

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 TRI-COUNTY METROPOLITAN)
5 TRANSPORTATION DISTRICT,)

6)
7 Petitioner,)

8)
9 vs.)

10) LUBA Nos. 94-002 and 94-003

11 CITY OF BEAVERTON,)

12) FINAL OPINION
13) AND ORDER

14)
15 and)

16)
17 HENRY KANE,)
18)

19 Intervenor-Respondent.)

20
21
22 On remand from the Court of Appeals.

23
24 Gregory S. Hathaway and Mark J. Greenfield, Portland,
25 represented petitioner.

26
27 Mark Pilliod, City Attorney, Beaverton, represented
28 respondent.

29
30 Henry Kane, Beaverton, represented himself.

31
32 SHERTON, Chief Referee; GUSTAFSON, Referee,
33 participated in the decision.

34
35 REMANDED 07/31/95

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISIONS**

3 Petitioner Tri-County Metropolitan Transportation
4 District (Tri-Met) appeals two city council orders granting
5 design review approval, with conditions, for two segments of
6 Tri-Met's Westside Corridor Project (Project).

7 **INTRODUCTION**

8 The Project will provide high-capacity Light Rail
9 Transit (LRT) service between downtown Portland and
10 Hillsboro. The 1991 Oregon Legislature enacted a special
11 statute establishing a process for siting and approving the
12 Project, Oregon Laws 1991, chapter 3 (Senate Bill 573). The
13 Court of Appeals summarized the purpose of this statute as
14 follows:

15 "[T]he objectives of Senate Bill 573 are to
16 achieve the completion of the project and assure
17 federal funding. In pursuit of those aims, the
18 bill provides for more expeditious land use
19 decision making and review and less exacting
20 criteria in the decision and review process than
21 apply generally under ORS chapter 197." Tri-Met
22 v. City of Beaverton, 132 Or App 253, 256, ___ P2d
23 ___, rev den 320 Or 598 (1995) (Tri-Met II).

24 The provision of Senate Bill 573 critical to this
25 appeal is section 7(1)(b), which provides that all cities
26 counties and other local governments shall:

27 "Issue the appropriate permits, licenses and
28 certificates necessary for the construction of the

1 project * * * consistent with a final order.^[1]
2 Permits, licenses and certificates may be subject
3 to reasonable and necessary conditions of
4 approval, but may not, either by themselves or
5 cumulatively, prevent the implementation of a
6 final order."

7 In August and September, 1993, petitioner submitted
8 applications to the city for design review approval for
9 construction of two segments of the project, one extending
10 from S.W. 117th Avenue to S.W. Hall Boulevard (117th to Hall
11 segment) and one extending from S.W. Hall Boulevard to
12 S.W. Hocken Avenue (Hall to Hocken segment). Petitioner
13 proposed construction of an open tie and gravel ballast
14 railbed and an overhead wiring system. Petitioner also
15 proposed construction of a new LRT station at the existing
16 Transit Center in the 117th to Hall segment and construction
17 of a new Beaverton Central LRT station in the Hall to Hocken
18 segment.

19 On December 13, 1993, the city council issued orders
20 approving petitioner's applications, with conditions. As
21 relevant here, the orders require construction of a
22 pedestrian esplanade and enhanced trackway treatment between

¹In this case, the relevant "final order" referred to in the statute is petitioner's Land Use Final Order (LUFO) for the Project, which was adopted on April 12, 1991. The history of the enactment of Senate Bill 573, petitioner's adoption of the LUFO, the city's adoption of its Downtown Development Plan (DDP) as part of its acknowledged comprehensive plan, and the Full Funding Agreement entered into by petitioner and the federal Urban Mass Transportation Administration (UMTA) is set out in more detail in Tri-County Metro Trans. Dist. v. City of Beaverton, 28 Or LUBA 78, 84-88 (1994) (Tri-Met I).

1 the Transit Center and Beaverton Central LRT stations, and
2 construction of restrooms and drinking fountains at the
3 Transit Center LRT station. Petitioner challenges the
4 pedestrian esplanade/ enhanced trackway condition imposed in
5 the order approving design review for the Hall to Hocken
6 segment in LUBA No. 94-002. Petitioner challenges both the
7 pedestrian esplanade/enhanced trackway and restroom/water
8 fountain conditions imposed in the order approving design
9 review for the 117th to Hall segment in LUBA No. 94-003.

