

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 COMMERCIAL REAL ESTATE ECONOMIC
5 COALITION, HOME BUILDERS
6 ASSOCIATION OF METROPOLITAN
7 PORTLAND, and COLUMBIA CORRIDOR
8 ASSOCIATION,
9 *Petitioners,*

10 and

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13 CITY OF TUALATIN, and
14 CITY OF TIGARD,
15 *Intervenors-Petitioner,*

16 vs.

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18
19 METRO,
20 *Respondent,*

21 and

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23 AUDUBON SOCIETY OF PORTLAND
24 CEDAR MILL CREEK WATERSHED
25 WATCH, COALITION FOR A LIVABLE
26 FUTURE, 1000 FRIENDS OF OREGON,
27 FRIENDS OF ARNOLD CREEK, FRIENDS
28 OF GOAL 5, FRIENDS OF KELLOGG AND
29 MT. SCOTT CREEKS, FRIENDS OF ROCK,
30 BRONSON AND WILLOW CREEKS,
31 TUALATIN RIVER-KEEPERS, RON
32 CARLEY, LINDA CRAIG, JIM KIMBALL,
33 TRICIA SEARS, BONNIE SHOFFNER,
34 LOUISE SHORR, PETER TENNEAU,
35 and GRETCHEN VADNAIS,
36 *Intervenors-Respondent.*

37
38 LUBA No. 98-116

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40 Appeal from Metro.

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42 Stark Ackerman, Portland, and Gary Firestone, Portland, filed the petition for review
43 on behalf of the petitioners and intervenor-petitioner, City of Tigard. With them on the brief
44 were Black Helterline LLP and Ramis Crew Corrigan & Bachrach LLP. Stark Ackerman
45 argued on behalf of the petitioners.

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2 Kenneth D. Helm, Portland, filed the response brief and argued on behalf of the
3 respondent.

4
5 Michael Collmeyer, Portland, filed a response brief on behalf of the intervenors-
6 respondent.

7
8 Richard M. Whitman, Assistant Attorney General, Salem, filed a state agency brief
9 on behalf of the Department of Land Conservation and Development and Department of
10 Environmental Quality. With him on the brief were Hardy Myers, Attorney General, and
11 Michael D. Reynolds, Solicitor General.

12
13 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
14 participated in the decision.

15
16 REMANDED

11/10/99

17
18 You are entitled to judicial review of this Order. Judicial review is governed by the
19 provisions of ORS 197.850.
20

NATURE OF THE DECISION

Petitioners seek review of Metro Ordinance 98-730C, which amends Metro’s existing Urban Growth Management Functional Plan (UGMFP).¹

MOTION TO INTERVENE

The cities of Tigard and Tualatin move to intervene on the side of petitioners. The Audubon Society of Portland, Cedar Mill Creek Watershed Watch, Coalition for a Livable Future, 1000 Friends of Oregon, Friends of Arnold Creek, Friends of Goal 5, Friends of Kellogg and Mt. Scott Creeks, Friends of Rock, Bronson and Willow Creeks, Tualatin Riverkeepers, Ron Carley, Linda Craig Jim Kimball, Tricia Sears, Bonnie Shoffner, Louise Shorr, Peter Tenneau and Gretchen Vadnais move to intervene on the side of respondent. There is no opposition to the motions and they are allowed.

FACTS

On November 21, 1996, Metro adopted the UGMFP.² Among the provisions included in the UGMFP is Title 3. Title 3 addresses “Water Quality and Flood Management Conservation.”³ Respondent’s Brief Appendix A at 5-9. As adopted in 1996, Title 3 Section 6 delayed the effective date of Title 3.

¹Petitioners and intervenor-petitioner City of Tigard filed a joint petition for review, we refer to them jointly as petitioners. Intervenor-petitioner City of Tualatin did not file a petition for review. Intervenor-respondent joined in the response brief filed by Metro. We refer to Metro in this opinion without separately referring to intervenors-respondent.

²In our discussion of the facts, we briefly describe the key Metro decisions that preceded the challenged decision and the general nature of those decisions. We discuss those decisions further under the first assignment of error. Although the parties refer to the UGMFP as the Functional Plan, we use the acronym to avoid confusion with other Metro planning documents.

³UGMFP Title 3, Sections 2-4, 6 and 8 are the most relevant in this appeal. Section 4 establishes performance standards governing water quality and flood management. Section 2 requires that local governments “ensure that their comprehensive plans and implementing regulations protect Water Quality and Flood Management Areas pursuant to Section 4.” Section 3 requires that cities and counties adopt a “Metro Water Quality and Flood Management model ordinance and map entitled Metro Water Quality and Flood

1 “Metro shall adopt a Water Quality and Flood Management Model Ordinance
2 and map for use by local jurisdictions to comply with this section. Sections
3 1-4 of this title shall not become effective until 24 months after [the] Metro
4 Council has adopted a Model Code and map that addresses all of the
5 provisions of this title. Metro may adopt a Model Code and map for
6 protection of regionally significant fish and wildlife habitat. Section 5 of this
7 title shall be implemented by adoption of new functional plan provisions.”

