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

ZENITH ENERGY TERMINAL
HOLDINGS LLC,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

COLUMBIA RIVERKEEPER and
WILLAMETTE RIVERKEEPER,
Intervenors-Respondents.

LUBA No. 2021-083

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Eric L. Martin filed the petition for review and reply briefs. Also on the brief was Stoel Rives LLP. Dana L. Krawczuk argued on behalf of petitioner.

Lauren King filed a response brief and argued on behalf of respondent.

Maura C. Fahey filed a response brief and argued on behalf of intervenors-respondents. Also on the brief was Crag Law Center.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

REMANDED 02/03/2022

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city land use compatibility statement (LUCS) issued to petitioner to fulfill an Oregon Department of Environmental Quality (DEQ) requirement for renewal of petitioner's existing Title V Air Quality Permit.[1]

MOTIONS TO INTERVENE

Columbia Riverkeeper and Willamette Riverkeeper (intervenors) move to intervene on the side of the city. The motion is unopposed and granted.

MOTION TO TAKE EVIDENCE

OAR 661-010-0045 provides that we may take evidence not in the record in the case of disputed factual allegations in the briefs concerning the

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[1] As the court explained in *Sierra Club v. Otter Tail Power Co.*:

> "In 1990 Congress * * * amended the [federal Clean Air Act (CAA)] to require each covered facility to obtain a comprehensive operating permit setting forth all CAA standards applicable to that facility. *See* 42 USC § 7661a(a). These 'Title V' permits do not generally impose any new emission limits, but are simply intended to incorporate into a single document all of the CAA requirements governing a facility. Similar to other CAA programs, Title V is implemented primarily by the states under [United States Environmental Protection Agency (EPA)] oversight. In states with EPA approved programs, Title V permits are issued by the state permitting authority, but are subject to EPA review and veto. *See* 42 USC § 7661d." 615 F.3d 1008, 1012 (8th Cir 2010) (case citations omitted).

constitutionality of the appealed decision.[2] Petitioner's fourth assignment of error is that the decision violates the 14th Amendment to the United States Constitution's Equal Protection Clause and Article I, section 20, of the Oregon Constitution's Privileges and Immunities Clause. The city asks that we take as evidence not in the record the following items:

Item 1 DEQ LUCS Application (unsigned and undated) and Incomplete Letter Checklist dated October 1, 2021, for property at 5528 NW Doane Avenue.

Item 2 U.S. Army Corp of Engineers, Department of State Lands, and DEQ Joint Permit Application signed and dated August 16, 2021, and Incomplete Letter Checklist dated October 5, 2021, for property at 9930 NW Saint Helens Road.

Item 3 DEQ LUCS Decision signed and dated April 16, 2021, for construction of petitioner's new off-loading area for rail cars.

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[2] OAR 660-010-0045(1) provides:

> "The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

The city argues that those three items are properly admitted as "[e]vidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs." OAR 661-010-0045(6)(a).

We will exclude "[i]rrelevant, immaterial or unduly repetitious evidence." OAR 661-010-0045(6)(b). Petitioner objects to our consideration of Items 1 and 2 as irrelevant to petitioner's claim that it has been treated differently than others in violation of its constitutional rights. We agree with petitioner that those items are irrelevant. Item 1 is an unsigned application, and the Incomplete Letter Checklist does not appear to be a city decision on the application. Although Item 2 is a signed application, the Incomplete Letter Checklist similarly does not appear to be a city decision on the application. More importantly, both of those items post-date the challenged decision, and we fail to see how they are relevant to demonstrating that, on the date it made the decision, the city treated petitioner the same as others similarly situated. Accordingly, we agree with petitioner that Items 1 and 2 are not relevant to our resolution of the fourth assignment of error.

Item 3 pre-dates the challenged decision. The city cites Item 3 to demonstrate that, prior to issuing the challenged decision, the city issued a separate DEQ LUCS in which the city evaluated petitioner's operations on the same property for compatibility with the city's recently acknowledged update to its comprehensive plan, which we refer to in this opinion as the 2035 Plan. However, the city does not explain how it is relevant to our analysis of petitioner's constitutional claims that the city has treated petitioner—the same

applicant—similarly. For that reason, we agree with petitioner that Item 3 should be excluded. OAR 661-010-0045(6)(b).

The city's motion to take evidence is denied.

MOTIONS TO TAKE OFFICIAL NOTICE

The city asks that we take official notice of Ordinance 188177, which was adopted on December 21, 2016, and which amends the Portland City Code (PCC). City's Response Brief 2 n 1. We will take official notice of items subject to judicial notice under ORS 40.090. *Blatt v. City of Portland*, 21 Or LUBA 337, *aff'd*, 109 Or App 259, 819 P2d 309 (1991), *rev den*, 314 Or 727 (1992). We take official notice of Ordinance 188177.[3]

The city also asks that we take official notice of Land Conservation and Development Commission (LCDC) Order 18-WKTSK-001897. City's Response Brief 3 n 2. We take official notice of Order 18-WKTSK-001897 as an official act of Oregon's executive branch of government. ORS 40.090(2).[4] The city's motions to take official notice are granted.

