

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

3
4 TERRA HYDR INC.,
5 TONQUIN INDUSTRIAL LLC,
6 BOB ALBERTSON, DONNA ALBERTSON,
7 ALBERTSON TRUCKING INC., MARK BROWN,
8 MCCAMMANT PROPERTIES INC.,
9 BROWN TRANSFER INC., MCGUIRE BROTHERS LLC,
10 and STEVE MCGUIRE,
11 *Petitioners,*

12
13 vs.

14
15 METRO,
16 *Respondent.*

17
18 LUBA No. 2013-025

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Metro.

24
25 Wendie L. Kellington, Lake Oswego, filed the petition for review and argued on
26 behalf of petitioners.

27
28 Roger A. Alfred, Metro Senior Attorney, Portland, filed a response brief and argued
29 on behalf of respondent.

30
31 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
32 participated in the decision.

33
34 DISMISSED

11/01/2013

35
36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal the Metro Council’s adoption of Resolution 13-4415 (the resolution), which approves the Ice Age Tonquin Trail Master Plan.

REPLY BRIEF

Petitioners move to file a reply brief to address new matters raised in Metro’s response brief. There is no opposition to the motion, and the reply brief is allowed.

FACTS

For a number of years, Metro staff in partnership with several cities and counties has been developing a plan for a new regional trail facility, known as the Ice Age Tonquin Trail (Trail). The original planning began as long ago as 1992, when Metro adopted the *Metropolitan Greenspaces Master Plan*, which listed the landscape in the area formed by ice age floods as a unique open space to be protected. In 2004, a study confirmed the feasibility of connecting existing trails, parks, open spaces and natural areas with new acquisitions, to form a new regional trail. Approximately 500 acres of natural areas have been acquired and protected to date, with additional lands planned for acquisition using funds from two bond measures. The proposed trail when completed would extend 22 miles and connect the Tualatin River with the Willamette River, running through the cities of Tualatin, Sherwood, Wilsonville and unincorporated areas of Washington and Clackamas Counties. This process culminated in February 2013 with a draft master plan entitled the Ice Age Tonquin Trail Master Plan. In this opinion we refer to this plan as the Tonquin Trail Master Plan or (TTMP).¹

¹ The “Ice Age” part of the name is explained in the TTMP executive summary:

“The trail’s name reinforces the primary theme to be interpreted throughout the corridor—the Glacial Lake Missoula Ice Age Floods, a series of cataclysmic floods that formed the Columbia River Gorge and the Willamette Valley during the last Ice Age. Remains from the Ice Age floods that can be seen along the future trail include glacial erratic, scablands, kolk

1 Washington County and the cities of Tualatin and Sherwood each adopted resolutions
2 approving the February 2013 draft of the TTMP. Subsequently, on February 28, 2013, the
3 Metro Council adopted the TTMP by resolution, along with an updated map of properties to
4 be acquired for the trail. Metro’s resolution is the subject of the present appeal.

5 Each of the city and county resolutions approving the draft February 2013 TTMP was
6 also appealed to LUBA, and ultimately consolidated with the present appeal of Metro’s
7 resolution approving the TTMP. Pursuant to a stipulated case management order, the
8 consolidated proceedings were delayed to allow the parties to litigate jurisdictional questions.
9 The county and each city filed motions to dismiss the appeals of their respective resolutions.
10 In an order dated July 26, 2013, LUBA concluded that the Board lacked jurisdiction over the
11 resolutions adopted by the county and the City of Tualatin, and dismissed those appeals.
12 *Terra Hydr v. Washington County*, __ Or LUBA __ (LUBA Nos. 2013-017/018/019/025).
13 The parties in the City of Sherwood appeal then stipulated to voluntary remand, leaving only
14 the appeal of the Metro decision at issue.

15 On the same date that the City of Tualatin adopted its resolution approving the
16 TTMP, the city adopted a new transportation system plan (TSP). The TSP amendments
17 included text and map amendments reflecting the Trail alignment proposed in the TTMP.
18 That City of Tualatin TSP decision was separately appealed to LUBA and is the subject of
19 LUBA No. 2013-016, issued this date. *Terra Hydr v. City of Tualatin*, __ Or LUBA __
20 (LUBA No. 2013-016, November 1, 2013).