10 In Tri-Met I, 28 Or App at 100, we concluded that under
11 Section 7(1)(b) of Senate Bill 573, quoted above, "the city
12 is required to demonstrate that the disputed conditions
13 requiring * * * restrooms and drinking fountains (1) are
14 reasonable and necessary, and (2) do not, individually or
15 cumulatively, prevent implementation of the LUFO." We
16 observed the challenged order on the 117th to Hall segment
17 included no findings demonstrating that the conditions
18 requiring restrooms and drinking fountains complied with the
19 requirements of section 7(1)(b) and concluded this required
20 that we remand the decision appealed in LUBA No. 94-003.
21 However, with regard to the pedestrian esplanade/ enhanced
22 trackway conditions, we concluded those elements were
23 required by the LUFO and the FEIS and, therefore, the city
24 did not have to demonstrate that these conditions complied
25 with the above-described requirements of Section 7(1)(b).
26 Tri-Met I, 28 Or LUBA at 98-100. We therefore affirmed the

1 decision appealed in LUBA No. 94-002.

2 Petitioner appealed our decision to the Court of
3 Appeals. With regard to our disposition of LUBA No. 94-002,
4 the Court did not decide whether the LUFO and FEIS call for
5 construction of the pedestrian esplanade and enhanced
6 trackway, as contended by the city and found by LUBA, but
7 disputed by petitioner. Tri-Met II, 132 Or App at 256 n1.
8 Rather, the Court concluded that even if that were so, it
9 would not excuse compliance with the requirements of
10 Section 7(1)(b) that conditions of local permit approval
11 requiring these features (1) be reasonable and necessary,
12 and (2) do not, individually or cumulatively, prevent
13 implementation of the LUFO. The court discussed the
14 relevant provisions of Section 7(1)(b) as follows:

15 "* * * Conceivably, the fact that a condition is
16 directly or indirectly contemplated by the LUFO
17 may be a factor to weigh in deciding whether it is
18 reasonable and necessary. However, the statute
19 does not allow a condition to be attached without
20 inquiry into its reasonableness and necessity.

21 "Similarly, if a measure is set forth in the FEIS,
22 that may have bearing on whether it can be
23 required as a reasonable and necessary condition,
24 whether or not it is also expressly mentioned in
25 the LUFO. However, if the same measure is subject
26 to mandatory deferral in the agreement between
27 Tri-Met and the authoritative federal agency,
28 that, too, is pertinent to whether it is
29 reasonable and necessary for a local government to
30 make the measure a condition of approving a
31 permit, license or certificate under
32 section 7(1)(b)." Tri-Met II, 132 Or App at
33 259-60.

34 The Court concluded LUBA misinterpreted section 7(1)(b) and

1 remanded our decision in LUBA No. 94-002 for reconsideration
2 in light of the Court's opinion.

3 With regard to the portion of Tri-Met I addressing the
4 conditions requiring restrooms and drinking fountains, we do
5 not understand petitioners to have challenged, or the Court
6 to have disturbed, our conclusions that the burden is on the
7 city to demonstrate that the disputed conditions requiring
8 restrooms and drinking fountains (1) are reasonable and
9 necessary, and (2) do not, individually or cumulatively,
10 prevent implementation of the LUFO; and that the challenged
11 decision fails to include findings demonstrating compliance
12 of these conditions with section 7(1)(b). Rather,
13 petitioner challenged before the Court of Appeals comments
14 we made in dicta regarding the interpretation and
15 application of section 7(1)(b) to these conditions. The
16 Court of Appeals agreed with petitioners that our discussion
17 reflected an incorrect interpretation of section 7(1)(b):

18 "* * * The most relevant context for determining
19 whether the reasonable and necessary test in
20 section 7(1)(b) refers to project implementation
21 and impacts, or to the enforcement of all
22 provisions of local land use legislation, is to be
23 found in section 7(1)(a). That provision requires
24 local governments to amend their plans and
25 regulations to achieve consistency with a Tri-Met
26 final order, and the provision therefore differs
27 diametrically from the usual requirement that
28 particular decisions be consistent with existing
29 plans and regulations. Taken with the rest of the
30 bill, section 7(1)(a) leaves no doubt as to what
31 the legislature perceived to be the horse and cart
32 in Senate Bill 573. The reasonable and necessary
33 test applies to conditions that are related to or

1 necessitated by the project, but the bill does not
2 permit conditions of a kind that are designed to
3 further unrelated land use objectives of local
4 plans and regulations." (Emphasis added.)
5 Tri-Met II, 132 Or App at 261.