8 Almost 13 months later, on Dec 18, 1997, Metro adopted its Regional Framework
9 Plan (RFP). The 1996 UGMFP was “adopted as part of the [RFP]” and the UGMFP was
10 included in its entirety as an appendix to the RFP. RFP at 164.⁴ As required by
11 ORS 197.274(1), the RFP was submitted to the Land Conservation and Development
12 Commission (LCDC) for acknowledgment of compliance with the statewide planning goals.
13 The RFP is currently pending before LCDC, but has not yet been acknowledged.⁵

14 The challenged decision was adopted on June 18, 1998, approximately 19 months
15 after the UGMFP was first adopted and six months after the RFP was adopted. Petitioner
16 describes the challenged decision as follows:

17 “* * * The Challenged Decision made a variety of changes to the [RFP] and
18 [UGMFP] related to the [UGMFP] Title 3 provisions. The Challenged
19 Decision amended Title 3 Section 1-4 (Metro Code Sections 3.07.310-
20 3.07.340) in the [RFP] and in the [UGMFP] by substituting new language for
21 the previously adopted provisions of those sections. The Challenged decision
22 adopted a Model Ordinance and Water Quality and Flood Management Area
23 maps to implement Title 3 of the [UGMFP]. * * * The Challenged Decision
24 also amended Title 8 of the [UGMFP] to establish a new timetable within
25 which cities and counties were required to apply the new Title 3, Sections 1-4,
26 requirements and incorporate them into their comprehensive plans and

Management Conservation Area Map” or a local ordinance and map that substantially complies with the performance standards set out at Section 4.

⁴Selected pages of the RFP and other Metro Planning Documents cited in this opinion are attached as appendices to the parties’ briefs.

⁵Neither the RFP nor its components is a “comprehensive plan,” as that term is defined by ORS 197.015(5). ORS 197.015(16). However, the RFP is subject to LCDC review for compliance with the statewide planning goals “in the same manner as a comprehensive plan.” ORS 197.274(1).

1 implementing ordinances.”⁶ Petition for Review 4-5 (references to the
2 decision, record citations and footnote omitted).⁷

3 The substantive planning and regulatory requirements imposed by Title 3, Section 4
4 are described by petitioners as follows:

5 “The performance standards that the Challenged Decision adopted as Section
6 4 of Title 3 include flood management performance standards (applicable to
7 all development, excavation, and fill in designated Flood Management Areas),
8 which will maintain or increase flood storage and conveyance capacity,
9 require balanced cut and fill below the design flood elevation, establish
10 minimum finished floor elevations for habitable structures in Flood
11 Management Areas, and prohibit uncontained areas of hazardous materials in
12 such areas.

13 “The performance standards in Section 4 also address water quality. The
14 water quality performance standards include a requirement for vegetated
15 corridors varying (depending on slope) from 50 to 200 feet from designated
16 Protected Water Features, and requirements for how such protected areas and
17 corridors will be managed. Section 4 also requires erosion and sediment
18 control generally (even outside the Protected Water Features), and establishes
19 a process by which local governments administer and amend their Water
20 Quality and Flood Management Area map.” Petition for Review 5-6 (footnote
21 and record citations omitted).

22 As relevant in this appeal, the challenged decision does four things. First, it adopts a
23 model ordinance and maps and amends the performance standards that were originally
24 adopted as UGMFP Title 3, Section 4. Second, it requires that local governments amend
25 their comprehensive plans and land use regulations to implement those amended
26 performance standards. Third, it directs that these comprehensive plan and land use
27 regulation changes be adopted within 18 months after the date of the decision and directs that
28 cities and counties advise Metro of the process they will follow to meet that deadline six

⁶The Title 8 amendments require that cities and counties amend their comprehensive plans to comply with Title 3, Sections 1-4 within 18 months after the challenged decision. Record 5. The challenged decision also amends Title 8 to require that cities and counties commence hearings on needed amendments and advise Metro of proposed amendments six months before that 18 month deadline expires. Record 5-6.

⁷The omitted footnote points out that the challenged decision also makes several changes to the [UGMFP] definitions.