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[3] Judicially or officially noticed law includes "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, 'comprehensive plan' has the meaning given that term by ORS 197.015." ORS 40.090(7).

[4] Judicially or officially noticed law includes "[p]ublic and private official acts of the legislative, executive and judicial departments of this state, the United States, any federally recognized American Indian tribal government and any other state, territory or other jurisdiction of the United States." ORS 40.090(2).

Petitioner attaches to the petition for review the portions of the 2035 Plan, PCC, and ordinances that are cited therein, as required by OAR 661-010-0030(4)(f), and asks that we take notice of those provisions pursuant to ORS 40.090(7). Petition for Review 5 n 2. Petitioner's motion to take official notice is granted.

BACKGROUND

We begin with a brief description of petitioner's operations on the property that led to DEQ's decision to require petitioner to obtain a LUCS from the city. We then provide a description of the laws that are relevant to this appeal before turning to the assignments of error.

A. Petitioner's Operations

The subject 42-acre property is located within the Northwest Portland industrial area and zoned Heavy Industrial (IH) with a Prime Industrial (k) overlay.[5] Petitioner's existing facility on the subject property "consists of a petroleum, petroleum products, and renewable fuels bulk distribution terminal

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We do not consider items officially noticed for adjudicative purposes. *Murray v. Clackamas County*, 22 Or LUBA 247, 252 (1991).

[5] The subject property is:

> "approximately 42 acres in area and is located in Northwest Portland on the west side of NW Front Avenue. On the west side of the site is a BNSF railroad right-of-way, and to the west of the railroad right-of-way is NW Saint Helens Road. * * * The Willamette River is to the east, and Forest Park is to the west on the opposite side of NW Saint Helens Road." Record 5.

and asphalt refinery that includes bulk storage tanks, railcar storage/parking, rail and truck racks, off-loading facilities for transfer to other modes of transport, a vapor combustion unit, fire suppression equipment and other associated equipment." Record 4. Under PCC 33.140.100, petitioner's use of the property is allowed outright in the IH zone. For uses that are allowed outright in a zone, no land use review is required. PCC 33.700.010.

The property was used as an asphalt refining facility until 2006. Since then, it has been used for petroleum terminal operations. After petitioner acquired the property in 2017, petitioner intensified the operations on the property, including the storage and transfer of crude oil. Record 367-68. That intensification included the construction of 32 new rail car docks to increase the capacity to off-load crude oil into storage tanks on the property and the construction of a new marine vapor combustion unit. *Id.* Those intensified activities ultimately led DEQ to require that petitioner obtain a LUCS from the city in connection with DEQ's renewal of petitioner's Title V Air Quality Permit (DEQ Permit).[6] Record 370.

B. The City's LUCS Proceeding

In a letter dated January 11, 2021, DEQ notified petitioner that petitioner would be required to provide DEQ with a LUCS in connection with the requested

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[6] OAR 340-018-0050(2)(b)(B)(iv) requires an applicant for a Title V permit renewal to submit a LUCS "[f]or a major modification of an air contaminant discharge permit which means any physical change or change of operation of a source that results in a net significant emission rate increase as defined in OAR 340-020-0225(25)."

renewal of its DEQ Permit. *Id.* On May 16, 2021, petitioner applied to the city for the LUCS. On August 27, 2021, the Director of the city's Bureau of Development Services (BDS) issued the LUCS. The LUCS concludes that petitioner's activity or use is not compatible with various provisions of the 2035 Plan.[7] The Director of BDS attached four pages of findings to the LUCS,

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[7] The DEQ LUCS form asks, "Is the activity or use compatible with your acknowledged comprehensive plan as required by OAR 660-031?" Record 470. The form then lists the following response options:

> "□ The activity or use is specifically exempt by the acknowledged comprehensive plan; explain:
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> "□ Yes, the activity or use is pre-existing nonconforming use allowed outright by (provide reference for local ordinance):
>
> "□ Yes; the activity is allowed outright by (provide reference for local ordinance):
>
> "□ Yes, the activity or use received preliminary approval that includes requirements to fully comply with local requirements; findings are attached.
>
> "□ Yes, the activity or use is allowed; findings are attached.
>
> "□ No, see 2D. above, activity or use allowed under Measure 49; findings are attached.
>
> "□ No, (complete below or attach findings for noncompliance and identify requirements the applicant must comply with before compatibility can be determined):
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> "Relevant specific plan policies, criteria, or standards:
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> "Provide the reasons for the decision:" *Id.*

describing petitioner's facility and identifying the 2035 Plan policies that they found relevant and incompatible with petitioner's use. Record 4-7. This appeal followed.

C. Applicable State Laws

ORS 197.180(1)(b) requires state agencies to take actions that are authorized by law with respect to programs affecting land use "[i]n a manner compatible with acknowledged comprehensive plans and land use regulations." All agencies are required to adopt and have adopted rules to comply with ORS 197.180(1)(b).

1. LCDC Rules

All agencies are required to adopt state agency coordination (SAC) programs to "assure that state agency rules and programs which affect land use comply with the statewide goals and are compatible with acknowledged city and county comprehensive plans." OAR 660-030-0000. DEQ's SAC program implementing ORS 197.180(1)(b) is found in OAR chapter 340, division 18, and has been acknowledged by LCDC to comply with Statewide Planning Goal 2 (Land Use Planning).