21 Metro Resolution 13-4415, the decision challenged in this appeal, states in relevant
22 part:

23 WHEREAS, on September 10, 2007, the Metro Council adopted Resolution
24 No. 07-3850 approving the Tonquin Geologic Area target area refinement plan

ponds, flood channels, and ripple marks. The trail’s name also ties it to the National Park Service’s Ice Age Floods National Geologic Trail, which increases the likelihood of trail funding opportunities and tourism in the cities the Ice Age Tonquin Trail will serve.” Record 8.

1 and confidential tax lot specific map, which highlighted acquisition priorities
2 on properties with unique geologic formations formed in the last Ice Age
3 Floods and properties needed for the Tonquin Trail; and

4 “* * * * *

5 “WHEREAS, the updated confidential tax lot specific map for the Tonquin
6 Geologic Area target area was signed by Metro President Hughes on February
7 26, 2013, and added the properties necessary to implement the Master Plan;
8 and

9 “WHEREAS, approval of the Master Plan will allow Metro staff and other
10 jurisdictions to being trail acquisition work in earnest; and

11 “WHEREAS, it is anticipated that the cities of Tualatin, Sherwood[,] and
12 Wilsonville, as well as Washington County will approve the Master Plan and
13 that those jurisdictions and Clackamas County will subsequently include the
14 new alignment in their transportation system plans; and

15 “WHEREAS, it is anticipated that the Metro Council’s approval of the Master
16 Plan would allow for inclusion of the new alignment in the 2035 Regional
17 Transportation Plan; now therefore

18 BE IT RESOLVED that the Metro Council hereby approves the Ice Age
19 Tonquin Trail Master Plan, attached hereto as Exhibit A, and the updated
20 confidential tax lot specific map for the Tonquin Geologic Area target area
21 signed by Metro Council President Hughes on February 26, 2013.” Record 1-
22 2.

23 The TTMP states that its purpose as follows:

24 “The [TTMP] establishes a clearly defined roadmap for taking the trail from a
25 feasible concept to reality. Building on work completed in the 2004 Tonquin
26 Trail Feasibility Study and many other efforts, this Master Plan provides the
27 information needed as local and regional partners embark on trail
28 implementation efforts. Providing detailed alignment, design, and
29 implementation guidance, this document represents the culmination of
30 tremendous work undertaken by many stakeholders over a multi-year period.

31 “The Master Plan is structured so that relevant items can be integrated into
32 local comprehensive plans and transportation system plans, setting the stage
33 for successful funding pursuits. Local jurisdictions responsible for
34 implementing the Master Plan may need flexibility with some of the Master
35 Plan’s recommendations to meet local zoning code, regulatory, and other
36 requirements.” Record 17.

1 The TTMP includes six chapters. Chapter 3 describes the trail segment options
2 analysis that Metro and its partners conducted, and selects a preferred trail alignment. As
3 discussed below, the preferred trail alignment crosses petitioners’ industrially-zoned
4 property. Chapter 4 sets out trail design guidelines, and lists certain “Special Design
5 Requirements.” Chapter 5 discusses implementation by cities and counties, and Chapter 6
6 discusses maintenance, management and operations. As proposed in the TTMP, the trail’s
7 typical cross-section would consist of shared use bicycle and pedestrian paths with a 12-foot
8 wide surface treated with asphalt or concrete and two-foot wide crushed stone shoulders.
9 Associated facilities include trailheads, one of which is proposed for petitioners’ property.
10 Trailheads include parking, drinking fountains, benches, bicycle racks, trash receptacles, pet
11 waste bag dispensers, an information kiosk, and can include restrooms, shelters, picnic areas,
12 wayfinding stations, interpretative signs, a secure bike parking area, a bike maintenance
13 station, or a fitness course. In addition, the TTMP proposes a number of art, educational and
14 interpretative facilities, including one proposed for petitioners’ property.

15 Petitioners are a group of industrial businesses located on roughly fifty acres of land
16 in unincorporated Washington County, but within the City of Tualatin’s planning area, in an
17 area designated by Metro as a Regionally Significant Industrial Area (RSIA). ORS 197.722-
18 197.728. The RSIA that includes petitioners’ property is known as the Tonquin Industrial
19 Group (TIG) RSIA.

20 Petitioners submitted testimony in opposition to the TTMP, citing alleged conflicts
21 between the trail and industrial uses. Record 535-77. Following Metro’s adoption of the
22 resolution, petitioners appealed to LUBA.