1 months before the December 18, 1999 deadline. Finally, the challenged decision requires
2 that any amendments to city or county comprehensive plans that are adopted after the date of
3 the decision must comply with the Title 3, Section 4 performance standards described above.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners argue that the schedule for compliance with the substantive provisions of
6 Title 3 that is established by the challenged decision violates ORS 268.390(5). According to
7 petitioners, that statute requires that the RFP first be acknowledged by LCDC *before* Metro
8 can require that cities and counties adopt amendments to their comprehensive plans to
9 comply with the RFP.⁸ Petitioners also argue that under ORS 268.390(5), cities and counties
10 may not be required by Metro to apply the RFP to their individual land use decisions until
11 one year after the RFP has been acknowledged. ORS 268.390(5) was adopted by the 1997
12 legislature at Metro’s request and reflects the following language in the 1992 Metro Charter:

13 “* * * If the [RFP] is subject to compliance acknowledgment, local plans and
14 implementing regulations shall be required to comply with the [RFP] within
15 two years of compliance acknowledgment[.] The obligation to apply the
16 [RFP] to local land use decisions shall not begin until one year after adoption
17 and compliance acknowledgment of the regional framework plan[.]” Metro
18 Charter Section 5(2)(e).⁹

⁸ORS 268.390(5) provides:

“Pursuant to a regional framework plan, [Metro] may adopt implementing ordinances that:

- “(a) Require local comprehensive plans and implementing regulations to comply with the regional framework plan *within two years after compliance acknowledgment*.
- “(b) Require adjudication and determination by the district of the consistency of local comprehensive plans with the regional framework plan.
- “(c) Require each city and county within the jurisdiction of the district and making land use decisions concerning lands within the land use jurisdiction of the district to make those decisions consistent with the regional framework plan. *The obligation to apply the regional framework plan to land use decisions shall not begin until one year after the regional framework plan is acknowledged as complying with the statewide planning goals[.]*” (Emphases added.)

⁹With regard to petitioners’ first argument, ORS 268.390(a) does not expressly require that the RFP be acknowledged before Metro may require that local comprehensive plans and implementing regulations comply

1 It is undisputed that the UGMFP has been incorporated into the RFP, and that
2 adoption of certain “implementing ordinances” “[p]ursuant to a regional framework plan” is
3 subject to the limitations specified in ORS 268.390(5). However, Metro argues in its brief
4 that the UGMFP was adopted in 1996 *pursuant to* Metro’s separate statutory authority under
5 ORS 268.390(1)-(2) and (4) to adopt and enforce functional plans.¹⁰ Therefore, according to
6 Metro, the UGMFP has a dual identity—it is both a functional plan and a part of the RFP.¹¹
7 The significance of this dual identity, according to Metro, is that the timing limitations that
8 ORS 268.390(5) imposes on Metro’s authority to require that cities and counties comply with

with the RFP. However, that requirement can be implied from the statutory language. Although Metro argues that ORS 268.390(5)(a) does not apply to the challenged decision for other reasons, it does not challenge this aspect of petitioners’ interpretation of the statute. In the absence of argument from the parties on this point, we assume that if ORS 268.390(5)(a) applies, it requires that the portions of the RFP that are amended by the challenged decision must be acknowledged before Metro can require that local comprehensive plans and land use regulations be amended to comply with the amended RFP.

¹⁰ORS 268.390(1), (2) and (4) are as follows:

“(1) [Metro] may define and apply a planning procedure which identifies and designates areas and activities having significant impact upon the orderly and responsible development of the metropolitan area, including, but not limited to, impact on:

“(a) Air Quality;

“(b) Water quality; and

“(c) Transportation.

“(2) [Metro] may prepare and adopt functional plans for those areas designated under subsection (1) of this section to control metropolitan area impact on air and water quality, transportation and other aspects of metropolitan area development [that Metro] may identify.

“* * * * *

“(4) [Metro] may review the comprehensive plans in effect on January 1, 1979, or subsequently adopted by the cities and counties within the district * * * and recommend or require cities and counties, as it considers necessary, to make changes in any plan to assure that the plan and any actions taken under it conform to the district’s functional plans adopted under subsection (2) of this section * * *.”

¹¹ORS 197.015(16) defines RFP broadly as meaning “the regional framework plan required by the 1992 Metro Charter or its separate components. * * *” ORS Chapter 268 defines RFP even more broadly. “‘Regional framework plan’ means the Metro regional framework plan defined in ORS 197.015 *and any district ordinances that implement the plan.* ORS 268.020(7) (emphasis added.)

1 the “implementing ordinances” that are adopted “[p]ursuant to a regional framework plan”
2 do not apply to functional plans. According to Metro, its authority to require that cities and
3 counties comply with the UGMFP prior to acknowledgment is based on ORS 268.390(4),
4 which does not require that a functional plan be acknowledged by LCDC before Metro can
5 require that cities and counties change their comprehensive plans to comply with the
6 functional plan.

