

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

3
4 CITIZENS FOR BETTER TRANSIT)
 and DOUGLAS R. ALLEN,)
)
5 Petitioners,)
)
6 vs.)
)
7 METROPOLITAN SERVICE DISTRICT,)
)
8 Respondent.)
)
9)
10)

LUBA No. 86-022
ORDER ON
MOTION TO DISMISS

11 The challenged resolution concerns street and highway
12 improvements in the McLoughlin Boulevard Improvement
13 Program.¹ The improvement program will entail use of federal
14 monies for work on a state highway (McLoughlin Boulevard). The
15 work must be approved in conformance with federal and state
16 statutes as well as ordinances of the Metropolitan Service
17 District (Metro) and affected cities and counties. See Kasch's
18 Garden Center and Nurseries, Inc. v. City of Milwaukie, 14 Or
19 LUBA 406 (1986).

20 Respondent moves for an order dismissing this appeal on the
21 ground the challenged resolution is not a land use decision.

22 The resolution states:

23 "BE IT RESOLVED,

24 "1. That the Metro Council accepts the McLoughlin
25 Boulevard Improvement Program as described in
26 Attachment 'A' and directs staff to incorporate
 appropriate portions into the ordinance to update the
 Regional Transportation Plan.

1 "2. That the Transportation Improvement Program is
2 hereby amended in accordance with Attachment 'A'."2

3 Metro's obligation to adopt a transportation plan derives
4 from both federal and state law. ORS 268.390 directs
5 Metropolitan Service Districts to:

6 "(1)...designate areas and activities having
7 significant impact upon the...development of the
8 Metropolitan Area, including but not limited to...

9 * * *

10 "(c) Transportation.

11 "(2) Prepare and adopt functional plans for those
12 areas designated under subsection (1) of this
13 section...."

14 In addition to this state requirement, federal law requires
15 an urban transportation plan "describing policies, strategies and
16 facilities or changes in facilities proposed" as a prerequisite
17 to use of federal funds for transportation improvements. 23 CFR
18 450.110(a). Metro's Regional Transportation Plan (RTP) satisfies
19 both federal and state mandates.

20 Federal regulations also require a Transportation
21 Improvement Program (TIP). A TIP is defined in the regulations
22 as a "staged multi-year program of transportation improvements
23 including an annual (or biennial) element." 23 CFR
24 450.104(b)(5). The annual element of a TIP must
25 "list...transportation improvement projects proposed for
26 implementation during the first year (or two years) of the
program." 23 CFR 450.104(b)(4). The list of projects in the
TIP designates improvements from the transportation plan that

1 are recommended for federal funding. 23 CFR 450.204(b).

2 Respondent says neither paragraph of its resolution is a
3 land use decision. First, respondent says the resolution does
4 not amend its RTP but only directs staff to prepare an
5 amendment ordinance. Second, respondent argues that the
6 amendment to the TIP, referred to in the second paragraph of
7 the resolution, is a fiscal decision because it makes purely
8 financial arrangements for a project included in the plan.

9 We agree with respondent that the order to prepare an
10 ordinance is not a reviewable land use decision. This aspect
11 of the resolution is not a final decision. The ordinance, when
12 adopted, may be a final land use decision, but it is not before
13 us. See N.O.P.E. in Mulino v. Port of Portland, 2 Or LUBA 234
14 (1980).

15 For the reasons set forth below, we reject respondent's
16 second argument, i.e., that the resolution is only a fiscal
17 decision and for that reason is exempt from our review. In
18 addition, we conclude the resolution is a reviewable land use
19 because it approves a project that will have a substantial
20 impact on land use.

21 Respondent contends the TIP amendment is not an exercise of
22 planning and zoning responsibility because it merely allocates
23 a transfer of funds for a project in the RTP. According to
24 Respondent, the McLoughlin Corridor Improvement Project has
25 always been in the RTP; funding for the project was reserved by
26 an amendment to the TIP seven years ago, and the present

1 amendment simply releases the funding. Respondent alleges this
2 amendment merely implements the RTP by releasing the funding.

3 Under federal law, the amendment to the TIP is not just a
4 mechanism to arrange funding. It is the means by which Metro
5 selects transportation improvement projects for construction.
6 Metro has been designated as the Metropolitan Planning
7 Organization responsible for carrying out regional highway
8 planning. See 48 CFR 450.104(b)(3). Federal regulations
9 require the Metropolitan Planning Organization to develop the
10 TIP, including an annual element, to designate improvements
11 described in the transportation plan which are recommended for
12 federal funding during any program period. See 48 CFR
13 450.204. However, final selection of federally funded projects
14 is the responsibility of the Federal Highway Administrator or
15 the Urban Mass Transportation Administrator. 48 CFR 450.212.³

16 When Metro designates dollar amounts for particular highway
17 projects in the TIP, it exercises its duty under federal law to
18 designate projects for federal assistance.