23 **JURISDICTION**

24 **A. Stipulated Case Management Order**

25 As noted, this appeal was formerly consolidated with three other related appeals.
26 Prior to the deadline for filing the petition for review, all parties, including Metro, signed a

1 stipulated case management order, approved by the Board, in which the respondents and
2 intervenors-respondents agreed to file any motion to dismiss this appeal by May 17, 2013.
3 The other three respondents duly filed motions to dismiss, and the consolidated appeals were
4 suspended pending resolution of those motions. As noted, LUBA ultimately granted two of
5 the motions, denied one, and then restarted the briefing schedule pursuant to the stipulated
6 order. However, Metro did not file a motion to dismiss or other jurisdictional challenge by
7 the May 17, 2013 deadline. Instead, Metro waited to challenge LUBA’s jurisdiction in its
8 response brief, filed September 6, 2013. In the reply brief, petitioners argue that LUBA
9 should not encourage parties to violate a stipulated case management agreement, and should
10 not consider Metro’s jurisdictional challenge.

11 Had the stipulated agreement concerned any matter other than jurisdiction, LUBA
12 would likely give effect to the agreement and not consider arguments that Metro advanced in
13 a manner that violated the agreement. However, LUBA has a statutory obligation to ensure
14 that its jurisdiction is appropriately exercised. Metro’s violation of the stipulated case
15 management order does not permit LUBA to ignore an otherwise well-founded jurisdictional
16 challenge. For the reasons below, we agree with Metro that LUBA does not have jurisdiction
17 over Metro’s resolution. Accordingly, we must dismiss this appeal.

18 **B. Introduction**

19 As relevant here, LUBA’s jurisdiction is limited to “land use decisions” as defined at
20 ORS 197.015(10)(a), which includes a final decision by a local government that concerns the
21 adoption, amendment or application of the statewide planning goals, a comprehensive plan
22 provision, land use regulation or new land use regulation.² Metro is a “local government” as

² ORS 197.015(10)(a)(A) defines “land use decision” to include:

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

1 that term is defined at ORS 197.015(13). Specifically, Metro is a metropolitan service
2 district organized under ORS chapter 268, whose primary responsibilities under its charter
3 and governing statutes include planning for regional parks, open spaces and recreational
4 facilities, as well as the regional transportation system.

5 LUBA’s jurisdiction over Metro decisions is complicated by the fact that Metro does
6 not have a comprehensive plan and its ordinances are not land use regulations, under the
7 relevant statutory definitions. ORS 197.015(11); ORS 197.015(16). That means, as a
8 practical matter, that a Metro decision fits within the ORS 197.015(10)(a)(A) definition of
9 “land use decision” only if the decision concerns the application of the statewide planning
10 goals.

11 Instead of a comprehensive plan, Metro’s overarching land use planning document is
12 known as the Regional Framework Plan (RFP). The RFP has several components, including
13 what are known as functional plans. ORS 197.015(16) provides that Metro’s RFP and its
14 components do not constitute a comprehensive plan. Review of Metro’s RFP and its
15 components is governed by ORS 197.274, which provides:

16 “The Metro regional framework plan, its separate components and
17 amendments to the regional framework plan or to its separate components are
18 subject to review:

19 “(a) For compliance with land use planning statutes, statewide land use
20 planning goals and administrative rules corresponding to the statutes
21 and goals, in the same manner as a comprehensive plan for purposes
22 of:

23 “(A) Acknowledgment of compliance with the goals under ORS
24 197.251; and

-
- “(ii) A comprehensive plan provision;
 - “(iii) A land use regulation; or
 - “(iv) A new land use regulation[.]”

1 “(B) Post-acknowledgment procedures under ORS 197.610 to
2 197.651; and

3 “(b) As a land use decision under ORS 197.805 to 197.855 and 197.860.”

4 Thus, under ORS 197.015(10)(a) and ORS 197.0274, a Metro decision is subject to LUBA’s
5 review if the decision (1) adopts or amends the RFP or one of its components, such as a
6 functional plan, or (2) otherwise constitutes a final decision that concerns the application of
7 the statewide planning goals.