7 We summarize the relevant facts before turning to the parties’ arguments. The
8 UGMFP was first adopted in 1996, before there was an RFP. The 1996 UGMFP
9 subsequently was adopted as part of the RFP, when the RFP was adopted in 1997. The
10 challenged decision was adopted in 1998. It (a) adopts the model ordinance and maps
11 referred to in the 1996 UGMFP and also substantively amends the original UGMFP Title 3,
12 Section 4 performance standards, (b) accelerates the initial requirement that cities and
13 counties amend their comprehensive plans to comply with portions of the UGMFP, and (c)
14 requires that city and county land use decisions immediately comply with portions of the
15 UGMFP. The ultimate question posed by the first assignment of error is whether the
16 challenged decision violates the timing requirements of ORS 268.390(5).

17 **A. Legal Effect of the Original Adoption of the UGMFP as Part of the RFP**

18 Metro correctly argues that the UGMFP was initially adopted as part of the RFP in
19 1997 with the previously adopted UGMFP Title 3 compliance schedule for amending local
20 comprehensive plans and implementing ordinances. That compliance schedule, like the one
21 at issue in this appeal, did not depend on prior acknowledgment by LCDC. Indeed the Metro
22 Council was careful to clearly state that the UGMFP continued to remain effective according
23 to the schedule set out in the UGMFP itself, when it adopted the RFP in 1997.

24 “The provisions of the [UGMFP] (Metro Code 3.07) adopted as a component
25 of this [RFP] shall be subject to Metro’s adopted implementing ordinances as
26 provided in Section 5(2)(e) of the Metro Charter. However, the requirements
27 of the [UGMFP] shall continue to have force and effect independently of this
28 [RFP], and the requirements of the [UGMFP] shall be effective on the dates

1 specified therein, based on Metro’s statutory authority in ORS 268.390. After
2 acknowledgment of this [RFP], requirements for changes in comprehensive
3 plans and land use regulations initiated under Metro’s statutory and charter
4 authorities shall be required to be approved as amendments to this [RFP] in
5 order to become effective.” RFP 174.

6 Metro argues that “[t]he limited amendments to Title 3 [in the 1998 decision that is
7 challenged in this appeal] do not reopen debate on * * * when Title 3 may be effective.”
8 Respondent’s Brief 10.

9 To the extent Metro suggests that the challenged amendments are so insubstantial as
10 not to constitute an amendment or change in the UGMFP, we do not agree. Neither do we
11 agree with Metro’s suggestion that the existence of the 1997 decision somehow bars the
12 challenge that is presented in the first assignment of error.

13 The above-quoted language in the 1997 RFP appears to take the position that
14 ORS 268.390(5) does not apply to suspend an implementation schedule in a previously
15 adopted functional plan that is simply incorporated into the RFP at the time the RFP is
16 initially adopted. As explained later in this opinion, we agree with that position, but that is
17 not the question presented in this appeal. Rather, this appeal concerns a decision that amends
18 the UGMFP after it was made part of the RFP. Moreover, the first assignment of error does
19 not “reopen” any debate, because there never was a debate about Metro’s position that the
20 1996 UGMFP could be incorporated into the RFP with the previously adopted
21 implementation schedule. That issue of statutory interpretation was not presented in the
22 appeal filed with LUBA challenging the 1997 decision adopting the RFP, because the appeal
23 was dismissed based on a stipulation by the parties. There is nothing about the position that
24 Metro took in its 1997 decision adopting the RFP that prevents LUBA from considering
25 petitioners’ first assignment of error here. A different decision is at issue, and a different
26 question is presented.

1 **B. Deference to Metro’s Interpretation of RUGGO Objective 5**

2 Metro has statutory authority to adopt “land use planning goals and objectives.”
3 ORS 268.380(1)(a). Metro’s predecessor, Columbia Region Association of Governments,
4 adopted regional urban goals and objectives. In 1991, Metro adopted new regional urban
5 goals and objectives, referred to as RUGGOs. The RUGGOs have been acknowledged by
6 LCDC. Metro takes the position that the RUGGOs do not apply directly to city and county
7 comprehensive plans.¹² Functional plans and the RFP are tools that Metro uses to implement
8 the RUGGOs, and the RFP and functional plans are required to be consistent with the
9 RUGGOs. RUGGO Objectives 5 and 6.

10 Metro points out that RUGGO Objective 5 provides, in part:

11 “Until regional framework plan components are adopted existing or new
12 functional plans will continue to recommend or require changes in
13 comprehensive plans.”

14 Metro argues the Metro Council was relying on RUGGO Objective 5 when it adopted the
15 UGMFP with an accelerated compliance schedule and when it incorporated the UGMFP with
16 that compliance schedule into the RFP in 1997. Metro argues this interpretation is entitled to
17 deference by LUBA under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and
18 ORS 197.829(1)(a) and (d).