ORS 197.180(11) provides:

"[LCDC] shall adopt rules establishing procedures to ensure that

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The city checked the last box and attached findings. Record 3-7. As we explain in more detail below, we understand petitioner to argue that the city should have checked the third box, not the last box.

> state agency permits affecting land use are issued in compliance with the goals and compatible with acknowledged comprehensive plans and land use regulations, as required by subsection (1) of this section. The rules must prescribe the circumstances in which state agencies may rely upon a determination of compliance with the goals or compatibility with the acknowledged comprehensive plan."

LCDC has adopted OAR chapter 660, division 31, in order to comply with and implement that statute for agency programs that involve the issuance of state permits. OAR 660-031-0025(2) identifies when the city is required to address compatibility with the comprehensive plan:

> "Where the affected local government has an Acknowledged Comprehensive Plan, the state agency or local government review shall address compatibility with the Acknowledged Comprehensive Plan when the activity or use is:
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> "(a) Prohibited by the plan;
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> "(b) Allowed outright by the plan;
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> "(c) Allowed by the plan but subject to standards regarding siting, design, construction and/or operation; or
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> "(d) Allowed by the plan but subject to future goal considerations by the local jurisdiction."

OAR 660-031-0010(1) defines "Acknowledged Comprehensive Plan" to mean "a comprehensive plan *and* implementing ordinances that have been adopted by a city or county and have been found by [LCDC] to be in compliance with the Statewide Planning Goals pursuant to ORS 197.251." (Emphasis added.) Thus,

where OAR 660-031-0025(2) refers to "the plan," it refers to both the city's acknowledged comprehensive plan and its implementing ordinances.[8]

2. DEQ's SAC Program

Again, DEQ's SAC program implementing ORS 197.180(1)(b) is found in OAR chapter 340, division 18, and has been acknowledged by LCDC to comply with Goal 2. OAR 340-018-0030(1)(d) provides that DEQ's SAC program applies to the "[i]ssuance of Air Contaminant Discharge Permit[s]" such as the DEQ Permit.

OAR 340-018-0040(1) allows DEQ to establish compatibility with the statewide planning goals by "assuring compatibility with acknowledged comprehensive plans."[9] OAR 340-018-0050(1) in turn requires that certain permit actions taken by DEQ "be compatible with local government

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[8] Although not included in LCDC's rules implementing ORS 197.180(11) at OAR chapter 660, division 31, OAR 660-030-0005(5) provides:

> "'Compatibility with Comprehensive Plans' as used in ORS 197.180 means that a state agency has taken actions pursuant to OAR 660-030-0070, including following procedures in its coordination program where certified, and there are no remaining land use conflicts between the adoption, amendment or implementation of the agency's land use program and an acknowledged comprehensive plan."

[9] OAR 340-018-0020(1) defines "Acknowledged Comprehensive Plan" to mean "a city or county comprehensive land use plan that has been approved by [LCDC]." Differently, as explained both above and below, the definition of "Acknowledged Comprehensive Plan" in OAR 660-031-0010(1) includes "implementing ordinances."

acknowledged comprehensive plans to the extent required by law." OAR 340-018-0050(2)(a) allows DEQ to rely on "[a]n applicant's submittal of a LUCS which provides the affected local government's determination of compatibility."[10] The DEQ LUCS form asks, "Is the activity or use compatible with your acknowledged comprehensive plan as required by OAR 660-031?" Record 470.

D. The 2035 Plan

The city adopted a new comprehensive plan in 2016, and we refer to the new plan as the 2035 Plan.[11] The 2035 Plan includes goals and policies that are, as described by the city, intended "to address the issues and challenges facing Portland, including but not limited to climate change and the importance of

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[10] We note that OAR 340-018-0050(2)(a)(C) and (D) allow DEQ to reject a LUCS determination of compatibility with the acknowledged comprehensive plan if DEQ determines that the "LUCS review and determination may not be legally sufficient," but they do not allow DEQ to reject a LUCS determination of incompatibility with the acknowledged comprehensive plan.

[11] Generally, adopted and acknowledged comprehensive plans and their implementing ordinances may be amended either through periodic review according to the procedures set out in ORS 197.628 to 197.651 and OAR chapter 660, division 25, or through a post-acknowledgement plan amendment (PAPA) according to the procedures set out in ORS 197.610 to 197.625 and OAR chapter 660, division 18.

The 2035 Plan was adopted in June 2016 through periodic review Ordinance 187832, and it was acknowledged in May 2018. Ordinance 187832 fulfilled Task 4 of the city's periodic review work program, which was approved by LCDC in September 2009 through Order 001773.

transitioning to clean, renewable energy; hazard prevention and disaster preparedness; and addressing adverse impacts on the environment and historically marginalized groups." Record 5. The city did not, concurrently with the adoption of the 2035 Plan, adopt comprehensive amendments to the PCC, but the city has amended the PCC a number of times since the 2035 Plan's adoption.[12]

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner's first assignment of error is that the city's decision improperly considered provisions of the 2035 Plan in evaluating the LUCS application. ORS 197.835(9)(a)(D). Petitioner's second assignment of error is that the city's

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[12] As relevant here, in December 2016, the city adopted periodic review Ordinance 188177, which amended PCC 33.140.100 to prohibit residential uses and allow office uses in employment zones. Ordinance 188177 fulfilled Task 5 in the city's periodic review work program. *See* n 11.