8 Finally, a third possible basis for exercise of LUBA’s jurisdiction in this case is that
9 the challenged resolution qualifies as a “significant impact” land use decision, as described in
10 *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985), and *City of Pendleton v. Kerns*,
11 294 Or 126, 653 P2d 992 (1982).

12 Petitioners argue that the TTMP is subject to LUBA’s jurisdiction under each of the
13 foregoing three bases: (1) as the *de facto* adoption or amendment of a component of the RFP
14 pursuant to ORS 197.274; (2) as final Metro decision that concerns the application of the
15 statewide planning goals, within the meaning of ORS 197.015(10)(a)(A), and (3) as a
16 significant impacts land use decision. Metro disputes that Metro’s approval of the TTMP is
17 subject to LUBA’s review under any of the bases asserted. We address each argument in
18 turn.

19 **C. The TTMP is not a Functional Plan**

20 Petitioners’ primary argument for LUBA’s jurisdiction rests on ORS 197.274, which
21 as noted above provides that review of Metro’s RFP and its components, including functional
22 plans, is conducted “[a]s a land use decision under ORS 197.805 to 197.855 and 197.860,”
23 *i.e.* by LUBA. As elaborated in the first assignment of error, petitioners argue that (1)
24 Metro’s approval of the TTMP constitutes the *de facto* adoption of or amendment to a
25 functional plan, (2) Metro was required to process and adopt the TTMP as a functional plan,
26 and (3) Metro erred in failing to do so.

1 Metro disputes both the merits of the first assignment of error and petitioners’
2 associated reliance on ORS 197.274 to establish LUBA’s jurisdiction. Metro notes that any
3 adoption or amendment of a functional plan must be accomplished by ordinance, after
4 following a specified process. Because the Council approved the TTMP by simple resolution
5 and not by ordinance, Metro argues that the Council clearly did not intend to adopt or amend
6 a functional plan.

7 Further, Metro argues that nothing cited by petitioners requires the Council to process
8 and adopt the TTMP as a functional plan or amendment to a functional plan. Functional
9 plans are the vehicles Metro uses to impose requirements on local governments. RFP 7.5.2.³
10 According to Metro, the TTMP includes only *recommendations or guidelines*, and does not
11 *require* local governments to implement the Trail or impose any requirements on whether or
12 how the Trail is constructed. Because the TTMP imposes no requirements on local
13 governments, Metro argues, nothing in the RFP, Metro’s charter, or any other legislation
14 identified by petitioners requires Metro to adopt a regional trail master plan such as the
15 TTMP as a functional plan. Metro notes that in 1992 it adopted by resolution the
16 *Metropolitan Greenspaces Master Plan*, which like the TTMP, includes recommendations
17 but imposes no requirements on local governments. Elements of the *Greenspaces Master*
18 *Plan* were later adopted into the RFP and Urban Growth Management Functional Plan
19 (UGMFP).⁴ But Metro argues that the *Greenspaces Master Plan* itself is not a functional
20 plan or component of the RFP. Similarly, in 2004, Metro adopted by resolution the *Trolley*
21 *Trail Master Plan*, which like the TTMP is a master plan for a regional trail facility that

³ RFP 7.5.2 states that it is Metro policy to:

“Use functional plans as the identified vehicle for requiring changes in city and county comprehensive plans in order to achieve consistence and compliance with this Plan.”

⁴ The UGMFP is a functional plan and has been codified at Metro Code (MC) Section 3.07.

1 includes recommendations and guidelines, but does not mandate that local governments
2 implement the master plan.

3 Petitioners respond that a functional plan need not include requirements, but can also
4 consist of recommendations to local governments. RFP Policy 7.5.3 states that it is the Metro
5 Council’s policy to “[a]dopt policies of this Plan as functional plans if the policies contain
6 *recommendations* or requirements for changes in comprehensive plans and to submit the
7 functional plans to LCDC for acknowledgment of their compliance with the statewide
8 planning goals.” (Emphasis added.) However, RFP Policy 7.5.3 is not directed at
9 recommendations or requirements generally; it is only directed at policies of the RFP that
10 contain recommendations or requirements for changes in local government plans. Petitioners
11 do not identify any RFP policies concerning the Trail, regional trails in general, or that
12 otherwise constitute relevant “recommendations” for changes in local government
13 comprehensive plans that are carried out by the TTMP. Petitioners have not established that
14 RFP Policy 7.5.3, or any other policy, statute or other authority cited to us, requires that
15 Metro adopt the TTMP as a functional plan or as an amendment to a functional plan.