19 Because the issue presented under this assignment of error is an issue of statutory
20 interpretation, Metro is not entitled to the level of deference that it would receive were this
21 purely a question of interpretation of Metro legislation. *Forster v. Polk County*, 115 Or App
22 475, 478, 839 P2d 241 (1992); *Holsheimer v. Columbia County*, 28 Or LUBA 279, 282

¹²This position is based on ORS 268.380(1), which provides that Metro may “recommend that cities and counties * * * make changes in any plan to ensure that the plan conforms to [Metro’s] goals and objectives * * *.” The current language of ORS 268.380(1)(a) does not authorize Metro to “require” such plan changes, as it formerly did. RUGGO Goal I, Objective 3 explains that the RUGGOs are to be distinguished from functional plans and the regional framework plan.

1 (1994). In addition, we are not sure what bearing RUGGO Objective 5 could have on the
2 meaning of ORS 268.390(5). Moreover, we question whether it is possible to determine
3 from the portions of the 1996 and 1997 decisions cited by Metro, whether Metro was relying
4 on RUGGO Objective 5 in adopting the UGMFP as part of the RFP and carrying forward the
5 accelerated implementation schedule for Title 3. Finally, even without these problems,
6 Metro’s deference argument is flawed for another reason. The above-quoted portion of
7 RUGGO Objective 5 supports petitioners’ view of the statute rather than Metro’s. The
8 quoted part of RUGGO Objective 5 says “existing or new functional plans will continue to
9 recommend or require changes in comprehensive plans” but only “[u]ntil regional framework
10 plan components are *adopted*[.]” (Emphasis added.) Since the relevant RFP component (the
11 UGMFP) has been adopted, RUGGO Objective 5 seems to say the previously existing
12 UGMFP no longer independently applies. That is directly contrary to Metro’s position in
13 this appeal.

14 **C. Giving Effect to Metro’s Separate Authorities Under ORS 268.390(4) and**
15 **ORS 268.390(5)**

16 Metro argues that its interpretation of ORS 268.390 gives effect to all subsections of
17 the statute and that petitioners’ interpretation fails to give effect to ORS 268.390(4). Metro
18 also argues that its position concerning the meaning of ORS 268.390(4) and (5) is supported
19 by a plain reading of those statutes. *See* ns 8 and 10. All parties recognize that in
20 determining the meaning of ORS 268.390(5), we are required to consider the text and context
21 of that statute first. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143
22 (1993). In reviewing the text of ORS 268.390(5), we are not to add language that is not
23 included or ignore language that is included. We also must attempt to give meaning and
24 effect to all subsections of ORS 268.390.¹³

¹³A general rule for construction of statutes is set out at ORS 174.010:

1 Metro argues that the authority that Metro has had from its beginning under
2 ORS 268.390(4) is to “enforce functional plans by participating as a party and appealing
3 local government decisions which do not comply with those functional plans to LUBA.”
4 Respondent’s Brief 17. Metro argues that, under ORS 268.390(5), it has a very different
5 power, *i.e.*, Metro may adjudicate issues of local plan compliance itself and take direct steps
6 to require that local decision making be consistent. From these premises, Metro reasons that
7 its authority to adopt and enforce a functional plan under ORS 268.390(4) is not affected by
8 the adoption of a functional plan as part of the RFP. Metro further reasons that this result is
9 required to give effect to ORS 268.390(4), which the legislature could have repealed when it
10 adopted ORS 268.390(5) but did not.

11 ORS 268.390(4) broadly authorizes Metro to “require cities and counties, as it
12 considers necessary, to make changes in any plan to assure that the plan and any actions
13 taken under it conform to the district’s functional plans * * *.” It is not clear that there is any
14 substantive difference between Metro’s broad authority under ORS 268.390(4) and its more
15 specific adjudicatory powers under ORS 268.390(5). In fact, we understand Metro to argue
16 elsewhere in its brief that it is relying on ORS 268.390(4) to require that city and county
17 comprehensive plans and land use regulations be amended and that local land use decisions
18 be consistent with the amended UGMFP before it is acknowledged by LCDC. We see
19 nothing in ORS 268.390(4) that makes LUBA appeals the exclusive method of enforcing
20 Metro directives that are adopted under that statute. However, even if the powers granted by
21 ORS 268.390(4) and (5) are somewhat different, we fail to see how petitioners’
22 understanding of the statute fails to give effect to ORS 268.390(4). Petitioners simply
23 contend that once a functional plan is made part of the RFP, Metro may no longer enforce

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 that functional plan on a schedule that violates ORS 268.390(5). Viewed in that way, there is
2 no inconsistency between ORS 268.390(4) and (5); ORS 268.390(5) simply limits what was
3 previously permissible under ORS 268.390(4) after (and only after) a functional plan is made
4 part of the RFP.