Also in December 2016, the city adopted Ordinance 188142 as a PAPA. Ordinance 188142 amended PCC 33.140.100 to prohibit new bulk fossil fuel terminals, such as petitioner's, on a citywide basis and to limit the future expansion of existing bulk fossil fuel terminals. Ordinance 188142 was appealed to LUBA, and we remanded in *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017), *aff'd in part, rev'd in part, and rem'd*, 289 Or App 739,412 P3d 258, *rev den*, 363 Or 390 (2018). In December 2019, the city adopted Ordinance 189807 as a PAPA, which was similar to Ordinance 188142. Ordinance 189807 was also appealed to LUBA, and we remanded in *Columbia Pacific Building Trades Council v. City of Portland*, ___ Or LUBA ___ (LUBA No 2020-009, Oct 30, 2020). The PCC amendments proposed in Ordinances 188142 and 189807 are not effective. *Turner v. Jackson County*, 62 Or LUBA 199, 210 (2010), *aff'd*, 240 Or App 816, 249 P3d 564 (2011); *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42, *aff'd*, 229 Or App 504, 213 P3d 590 (2009); *Western States v. Multnomah County*, 37 Or LUBA 835, 842-43 (2000).

findings are inadequate to explain why petitioner's use of the property is not compatible with the 2035 Plan. Those assignments of error contain overlapping arguments and issues, and we address them together.

A. First Assignment of Error

The scope of the city's evaluation of provisions of the 2035 Plan when a LUCS application is presented to it is at the heart of petitioner's first assignment of error. Petitioner argues in the first assignment of error that the city is prohibited from directly evaluating compatibility with the 2035 Plan in completing the LUCS request. We understand petitioner to argue that, because PCC 33.140.100 allows petitioner's use as an outright permitted use, and because PCC 33.700.010(A) does not provide that provisions of the city's comprehensive plan apply as approval criteria in reviewing outright permitted uses and development, the city may not consider provisions of the 2035 Plan in completing the LUCS.[13] The crux of petitioner's argument is that, because provisions of the 2035 Plan are not approval criteria for an application for use or development of petitioner's property, the city may not consider provisions of the 2035 Plan in completing the LUCS.

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[13] PCC 33.700.010(A) provides:

> "Requests for uses and development which are allowed by right are reviewed for compliance with the zoning regulations. The review is a nondiscretionary administrative review. Decisions are made by the Director of BDS and are final. The review is done in a timely manner according to general operating procedures of [BDS] and the City."

In support of its argument, petitioner cites and relies on decisions in which we have attempted to elucidate how a local government determines whether particular comprehensive plan requirements apply as approval criteria for permit decisions. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459, 467 (2013), *rev'd on other grounds*, 263 Or App 80, 326 P3d 1229 (2014) (citing *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 211-12 (2004); *Murphey v. City of Ashland*, 19 Or LUBA 182, 199 (1990); *Miller v. City of Ashland*, 17 Or LUBA 147, 169 (1988)) (explaining that a demonstration that a permit application complies with land use regulations is sufficient to establish consistency with the comprehensive plan where the text of the comprehensive plan supports a conclusion that the local government's land use regulations displace the comprehensive plan entirely as a potential source of approval criteria). However, as the city and intervenors (together, respondents) point out, none of those cases involved a request for a LUCS or included any discussion of ORS 197.180 or LCDC's implementing rules at OAR chapter 660, division 31. For that reason, those cases are inapposite in answering the question of whether the status of a use under a city's zoning code forecloses city review of a comprehensive plan for purposes of completing a LUCS application.

In response, the city takes the position that ORS 197.180(1)(b) and LCDC's implementing rules require the city to determine whether petitioner's use of the property is compatible with relevant provisions of the city's comprehensive plan. Accordingly, the city argues, the fact that the use is allowed

outright under the existing PCC does not foreclose the city from evaluating compatibility with the 2035 Plan.[14]

Respondents also respond that the PCC provisions relied on by petitioner are inapposite because they address how and when the city's zoning code and comprehensive plan apply to review and approval *by the city* of land uses and development pursuant to its own regulatory authority. By contrast, in completing the LUCS, *the city* is not exercising its own regulatory authority. Rather, we understand respondents to argue, the city is assisting DEQ in fulfilling DEQ's statutory obligation to determine whether issuance of the DEQ Permit is in compliance with the city's comprehensive plan and land use regulations.