16 In the second assignment of error, petitioners argue that the TTMP conflicts with two
17 UGMFP policies protecting RSIA, and therefore constitutes a *de facto* amendment to the
18 UGMFP. In *Terra Hydr v. City of Tualatin*, __ Or LUBA __ (LUBA No. 2013-016), issued
19 this date, we agree with petitioners that locating the Trail within the TIG RSIA is inconsistent
20 with one of those UGMFP policies. Specifically, we conclude that the Trail viewed as a
21 whole constitutes a “park” within the meaning of a UGMFP requirement, codified at Metro
22 Code (MC) 3.07.420(D). MC 3.07.420(D) requires local governments to adopt land use
23 regulations that prohibit siting within a RSIA “parks intended to serve people other than
24 those working or residing in the RSIA.”

25 However, as odd as it may sound, that conclusion does not assist petitioners’
26 jurisdictional argument under ORS 197.274, which grants LUBA jurisdiction only over

1 decisions that *adopt* or *amend* the RFP or its components, including functional plans. While
2 the TTMP recommends that the City of Tualatin adopt plan amendments necessary to
3 authorize construction of a portion of the Trail within the TIG RSIA, that recommendation
4 does not and cannot amend the UGMFP or MC 3.07.420(D). Therefore, even if the TTMP-
5 recommended alignment conflicts with the policy underlying MC 3.07.420(D), that conflict
6 does not convert the TTMP into an amendment to the RFP or its component functional plans,
7 and therefore the resolution that adopted the TTMP as a set of nonbinding recommendations
8 is not subject to LUBA’s jurisdiction under ORS 197.247.⁵

9 **D. Finality and ORS 197.015(10)(a)(A)**

10 As noted above, under petitioners’ second jurisdictional theory, Metro’s resolution
11 constitutes a “land use decision” under ORS 197.015(10)(a)(A) if the decision is a “final”
12 decision that concerns the application of a statewide planning goal. For purposes of this
13 opinion, we will assume that Metro’s approval of a master plan for a regional trail concerns
14 the application of at least one statewide planning goal, such as Goal 8 (Parks and Recreation)
15 or Goal 12 (Transportation), even if that master plan was not adopted as a functional plan.
16 However, Metro argues that its approval of the TTMP does not qualify as a “land use
17 decision” under ORS 197.015(10)(a) because it is not a “final” decision. Citing to *Sensible*
18 *Transportation Options for People (STOP) v. Metro*, 100 Or App 564, 787 P2d 498 (1990),
19 Metro argues that a Metro decision that merely *recommends* that another local government
20 amend its legislation is not a “final” decision, and therefore does not qualify as a land use
21 decision subject to LUBA’s review. As discussed above, Metro argues that the TTMP
22 includes only non-mandatory guidelines and recommendations for cities and counties that
23 choose to implement the Trail, but does not require that local governments implement the

⁵ We note an issue that is not presented in this appeal. Although petitioners argue the challenged resolution is a *de facto* functional plan or a *de facto* amendment of the UGMFP, petitioners do not argue that Metro lacks statutory, charter, code or other legal authority to adopt master plans like the TTMP that are recommendations that are not binding on local governments. We therefore do not consider that question.

1 Trail or impose any requirements if local governments choose to do so. Therefore, Metro
2 argues that the TTMP is not a “final” decision of any kind.

3 At issue in *STOP* was an amendment to Metro’s regional transportation plan (RTP)
4 recommending that Washington County study and consider whether to amend its
5 comprehensive plan to allow construction of a new freeway corridor. Opponents appealed
6 the Metro decision, arguing that Metro failed to demonstrate that the disputed freeway
7 corridor was consistent with several statewide planning goals, including Goals 11 (Public
8 Facilities) and 14 (Urbanization). LUBA concluded that, given Metro’s special role as the
9 regional planning entity responsible for maintaining the urban growth boundary, in adopting
10 the recommendation Metro was required to demonstrate that the freeway corridor would
11 comply with at least Goals 11 and 14, and thus Metro’s decision was a final decision subject
12 to LUBA’s review under ORS 197.015(10)(a). *STOP v. Metro*, 18 Or LUBA 221, 247
13 (1989). However, the Court of Appeals disagreed, concluding that Metro’s recommendation
14 to the county to study and consider whether to amend the county plan to propose a freeway
15 corridor was not a “final” decision subject to LUBA’s review. The Court noted that Metro’s
16 recommendation “cannot lead to land use effects without further appealable land use
17 decisions by Metro or the county.” 100 Or App at 570. According to the Court, the
18 appealable decision(s) would occur when and if the county amended its comprehensive plan
19 to implement the recommendation, or Metro amended its functional plans to adopt a non-
20 contingent basis for the freeway corridor.

