policy 1. We
5 emphasize that the purpose of HRCP Goal 8 is “[t]o satisfy the recreational needs
6 of the citizens of the community and visitors to the area.” We affirm the city’s
7 conclusion that the recreational needs of the citizens of the community and
8 visitors to the area can be satisfied by preserving certain areas of Morrison Park
9 for recreational use and integrating limited residential development.

10 The first assignment of error is denied.

11 The city’s decision is affirmed.