In resolving the first assignment of error, the question we must address is a question of state law: What do ORS 197.180(1)(b) and LCDC's implementing rules at OAR chapter 660, division 31, require? OAR 660-031-0025(2)(b), quoted above, requires the local government to address compatibility with the acknowledged comprehensive plan when the activity or use is "[a]llowed outright

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[14] As noted, DEQ's SAC rule at OAR 340-018-0050(1) requires that DEQ actions be compatible with acknowledged comprehensive plans "to the extent required by law." The meaning of the phrase "to the extent required by law" is ambiguous, and the parties do not discuss it or argue that it has any meaning in resolving the issues presented by this appeal. Because no party presents any argument regarding the phrase "to the extent required by law," we do not discuss it further.

by the plan." In *Sparacino v. Klamath County*, we explained that the categories in OAR 660-031-0025(2)

> "are intended to include the different ways a subject use might be addressed in the plan. Finding that a use falls under one of these four categories is *not* equivalent to determining the use *is* compatible with the plan. It simply means that compatibility with the plan must be determined in issuing a state agency permit." 18 Or LUBA 804, 812-13 (1990) (emphases in original).

As noted, OAR 660-031-0010(1) defines "Acknowledged Comprehensive Plan" to include *both* the comprehensive plan and implementing ordinances. Accordingly, because the use is "[a]llowed outright by the plan," or at least by the PCC, OAR 660-031-0025(2)(b) requires the city to determine compatibility with *both* the 2035 Plan and the PCC. The fact that petitioner's use may be allowed outright under the PCC does not negate the city's obligation to determine compatibility with the 2035 Plan in responding to a LUCs request. The fact that there may be a conflict between what the PCC allows outright and the relevant goals and policies in the 2035 Plan does not mean that the city is required (or permitted) to disregard the 2035 Plan for purposes of determining compatibility in response to a LUCS request. For that reason, the PCC provisions that address and limit when provisions of the 2035 Plan apply as approval criteria do not limit the inquiry required by ORS 197.180 and OAR chapter 660, division 31, for proposes of determining compatibility in response to a LUCS request. We agree with respondents that the city properly considered compatibility with the relevant provisions of the 2035 Plan for purposes of completing the LUCS.

Petitioner's arguments in the first assignment of error regarding the PCC more accurately go to the merits of its argument that, because its use is allowed outright under the PCC, its use is compatible with the 2035 Plan. Petitioner argues that the PCC is "necessarily" compatible with the 2035 Plan and, therefore, petitioner's outright permitted use is necessarily compatible with the 2035 Plan. Petition for Review 6, 22. In many circumstances where an applicant seeks a LUCS in order to obtain a state agency permit, it will be axiomatic that a use or development that is allowed by the zoning code is compatible with the comprehensive plan. However, although ORS 197.175(2)(b) requires the city to "[e]nact land use regulations to implement [its] comprehensive plan[]," that statute does not specify any particular timing, and nothing in state law requires the completely concurrent enactment of land use regulations with comprehensive plans. Accordingly, it is not accurate to state that land use regulations are "necessarily" compatible with comprehensive plans.

Here, the issue is one of timing, with (1) petitioner's operations on the property having intensified and triggered OAR 340-018-0040's requirement for a LUCS in connection with the DEQ Permit renewal and (2) the 2035 Plan having taken effect but without the PCC having been updated to bring the latter into complete alignment with the former. Such an existing misalignment would not provide a basis for the city to deny an application from petitioner for city review of its use of the property for city regulatory purposes—for example, an application from petitioner for a building permit for the property—because PCC

33.700.010(A) does not provide that petitioner's use of the property is subject to review for compliance with the city's comprehensive plan. In that circumstance, even if a misalignment between the city's comprehensive plan and its zoning code had existed for many years, that misalignment would not be a basis for the city to deny a proposal for a use or development that is allowed on the property under the zoning code.[15]

However, state agency review of uses for purposes of ensuring that state agency permits are compatible with the affected local government's comprehensive plan is a statutory requirement, and it is not the equivalent of local land use review for the local government's own regulatory purposes. Various state agencies regulate the effects of uses and development of property that are distinct from, but related to, a property's zoning. If a property owner engages in a use or activity that requires a state agency permit, issuance of that state agency permit must be compatible with the governing comprehensive plan. The LUCS

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[15] We are aware of no statute that requires any particular time frame for a local government to amend its zoning code to address an incompatibility between the comprehensive plan and the zoning code. *See Richardi v. City of Eugene*, 78 Or LUBA 299, 310-11 (2018), *aff'd*, 295 Or App 840, 434 P3d 990 (2019) (rejecting the petitioner's argument that ORS 197.175(2)(d) and a comprehensive plan policy compelled the city to rezone property to conform to the comprehensive plan); *Baker v. City of Milwaukie*, 271 Or 500, 514, n 14, 533 P2d 772 (1975) (holding that, where a local government adopts a comprehensive plan that is inconsistent with a previously adopted zoning ordinance, the local government assumes an obligation to conform its zoning ordinance to the comprehensive plan, but leaving open the question of "the precise time that the [conforming zoning] ordinance should be enacted").

is the method that DEQ employs to fulfill *its* independent statutory obligation to determine whether issuing the DEQ Permit is compatible with the acknowledged comprehensive plan *and* land use regulations by requiring the applicant to obtain local government confirmation that it is. Pursuant to OAR 660-031-0025(2), the city is not free to disregard its recently amended comprehensive plan when it is asked to evaluate petitioner's use for compatibility with that plan. For that reason, PCC 33.700.010(A), which addresses city review of a proposed use or development that is permitted outright, is not relevant to the question of whether the city properly considered the 2035 Plan when completing the LUCS.