21 In the present case, we understand Metro to contend that final, appealable land use
22 decisions regarding the Trail will be made only if and when the affected cities and counties
23 choose to amend their comprehensive plans and land use regulations to implement applicable
24 portions of the TTMP. We also understand Metro to concede that a subsequent Metro
25 decision to amend its RTP maps to include the specific Trail alignment that is ultimately
26 decided upon, as contemplated in Resolution 13-4415, would be subject to LUBA’s review

1 under ORS 197.274. But Metro argues that because the TTMP merely recommends but does
2 not require that cities and counties implement the Trail pursuant to the recommendations set
3 out in the TTMP, Metro’s approval of the TTMP is not a final, appealable decision, for the
4 reasons stated in *STOP*.

5 In response to Metro’s arguments that the challenged decision is not a “final”
6 appealable decision for purposes of ORS 197.015(10)(a)—because it includes only non-
7 binding recommendations and guidelines—petitioners argue that the TTMP includes some
8 mandatory requirements that will apply when the Trail is constructed, such as the requirement
9 that the Trail be open 24 hours per day, seven days per week.

10 In any case, petitioners argue, Metro’s approval of the TTMP is “final” in the sense
11 that it is the last Metro action needed for local governments to adopt and implement the
12 TTMP. Even if local governments are not *required* to adopt and implement the TTMP into
13 their plans, petitioners argue that Metro’s decision represents the final green light for local
14 governments to do so.

15 Petitioners also argue that *STOP* is distinguishable. According to petitioners, *STOP*
16 predates the adoption of ORS 197.274, and the RTP amendment at issue in *STOP* would, if
17 adopted today, be subject to LUBA’s review under ORS 197.274. Further, petitioners note
18 that *STOP* predated Metro’s adoption of the RFP and the UGMFP, including the RFP and
19 UGMFP provisions protecting RSIAAs that petitioners allege in the petition for review that the
20 Trail would violate. Thus, petitioners argue, approval of the TTMP is Metro’s last word on
21 whether the Trail is consistent with Metro’s own legislation. *See Central Eastside Ind.*
22 *Council v. City of Portland*, 128 Or App 148, 875 P2d 482 (1994) (city’s recommendation to
23 the Oregon Department of Transportation not to construct an on-ramp is a final decision
24 reviewable by LUBA, because the recommendation is the city’s last word on consistency
25 with a city comprehensive plan calling for construction of the on-ramp).

1 Finally, petitioners note that in addition to adopting the TTMP, Resolution 13-4415
2 also adopted an updated tax lot specific property acquisition map that identifies additional
3 properties that Metro intends to acquire for the Trail. According to petitioners, Metro has
4 already taken steps to acquire property for the Trail alignment based on that updated map,
5 including contacting property owners within the TIG RSIA. Petitioners argue that no further
6 steps are needed for Metro to acquire all remaining private property needed for the Trail, and
7 for that reason alone Resolution 13-4415 should be viewed as a “final” appealable decision.

8 Although it is a reasonably close question, we agree with Metro that its approval of
9 the TTMP is not a “final” decision for purposes of ORS 197.015(10)(a). While the present
10 case differs in some respects from the circumstances in *STOP*, we believe the general
11 principle the Court of Appeals articulated in that case continues to apply: Metro’s adoption
12 of a document such as the TTMP that consists only of non-binding recommendations or
13 guidelines for local governments to use in adopting future comprehensive plan and land use
14 regulation amendments, or for Metro to use to initiate future RTP, RFP or functional plan
15 amendments, are not final and appealable decisions under ORS 197.015(10)(a). The final,
16 appealable decisions in such a circumstance, if any, are the subsequent city or county plan
17 and land use regulation amendments, or RTP, RFP and functional plan amendments, that may
18 be adopted to give effect to the recommendations or guidelines.