5 **D. ORS 268.390(5) Only Governs Ordinances Adopted Pursuant to the RFP**

6 Metro’s strongest argument is that the challenged decision was not, in the words of
7 ORS 268.390(5), adopted “[p]ursuant to a regional framework plan,” but rather pursuant to
8 ORS 268.390(2) and (4). As Metro points out, the authority that Metro has under
9 ORS 268.390(4) to adopt functional plans and require that cities and counties change their
10 comprehensive plans to comply with Metro functional plans predates ORS 268.390(5) by
11 many years. The UGMFP was adopted before ORS 268.390(5) was enacted into law. When
12 it was first adopted in 1996, the UGMFP included a schedule for mandatory city and county
13 comprehensive plan and implementing ordinance amendments that was not dependent on
14 prior acknowledgment by LCDC.¹⁴

15 To this literal interpretation argument, Metro adds “[i]f the Legislature had intended
16 to limit or condition functional planning authority on RFP acknowledgment prospectively
17 and postpone the compliance deadlines for existing functional plans retroactively, the
18 legislation would so read.” Respondent’s Brief 15 (citation omitted).

19 For the reasons explained below, we conclude that Metro’s arguments support a
20 conclusion that the 1996 UGMFP compliance schedule was not affected by ORS 268.390(5)
21 when the UGMFP was adopted as part of the RFP in 1997. However, as explained below,
22 these arguments do not support a conclusion that the challenged decision is similarly exempt
23 from the limitations imposed by ORS 268.390.

¹⁴Indeed there has never been a requirement that functional plans be submitted to LCDC for acknowledgment. The UGMFP, as amended by the challenged decision, is being reviewed by LCDC for acknowledgment solely because the UGMFP is now part of the RFP, which must be acknowledged by LCDC.

1 **E. The Requirements of ORS 268.390(4) and (5).**

2 There is no entirely satisfactory resolution to the statutory interpretation question
3 presented in the first assignment of error. It is reasonably clear that the drafters of Metro’s
4 Charter and the legislature did not anticipate the potential issues that might be raised when
5 previously adopted functional plans were incorporated into the RFP. Neither is there any
6 apparent recognition that there might be significant delays in obtaining acknowledgment of
7 the RFP with attendant questions concerning Metro’s continued ability to enforce such
8 functional plans or enforce further amendments of those functional plans. Because the
9 parties have provided no legislative history bearing on the question, we have no way of
10 knowing for sure how the legislature might have intended such issues to be resolved.

11 We cannot rewrite ORS 268.390(4) and (5) or fail to give the words that appear in
12 those statutes effect. Moreover we are not confident that we know what the legislature might
13 have intended, even if we could appropriately attempt such a rewrite. We base our
14 conclusions below on a literal reading of the statutes, recognizing that this may lead to a
15 result that is problematic or inconsistent with what the legislature may have intended, had it
16 anticipated the issues raised in the case now before us. Under our reading of the relevant
17 statutes, functional plans can be adopted or amended in three ways, only one of which is
18 “[p]ursuant to a [RFP],” within the meaning of ORS 268.390(5).

19 **1. Functional Plans and Implementing Ordinances Adopted Solely**
20 **Under ORS 268.390(1)-(2) and (4).**

21 Where it can be determined from the ordinance that adopts a functional plan that the
22 functional plan was adopted or amended under ORS 268.390(2) *only* as a functional plan and
23 the functional plan is not *also* adopted or amended to be part of the RFP, the limitations in
24 ORS 268.390(5) do not apply to the functional plan or any ordinances that Metro may adopt

1 to implement the functional plan under ORS 268.390(4).¹⁵ Such functional plans and
2 implementing ordinances are not subject to ORS 268.390(5) because they are not adopted
3 “[p]ursuant to a regional framework plan.” Rather, they are adopted solely under Metro’s
4 authority under ORS 268.390(1)-(2) and (4) to adopt and implement functional plans.

5 **2. Functional Plans that are not Originally Adopted as Part of the RFP**
6 **but are Later Incorporated as Part of the RFP**

7 When a functional plan as described in principle E(1) above is incorporated into the
8 RFP, the proscriptions included in ORS 268.390(5) do not apply to any compliance schedule
9 that was already included in the incorporated functional plan. Neither does the prohibition
10 included in ORS 268.390(5) apply to any separate ordinances that may later be adopted to
11 implement the incorporated functional plan, *provided* the functional plan itself is not also
12 amended after it is incorporated into the RFP. Such a compliance schedule and
13 implementing measures are adopted pursuant to a *functional plan that existed prior to its*
14 *incorporation into the RFP*; and, therefore, they are not, in the words of ORS 268.390(5),
15 adopted “[p]ursuant to a regional framework plan.”