Petitioner points to language in the court's decision in *Sky Lakes Medical Center v. Dep't of Human Services*, 310 Or App 138, 484 P3d 1107 (2021), to support its argument that, because its use of the property is allowed under the PCC, the city erred in considering whether its use is compatible with the 2035 Plan. In particular, petitioner quotes the court's statement that "a state agency action is 'compatible' with local land use law under ORS 197.180(1) if it is 'allowed' by the local zoning code." Petition for Review 14 (quoting *Sky Lakes*, 310 Or App at 149); Reply Brief to Intervenor's Response Brief 2 (same).

In *Sky Lakes*, the court affirmed a circuit court decision that granted summary judgment to the Department of Administrative Services (DAS) in a suit that challenged a DAS lease with a property developer and the findings of compatibility that DAS adopted in order to satisfy ORS 197.180(1)(b) and DAS's SAC program at OAR 125-110-0001. The lease required the developer to obtain

a conditional use permit pursuant to the standards and criteria in the city's land use ordinance prior to occupancy, and the findings relied on that lease requirement to find that the DAS action was compatible with the city's acknowledged comprehensive plan and land use regulations.

The court held that the requirement in the lease to obtain a conditional use permit prior to occupancy was sufficient, under DAS's SAC program, to establish that the proposed DAS action met the requirements of ORS 197.180(1)(b). The court looked to ORS 197.180 as context in reviewing DAS's interpretation of its SAC program, under a highly deferential standard of review that applies to an agency's interpretation of its own rules. Although the court discussed its understanding of the correct interpretation of ORS 197.180, *Sky Lakes* did not present any issue for the court to resolve regarding whether a local government, in completing a LUCS for a use that is allowed outright by its land use ordinance, should or must consider provisions of its comprehensive plan. Accordingly, the court's decision in *Sky Lakes* is inapposite to the issue presented in the first assignment of error, and the language in the decision that petitioner quotes and relies on is taken out of context. However, as we discuss in more detail below in our resolution of the second assignment of error, the court's decision in *Sky Lakes* is instructive in how the city should apply the term "compatible," as used in ORS 197.180(1)(b), in determining whether petitioner's use is compatible with the 2035 Plan.

In conclusion, the city did not improperly construe ORS 197.180 or LCDC's or DEQ's rules when it considered provisions of the 2035 Plan in completing the LUCS. Nothing in ORS 197.180(1)(b) or LCDC's or DEQ's rules prohibits the city from considering whether the activity or use is compatible with the 2035 Plan in completing the LUCS request or, stated differently, requires the city to conclude that petitioner's use is necessarily compatible with the 2035 Plan because it is allowed outright under the PCC. In so concluding, however, we emphasize that we do not reach any conclusion about whether the city correctly concluded that petitioner's use or activity is incompatible with the 2035 Plan. As we explain in our resolution of the second assignment of error below, the city's reasons for reaching that conclusion are not adequately explained in the findings.

The first assignment of error is denied.

B. Second Assignment of Error

In its second assignment of error, petitioner argues that LUBA should remand the city's decision because the city's findings are inadequate to explain why the city determined that petitioner's use is not compatible with the 2035 Plan. Two threshold issues we must address are (1) whether findings in support of the city's decision are required and (2) whether inadequate findings are a basis for LUBA to reverse or remand a land use decision such as the LUCS.

The parties appear to agree that nothing in DEQ's SAC program or LCDC's rules at OAR chapter 660, division 31, require a local government to adopt findings in support of a LUCS in the circumstances presented here, where

DEQ has not issued a DEQ Permit under OAR 660-031-0026(2)(b) on the condition that petitioner obtain land use *approval* that includes written findings.[16] Here, DEQ has informed petitioner that DEQ will *not* renew petitioner's DEQ Permit until petitioner obtains a LUCS from the city that determines that petitioner's use or activity is compatible with the city's comprehensive plan.[17] Record 370.

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[16] We note that the form that DEQ provides to LUCS applicants includes the following instructions: "Written findings of fact for all local decisions are required." Record 470. As explained above, one of the options that the local government can select in response to whether the activity or use is compatible with its acknowledged comprehensive plan is:

> "No, (complete below or attach findings for noncompliance and identify requirements the applicant must comply with before compatibility can be determined):
>
> "Relevant specific plan policies, criteria, or standards:
>
> "Provide the reasons for the decision:" *Id.*; *see* n 6.

[17] OAR 660-031-0026(2) provides:

> "In accordance with OAR 660-031-0020 and 660-031-0035(2), the review process shall assure either:
>
> "(a) That *prior to permit issuance*, the agency determines that the proposed activity and use are in compliance with Statewide Planning Goals and compatible with the applicable Acknowledged Comprehensive Plan; or
>
> "(b) That the applicant is informed that:

Petitioner cites *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977), for the proposition that the city is required to adopt findings in support of its LUCS. Petition for Review 25. In *Sunnyside*, the Supreme Court reaffirmed its decision in *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), that adequate findings are necessary for decisions that result from quasi-judicial land use proceedings.