19 It is true that the RTP amendment at issue in *STOP* would if adopted today be
20 reviewable by LUBA pursuant to ORS 197.274. Even so, it is not clear, whether LUBA’s
21 *scope of review* would include Goal-compliance challenges to a mere *recommendation* that a
22 county study and consider plan amendments to construct a new transportation facility. In any
23 case, we determined above that Metro’s approval of the TTMP does not qualify as the
24 adoption or amendment of a functional plan or RFP component, and therefore ORS 197.274
25 does not apply.

1 It is also true that *STOP* did not involve issues of compliance with the RFP or
2 UGMFP. In this sense, the present case is more similar to *Central Eastside Ind. Council*,
3 which involved a city recommendation not to construct a facility, which recommendation
4 conflicted with a city comprehensive plan policy favoring construction of the facility. The
5 Court held that the city’s recommendation to ODOT was the city’s last word on application
6 of the policy, and thus a “final” decision reviewable by LUBA. In the present case, Metro
7 has recommended that cities and counties adopt into their respective plans a Trail alignment
8 that, petitioners allege, violates RFP and UGMFP policies prohibiting incompatible non-
9 industrial uses in RSIA’s. However, in *Central Eastside Ind. Council*, the city’s
10 recommendation was the last word by the city on consistency with the city’s plan policy, and
11 the last opportunity to obtain LUBA review of that issue, because ODOT could act on the
12 city’s recommendation without further land use review. In the present case, Metro’s
13 recommendation will be implemented by city and county plan and land use regulation
14 amendments, and possibly by RTP amendments, all of which will be decisions subject to
15 LUBA’s review under either ORS 197.015(10)(a) or ORS 197.274. We believe such
16 decisions are the decisions that will determine the Trail alignment, and therefore such
17 decisions are the most appropriate juncture to consider challenges that the Trail alignment is
18 inconsistent with RFP and UGMFP policies.

19 Returning to the question of finality, in our view the requirement that a decision be
20 “final” to constitute a “land use decision” reviewable by LUBA means, at a minimum, that
21 the decision must actually decide something. If the decision is entirely precatory, without any
22 possible land use effects unless and until its recommendations are embodied in other
23 appealable decisions, then LUBA’s review would be entirely advisory. We believe that it is
24 inconsistent with the state policy embodied in the finality requirement for LUBA, and
25 inconsistent with the ORS 197.805 policy that LUBA review be consistent with sound

1 principles of judicial review, to conduct purely advisory reviews of local government
2 decisions.

3 In the present case, the TTMP recommends a Trail alignment and design features, but
4 as far as we can tell or petitioners have established, the TTMP does not impose any
5 mandatory or binding requirements on local governments. Local governments appear to be
6 entirely free to implement the Trail, or not, and nothing in the TTMP compels local
7 governments to follow any of the recommendations, including the alignment and design
8 features. If no local government chooses to implement the Trail, then the TTMP will never
9 be anything more than a collection of ignored recommendations. Conversely, to have any
10 land use effects at all, the TTMP must be implemented by local governments, which will
11 almost certainly entail post-acknowledgment plan amendments to their comprehensive plans,
12 transportation plans, master park plans, or land use regulations, such as the City of Tualatin
13 TSP amendment challenged in LUBA No. 2013-016. Such amendments are land use
14 decisions fully reviewable by LUBA, and in our view are the juncture at which petitioners’
15 challenges—that the Trail as implemented is inconsistent with applicable Goals, statutes,
16 rules and Metro legislation—must be addressed.

17 As petitioners note, the TTMP does include a section on hours of operation, which
18 states that “[r]egional trails are open 24 hours a day, 7 days a week.” Petition for Review,
19 Appendix 2, p. 121. Metro argues that this statement is not a requirement that the TTMP
20 imposes on local governments, but rather it simply reflects the fact that if federal
21 transportation funds are obtained to help build the Trail, federal law will require the Trail
22 remain open for users 24/7. Petitioners disagree, arguing that the federal transportation funds
23 might not be used, and Metro has not established that federal law would require that the Trail
24 remain open 24/7. Petitioners contend that the statement that “[r]egional trails are open 24
25 hours a day, 7 days a week” can only be understood as a requirement that Metro is imposing
26 on local governments. However, read in context with the remainder of the TTMP, it is

1 reasonably clear that the statement on hours of operation and similar statements regarding
2 design or operation are intended to reflect requirements or design features that Metro believes
3 other entities will require of local governments, not requirements imposed by Metro.