19 In Housing Council v. City of Lake Oswego, 48 Or App 525,
20 617 P2d 655 (1980), the Court of Appeals considered whether an
21 ordinance adopting a systems development charge on all
22 construction was a land use decision. The Court said that all
23 budget and taxation measures, even though they may have an
24 impact on land use, were not intended by the legislature to be
25 subject to review by LUBA. However, Metro's resolution is more
26 than a decision concerning budget and taxation matters. The

1 TIP amendment is worded as a financial measure, to be sure, but
2 we view it as principally a planning device. As described
3 above, by amending the TIP, Metro carries out its planning
4 obligation under federal law to designate transportation
5 projects in its transportation plan that are eligible for
6 federal funding. We therefore reject Metro's argument that the
7 resolution is not a land use decision because it is only a
8 fiscal measure.

9 We next consider whether the resolution is a land use
10 decision. There are two tests to determine whether a decision
11 is a land use decision: (1) the statutory test in ORS
12 197.015(10), and (2) the significant impact test referred to in
13 City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982) and
14 Billington v. Polk County, 299 Or 471, 703 P2s 232 (1985). In
15 Billington, the court said:

16 "In the absence of a direct statutory mandate to apply
17 a comprehensive plan provision or ordinance, the next
18 step is to determine whether the decision will have a
19 significant impact on present or future land uses. If
the decision will have significant impact, it is a
land use decision and LUBA has jurisdiction over the
land use matter." 299 Or at 480.

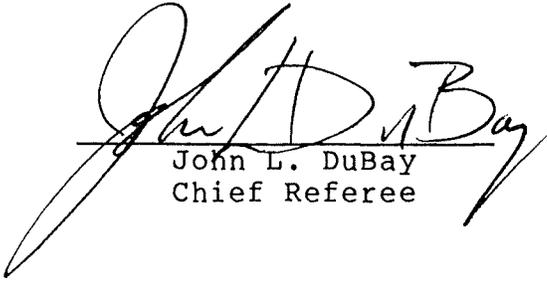
20 The TIP amendment implements Metro's functional
21 transportation plan, the RTP. Metro adopted the RTP after it
22 identified regional transportation matters as "areas and
23 activities having significant impact upon orderly and
24 responsible development of the Metropolitan area." (Emphasis
25 added.) ORS 268.390(1). The plan was adopted to "control
26 metropolitan impact on...transportation." ORS 268.390(2). By

1 these statutes, Metro's functional plans must focus on areas
2 and activities having a significant impact on present and
3 future land use. Projects described in such plans meet the
4 significant impact test referred to in Kerns and Billington,
5 supra.

6 McLoughlin Corridor Improvements are not minor projects.
7 The TIP amendment designates a multi-million dollar
8 construction project on a major transportation route in the
9 Metropolitan area. Its completion would implement a
10 transportation plan project that is concerned with activities
11 having a substantial impact on land use. The decision,
12 therefore, meets the substantial impact test referred to in
13 Kerns, supra and Billington, supra.⁴

14 The motion to dismiss is denied.

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16 Dated this 27th day of February, 1987.

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John L. DuBay
Chief Referee

FOOTNOTES

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4 The McLoughlin Corridor Improvement Program is also
5 referred to as the McLoughlin Boulevard Improvement Program.

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7 Attachment "A" to the resolution has four parts and is
8 described in Kasch's Gardens v. City of Milwaukie/Portland, 14
9 Or LUBA 406 (1986).

10 3
11 The final selection is based in part on an Environmental
12 Impact Statement (EIS). The Oregon Department of
13 Transportation prepared both a draft and final EIS for the
14 McLoughlin Corridor Improvement project.

15 4
16 Metro also contends the resolution is not a reviewable land
17 use decision because it does not meet the statutory test in ORS
18 197.015(10). Metro's argument relies on the fact that no
19 statute requires it to prepare a functional transportation plan
20 in compliance with statewide planning goals. Metro must comply
21 with the goals when adopting urban growth boundaries. ORS
22 268.390(3). According to Metro, the absence of a specific
23 requirement that functional plans described in ORS 268.390(1)
24 and (2) must comply with the goals implies that those plans,
25 including the RTP and the TIP, need not comply with the goals.

26 We need not decide whether the resolution meets the
27 statutory test. As explained above, the decision does meet the
28 significant impact test.