In *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, the Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative:

1. Is the process bound to result in a decision?

> "(A) Issuance of the permit is not a finding of compliance with the Statewide Planning Goals and compatibility with the Acknowledged Comprehensive Plan; and
>
> "(B) The applicant must receive a land use approval from the affected local government. The affected local government must include a determination of compliance with the Statewide Planning Goals or compatibility with the Acknowledged Comprehensive Plan which must be supported by written findings as required in ORS 215.416(6) or 227.173(2). Findings for an activity or use addressed by the acknowledged comprehensive plan in accordance with OAR 660-031-0020, may simply reference the specific plan policies, criteria, or standards which were relied upon in rendering the decision and state why the decision is justified based on the plan policies, criteria or standards." (Emphasis added.)

2. Is the making of the decision bound to apply preexisting criteria to concrete facts?

3. Is the matter directed at a closely circumscribed factual situation or a small number of persons? 287 Or 591, 602-03, 601 P2d 769 (1979).

No factor is determinative, but answering two or three of those questions in the affirmative suggests that the matter is quasi-judicial in nature. *See id.* Here, there is no dispute that the city could not decline to reach a decision on the LUCS application or that the city applied existing criteria to the specific facts regarding petitioner's operation (though it is disputed which criteria the city was allowed to apply). It is also clear that the LUCS is directed only at petitioner's operation. Accordingly, we conclude that, under state law, the city's decision must be viewed as a quasi-judicial decision. Under *Fasano* and *Sunnyside*, adequate findings are required to support the decision so that LUBA and the courts may perform their review function.

LUBA's scope of review of the LUCS is set out in ORS 197.835(8) and (9), which provide:

"(8) The board shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations.

"(9) In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"(C) Made a decision not supported by substantial evidence in the whole record;

"(D) Improperly construed the applicable law; or

"(E) Made an unconstitutional decision[.]"

Nothing in those subsections requires or allows LUBA to reverse or remand a land use decision if the findings are inadequate. However, pursuant to the authority in ORS 197.835(1), LUBA has adopted a rule that specifies when a land use decision shall be reversed and when a land use decision shall be remanded. OAR 661-010-0071(2)(a) provides that LUBA will remand a decision when "[t]he findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b)." Accordingly, LUBA can remand a land use decision that requires supporting findings if the findings are insufficient to support the decision.

Turning to petitioner's second assignment of error, petitioner argues that the city's findings are insufficient to support the decision, and we agree.[18] The LUCS itself contains one paragraph of findings:

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[18] The city responds that we should affirm the decision pursuant to ORS 197.835(11)(b), which allows LUBA to affirm a decision that is otherwise not supported by adequate findings if "the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision." However, the challenged decision is not a decision that must be supported by evidence in

> "While the current zoning code does not prohibit the activity, the City of Portland has recently adopted Comprehensive Plan policies to address issues and challenges facing Portland, including but not limited to climate change and the importance of transitioning to clean, renewable energy; hazard prevention and disaster preparedness; and addressing adverse impacts on the environment and historically marginalized groups. While the City's Comprehensive Plan has moved in one direction, some of the activities at the site have changed and have intensified in a direction counter to the City's Comprehensive Plan policies, particularly the activities related to fossil fuels, including crude oil, and the site has transitioned from an asphalt refining facility to more of a petroleum terminal. While some of the change at the site include a move toward bio-fuels, and needed safety measures, the extent of the fossil fuel activity and potential adverse impact on the environment and historically marginalized groups is not compatible with the Comprehensive Plan policies (See attached)." Record 3.

As explained above, the Director of BDS attached four pages of findings to the LUCS. Record 4-7. Those findings begin with a description of petitioner's facility and the relevant legal background. Record 4-5. They then repeat the above-quoted paragraph. Record 5. After that paragraph, the findings quote the text of one goal and 17 policies from the 2035 Plan, with no explanation of why the use is not compatible with each of those provisions. Record 5-7.

We agree with petitioner that remand is required for the city to adopt sufficient findings to support the decision. On remand, the city should explain why the use is not "compatible" with the cited provisions of the 2035 Plan. We emphasize a few key points here in order to assist the city on remand.

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the record; rather, the challenged decision construes the applicable law, the 2035 Plan.

ORS 197.180(13) provides that "[s]tate agency rules, plans or programs affecting land use are not compatible with an acknowledged comprehensive plan if the state agency takes or approves an action that is not allowed under the acknowledged comprehensive plan." Accordingly, in order for the city to determine that petitioner's use or activity is not compatible with the 2035 Plan, it must conclude that the use or activity is "not allowed under" the 2035 Plan. The goal and policies with which the city found petitioner's use incompatible include hortatory or aspirational, not mandatory or prohibitory, language, and the city should explain how aspirational language can be interpreted to be prohibitory such that petitioner's use is "not allowed under" those provisions. Additionally, in *Sky Lakes*, the court explained the meaning of "compatible," as used in ORS 197.180(1)(b):

> "The ordinary meaning of 'compatible' is 'capable of existing together without discord or disharmony—used usually with *with*.' Thus, the requirement that a land use action be 'compatible with * * * land use regulations' means that the use 'be capable' of existing in compliance with the land use regulations." 310 Or App at 149 (quoting *Webster's Third New Int'l Dictionary* 463 (unabridged ed 2002)).