4 As noted, petitioners also argue that Resolution 13-4415 is a “final” decision, because
5 it represents Metro’s last word or go-ahead for local governments to implement the Trail.
6 However, we note that the cities and county all adopted resolutions that approved the draft
7 TTMP and initiated legislative processes for implementing the Trail *prior* to Metro’s
8 adoption of Resolution 13-4415. Apparently, local governments were prepared to proceed
9 with plan and land use regulation amendments necessary to implement the Trail based on the
10 staff-prepared draft of the TTMP, regardless of whether the Metro Council approved the
11 TTMP. This suggests that the Metro Council’s February 28, 2013 resolution approving the
12 TTMP did not carry much significance for local governments.

13 The “Whereas” clauses set out in Resolution 13-4415 suggest that the main
14 significance of Resolution 13-4415 is two-fold: (1) to initiate a process for Metro to consider
15 amendments to its RTP to reflect the Trail alignment, and (2) to adopt an updated property
16 acquisition map. In our view, neither purpose supports a conclusion that Resolution 13-4415
17 is a “land use decision” subject to LUBA’s review under ORS 197.015(10)(a). As we
18 explained in *Terra Hydr v. Washington County*, ___ Or LUBA ___ (LUBA Nos. 2013-
19 017/018/019/025), a decision to initiate a legislative process to amend the comprehensive
20 plan or land use regulations is not generally a “final” decision of any kind.

21 Further, that Resolution 13-4415 adopts an updated property acquisition map does not
22 demonstrate that it is a “land use decision” as defined at ORS 197.015(10)(a). Based on an
23 earlier version of that map adopted in 2007, Metro has been acquiring properties from willing
24 sellers for potential inclusion in the Trail and associated natural areas, using funds available
25 from two bond measures. The updated map adopted in Resolution 13-4415 apparently
26 includes additional properties. Adoption of the updated map appears to be a final decision, in

1 the sense that no further decisions are necessary to designate particular tax lots for
2 acquisition. However, petitioners do not explain how adoption of the updated property
3 acquisition map itself concerns the application of any statewide planning goal, and we do not
4 see that it does. Therefore, that Resolution 13-4415 also adopts an updated property
5 acquisition map does not render Resolution 13-4415 a land use decision as defined at ORS
6 197.015(10)(a) or, more to the point, grant LUBA jurisdiction to review petitioners'
7 challenges to the TTMP.

8 As a final observation, there does not appear to be much question that Metro could
9 have made local government implementation of the TTMP much easier and efficient by
10 adopting the TTMP as a functional plan or in another manner that invokes final application of
11 the Goals, statutes, rules and Metro legislation. However, that is not a basis for remand of
12 Metro's resolution. For whatever reason, Metro elected to leave the responsibility for
13 addressing applicable land use laws to any local governments that elect to amend their plans
14 and land use regulations to implement and give effect to the TTMP, and petitioners have not
15 identified any laws that prohibit Metro from proceeding in that manner.

16 **E. Approval of the TTMP is not a Significant Impacts Land Use Decision**

17 Finally, petitioners argue that Metro's approval of the TTMP will lead to significant
18 impacts on present and future land uses, and therefore Resolution 13-4415 qualifies as a
19 "significant impacts" land use decision. However, we have held that a significant impacts
20 land use decision must be a "final" decision. *Knee Deep Cattle Company v. Lane County*, 28
21 Or LUBA 288, 295 (1994), *aff'd* 133 Or App 120, 890 P2d 449 (1995). Our conclusion
22 above that Metro's approval of the TTMP is not a "final" decision of any kind means that we
23 cannot exercise jurisdiction over the decision under the significant impacts test. The
24 rationale for that is especially clear in the present case, because none of the "significant
25 impacts" that petitioners allege can occur based solely on Metro's approval of the TTMP.

1 There can be no impacts on land uses at all unless and until local governments implement the
2 TTMP through subsequent land use decisions.

3 **CONCLUSION**

4 For the foregoing reasons, we agree with Metro that we lack jurisdiction over the
5 appeal of Resolution 13-4415. Accordingly, this appeal is dismissed.