16 **3. Functional Plans that are not Adopted as Part of the RFP but are**
17 **Later Incorporated as Part of the RFP and Subsequently Amended**

18 Once a functional plan has been incorporated into the RFP, if the functional plan is
19 amended to impose new or amended requirements that (1) local comprehensive plans and
20 implementing ordinances be amended or (2) land use decisions comply with the new or
21 amended provisions, such implementing requirements are subject to ORS 268.390(5).
22 Similarly, any subsequent implementing ordinance that imposed implementation

¹⁵This situation would most clearly apply to functional plans that (1) were adopted before the RFP was adopted in 1997 and (2) have not yet been incorporated into the RFP. We are not certain whether it remains permissible for Metro to adopt functional plans without also adopting such functional plans as part of the RFP. To the extent Metro is not precluded by other statutes or its own legislation from doing so, any functional plans that may be adopted in the future, without also adopting them as part of the RFP, are not subject to the limitations imposed by ORS 268.390(5). Neither would other, separate ordinances that are adopted to implement such functional plans be subject to ORS 268.390(5).

1 requirements that were not included in the functional plan when it was incorporated into the
2 RFP would be subject to ORS 268.390(5). Such new or amended requirements are adopted
3 “[p]ursuant to a regional framework plan.” The fact that those requirements may *also* be
4 adopted pursuant to ORS 268.390(4) does not mean that they need not comply with
5 ORS 268.390(5).

6 **F. Conclusion**

7 The UGMFP has been incorporated as part of the RFP. The challenged decision does
8 not simply adopt an ordinance that implements the UGMFP, according to its terms as
9 incorporated into the RFP.¹⁶ Therefore, the first and second principles described above do
10 not apply. Rather the challenged decision amends Title 3 of the UGMFP substantively and
11 imposes a different, accelerated compliance schedule for local governments to bring their
12 land use decision making, comprehensive plans and land use regulations into compliance
13 with the amended UGMFP. Therefore, the limitations imposed by ORS 268.390(5) apply.
14 We agree with petitioners that the implementation requirements specified in the challenged
15 decision violate ORS 268.390(5), because they require action by local governments prior to
16 the deadlines set out in that statutory provision.

17 We reject Metro’s argument that the functional plans described in the third principle
18 above should be viewed as retaining a separate identity as a functional plan and remaining
19 enforceable in that separate identity through ORS 268.390(4), free of the constraints imposed
20 by ORS 268.390(5). There is nothing in ORS 268.390(4) or (5) that supports Metro’s
21 separate identity theory, and there is no support for that theory in the RFP. To the contrary,
22 the RFP suggests that functional plans are precisely the kind of implementing ordinance that
23 ORS 268.390(5) regulates.

¹⁶By this we mean the challenged decision does more than supply the model ordinance and maps that were anticipated in Title 3, Section 6 of the original UGMFP.

1 “* * * Where requirements are directed to cities and counties, these
2 requirements are adopted as Functional Plans, such as the [UGMFP] and the
3 [Regional Transportation Plan] RTP. These requirements are summarized in
4 Chapter 8 [of the RFP] and fully stated in the Appendices [of the RFP].”

5 “* * * * *

6 “* * * In this [RFP], Metro has decided to designate clearly any portions of
7 the Plan that are requirements for cities and counties as Functional Plans.
8 * * *” RFP 4.

9 “Functional Plans are limited purpose plans, consistent with this [RFP], which
10 address designated areas and activities of metropolitan concern. Functional
11 plans are established in state law as a way Metro may recommend or require
12 changes in local plans. *This [RFP] uses functional plans as the identified*
13 *vehicle for requiring changes in local plans in order to achieve consistence*
14 *and compliance with this [RFP].”*

15 “* * * These functional plans, which are adopted as part of the [RFP], will be
16 submitted along with other parts of the [RFP] to LCDC for acknowledgment
17 of their compliance with the statewide planning goals. *Because functional*
18 *plans are the way Metro recommends or requires local plan changes, most*
19 *Regional Framework Plan components will probably be functional plans.*
20 Until [RFP] components are adopted, existing or new functional plans will
21 continue to recommend or require changes in comprehensive plans.” RFP
22 163-64 (emphases added).

23 In the words of the RFP language quoted immediately above, functional plans are “the
24 identified vehicle for requiring changes in local plans in order to achieve consistency and
25 compliance with [the RFP].”