In other words, on remand, the city must explain why petitioner's use is "not allowed under" the goal and policies in the 2035 Plan that the city found apply and why the use is not "capable" of existing "without discord or disharmony" with those provisions.

The second assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

In its fourth assignment of error, petitioner argues that the city's decision that its use is incompatible with various provisions of the 2035 Plan violates Article I, section 20, of the Oregon Constitution and the Equal Protection Clause of the 14th Amendment to the United States Constitution.[19] The Equal Protection Clause analysis is similar to that required under Article I, section 20. *School Dist. No. 12 v. Wasco County*, 270 Or 622, 628, 529 P2d 386 (1974). In order to establish a violation under either provision, petitioner must establish that it is similarly situated to other applicants and that the city has treated it differently without a rational basis to do so. *Id.* at 629.

Petitioner asserts a "class of one" claim. It does not allege that it belongs to a protected class; rather, it asserts merely that it was treated differently from others similarly situated without any rational basis. Petition for Review 37 (citing *Village of Willowbrook v. Olech*, 528 US 562, 564, 120 S Ct 1073, 145 L Ed 2d 1060 (2000)). Petitioner argues that the city treated it differently from other entities that have applied for a LUCS in order to secure a DEQ Permit. In support of its argument, petitioner cites 20 other city LUCS decisions that were issued in

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[19] Article I, section 20, of the Oregon Constitution provides, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

The Equal Protection Clause of the 14th Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

connection with DEQ Permits, all of which post-date the May 2018 acknowledgment of the 2035 Plan, involved uses that were allowed outright under the PCC, and did not apply provisions of the 2035 Plan.

Petitioner also specifically cites and relies on three city LUCS decisions that were made after May 2018 and that concluded that activities on property zoned IH with a k overlay, which were similar to petitioner's operations on the subject property, were compatible with the city's comprehensive plan because they were allowed by the PCC, without applying provisions of the 2035 Plan. Petitioner argues that it is similarly situated to those applicants based on the identical zoning of their properties and argues that the city had no rational basis for departing from its prior practices and evaluating petitioner's LUCS request in a manner "more demanding" than its treatment of the other LUCS applicants. Petition for Review 38-39.

The city responds that petitioner is not similarly situated to the other LUCS applicants because no other LUCS that petitioner cites and relies on involved a terminal that stores and transfers petroleum or involved a DEQ Permit renewal for which DEQ required a LUCS due to the intensification of activities on the applicant's property. For the three particular LUCS decisions that petitioner cites and relies on that involved property zoned IH with a k overlay, the city responds that the only similarity between those applicants and petitioner is the zoning of their properties and that none of those properties were used for petroleum operations.

Respondents also respond that, even assuming, for argument's sake, that the city treated petitioner differently from other similarly situated LUCS applicants, the city had a rational basis for doing so. The city explains that basis as the city's legitimate interest in ensuring compatibility with its comprehensive plan, which is a rational basis for considering whether the undisputed intensification of petitioner's activities on the subject property, which prompted the requirement for the LUCS, is compatible with the 2035 Plan.

Because the parties agree that the city's actions are subject to rational basis review, it is petitioner's burden to establish that there is no conceivable basis that might support the city's actions. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 US 356, 364, 93 S Ct 1001, 1006, 35 L Ed 2d 351 (1973). Petitioner's argument focuses on the difference in treatment between petitioner and other LUCS applicants, but we agree with the city that petitioner has not sustained its heavy burden to establish that there is no rational basis that supports the city's actions. We also agree with the city that the city has established that there is a plausible policy reason for determining that petitioner's intensified uses and activities on the property related to petroleum operations, which led DEQ to require the LUCS, must be reviewed for compatibility with the recently acknowledged 2035 Plan, the city's governing planning document.

The fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the findings attached to the LUCS, the city describes the zoning of the property and states:

> "The site is mapped with the IH (Heavy Industrial) base zone * * *.
>
> "* * * Industrial Service uses are identified in the [PCC] as allowed in the IH zone ([PCC] 33.140.100.A, Table 140-1), with fuel oil distributors being an example of an Industrial Service Use ([PCC] 33.920.310.C)." Record 5.

In the third assignment of error, petitioner argues that the city improperly construed PCC 33.920.310(C) when it classified petitioner's existing facility as "Industrial Service." Petitioner argues that the correct classification of its facility is as both "Warehouse and Freight Movement" and "Manufacturing and Production."

However, petitioner concedes:

> "This error is not determinative to the issues presented in this appeal because all three use categories are permitted outright in the IH zone. Petitioner nevertheless assigns error to the use misclassification because if the LUCS is remanded for further proceedings, the city should correctly classify the Existing Facility's uses." Petition for Review 32.

Because petitioner does not make any attempt to show that the challenged findings or interpretation of the PCC are critical to the city's decision, and because it does not appear to us that they are, petitioner's challenge to those findings and that interpretation provides no basis for reversal or remand. *David*

v. City of Hillsboro, 57 Or LUBA 112, 149, *aff'd*, 223 Or App 761, 197 P3d 1152 (2008), *rev den*, 346 Or 10 (2009).

The third assignment of error is denied.

The city's decision is remanded.