6 Because the Court concluded our misinterpretation of the
7 purpose of the reasonable and necessary test of
8 section 7(1)(b) could have affected our disposition of LUBA
9 No. 94-003, it remanded our decision regarding that appeal
10 for reconsideration as well. Id. at 262.

11 **DECISION**

12 Petitioner asks us to review each of the disputed
13 conditions and determine that, as a matter of law, it cannot
14 be found to be both reasonable and necessary based on the
15 local record in this appeal, or that the condition,
16 individually or cumulatively, would prevent implementation
17 of the LUFO. Petitioner further argues that, based on such
18 determinations, this Board should either (1) reverse the
19 challenged decisions with regard to each invalid condition,
20 or (2) remand the decisions to the city, with specific
21 instructions to strike the invalid conditions or, for the
22 esplanade and trackway, to add qualifying language that
23 petitioner is required to provide the improvement only if:

24 " * * * (1) unforeseen cost savings or additional
25 appropriations from Congress * * * become
26 available for reinstatement of one or more
27 deferred items; (2) there is consensus among the
28 regional partners that such savings or funds
29 should be spent on the item in question; and
30 (3) the FTA agrees to allow such expenditures
31 under its FFA." Petitioner's Memorandum on

1 Remand 6.

2 The city concedes the challenged decisions do not
3 include findings demonstrating the disputed conditions
4 satisfy section 7(1)(b). The city asks, however, that
5 pursuant to ORS 197.835(9)(b),² the Board determine the
6 evidence identified in the record clearly supports a
7 determination that the pedestrian esplanade and enhanced
8 trackway satisfy section 7(1)(b), as interpreted by the
9 Court of Appeals. The city also moves to submit additional
10 evidence to this Board concerning the extent and nature of
11 petitioner's involvement in the development of the city's
12 DDP.³ With regard to the disputed conditions requiring
13 restrooms and water fountains, the city concedes LUBA does
14 not have "sufficient facts to determine whether the
15 requisite standard of reasonableness and necessity has been
16 met [and] should remand [the decision challenged in LUBA No.
17 94-003] to the city to investigate whether these
18 [conditions] are justified." Respondent's Memorandum on

²ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, [LUBA] shall affirm the decision or part of the decision supported by the record * * *."

³Petitioner opposes the city's motion, arguing that under ORS 197.830(13)(a), LUBA's review is limited to the record made before the city.

1 Remand 4.

2 As we explain above, the city has the burden of
3 demonstrating that the disputed conditions (1) are
4 reasonable and necessary, and (2) do not, individually or
5 cumulatively, prevent implementation of the LUFO. Without
6 findings by the city addressing this issue, we are unable to
7 perform our review function. We therefore agree with
8 petitioner that the city has failed to demonstrate that the
9 disputed conditions comply with section 7(1)(b), as that
10 section has been interpreted by the Court of Appeals in
11 Tri-Met II. Additionally, because the evidence in the
12 record cited by the parties is conflicting, we cannot affirm
13 the city's decision under ORS 197.835(9)(b). Forster v.
14 Polk County, 22 Or LUBA 380, 384 (1991). On the other hand,
15 petitioner has not convinced us that, as a matter of law,
16 the disputed conditions cannot comply with section 7(1)(b)
17 and are therefore prohibited as a matter of law.

18 The challenged decisions must be remanded for the city
19 to consider, in light of the interpretation of
20 section 7(1)(b) expressed by the Court of Appeals in
21 Tri-Met II, whether the disputed conditions comply with
22 section 7(1)(b).⁴ If the disputed conditions do not satisfy

⁴We are not aware of any reason why, on remand, the city could not reopen the evidentiary record to accept new evidence from any party concerning compliance of the disputed conditions with section 7(1)(b), as interpreted by the Court of Appeals. We agree with petitioner, however, that we are not authorized to accept new evidence on this issue. The city's motion to submit additional evidence is denied.

1 that statutory provision, then the city must either delete
2 or modify the conditions. If the decisions adopted by the
3 city on remand include the same or modified conditions of
4 approval, the city must adopt findings explaining the basis
5 for its determinations that the conditions comply with
6 section 7(1)(b).

7 The city's decisions are remanded.