26 Metro’s brief can be read to suggest that there could be other “implementing
27 ordinances” that are adopted “[p]ursuant to a regional framework plan” that are not also new
28 or amended functional plans. However, Metro provides no existing or proposed examples,
29 and the RFP does not appear to contemplate such separate ordinances. If the functional plans
30 that are initially adopted or subsequently amended as part of the RFP are *not* subject to
31 ORS 268.390(5)—under Metro’s theory that they are *also* an exercise of its power under
32 ORS 268.390(4)—the universe of “implementing ordinances” referenced in ORS 268.390(5)
33 appears to be vacant. Even if that universe is not vacant as a matter of law, the language of

1 the RFP quoted above appears to render ORS 268.390(5) essentially meaningless under
2 Metro’s reading of the statute. Our interpretation of ORS 268.390(4) and (5) avoids that
3 result, consistent with ORS 174.010. *See* n 13.

4 The first assignment of error is sustained.

5 **SECOND ASSIGNMENT OF ERROR**

6 Under this assignment of error, petitioners argue that the challenged decision violates
7 Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas and Natural Resources)
8 and fails to address other potentially relevant goals or give equal weight to those goals, as
9 required by ORS 197.340(1).

10 All parties take the position that we have jurisdiction to review the challenged
11 decision, and we agree that we do.¹⁷ However, ORS 197.825(2)(c) limits our scope of
12 review. That statute provides that LUBA’s jurisdiction “[d]oes not include those matters
13 over which the Department of Land Conservation and Development or the Land
14 Conservation and Development Commission has review authority under ORS 197.251
15 * * *.” As previously noted, the amendments adopted by the challenged decision have been
16 forwarded to LCDC for review for compliance with the statewide planning goals as part of
17 the RFP. That LCDC review is required by ORS 197.274 and 197.251. Therefore, although
18 we have jurisdiction to consider the assignments of error in this appeal that do not raise goal
19 compliance issues, we may not review the challenged decision to determine whether it
20 violates the statewide planning goals. That responsibility resides with LCDC under
21 ORS 197.251, 197.274 and 197.825(2)(c).

¹⁷Metro is a local government, as that term is defined by ORS 197.015(13). The challenged Metro decision is a “final” decision, and it concerns the application of statewide planning goals. Therefore it is a “land use decision,” as that term is defined by ORS 197.015(10)(a)(A). With certain statutory exceptions, LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). We therefore have jurisdiction to review the challenged decision.

1 We lack jurisdiction to consider petitioners’ arguments under the second assignment
2 of error.

3 **THIRD ASSIGNMENT OF ERROR**

4 Petitioners argue that the challenged decision violates ORS 268.390(5), Metro
5 Charter Section 5(2)(e), and certain unspecified RUGGOs.

6 Petitioners’ arguments concerning ORS 268.390(5) add nothing to their arguments
7 under the first assignment of error. We therefore do not further consider petitioners’
8 statutory arguments under the third assignment of error.

9 Section 5(2)(e) of the Metro Charter, quoted in part under the first assignment of
10 error, apparently was the basis for ORS 268.390(5). Petitioners argue the challenged
11 decision violates this section of the Metro Charter, for the same reason the decision violates
12 the statute. However, although the wording of Section 5(2)(e) of the Metro Charter is similar
13 to the wording of ORS 268.390(5), it is not the same. We have some question whether the
14 legal obligation imposed on Metro by Section 5(2)(e) of the Metro Charter is the same legal
15 obligation that is imposed by ORS 268.390(5). Because petitioners do not develop a separate
16 argument under the third assignment of error concerning Section 5(2)(e) of the Metro
17 Charter, we do not consider whether the challenged decision also violates that section of the
18 Metro Charter.

19 Petitioners finally point out that RUGGO Objective 3.2.1 requires that the RFP must
20 be consistent with the RUGGOs.¹⁸ RUGGO Objective 3.2.2 provides

21 “To the extent that a proposed policy or action may be compatible with some
22 goals and objectives and incompatible with others, consistency with RUGGOs
23 may involve a balancing of applicable goals, subgoals and objectives by the
24 Metro Council that considers the relative impacts of a particular action on
25 applicable goals and objectives.”

¹⁸That requirement is also imposed by ORS 268.380(2).

1 Petitioners complain that the challenged decision will have significant impacts and “raises
2 numerous issues about compatibility among the various RUGGOs’ goals and objectives.”
3 Petition for Review 39. Petitioners go on to argue that Metro’s findings are not adequate to
4 address these issues.

5 Petitioners make no attempt to identify any RUGGO provisions that they believe are
6 inconsistent with the challenged decision. Absent such inconsistencies, there is no obligation
7 to engage in the balancing required by RUGGO 3.2.2. Petitioners’ RUGGO-related
8 arguments under this assignment of error are not sufficiently developed to allow review.
9 *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982).

10 The third assignment of error is denied.¹⁹

11 **FOURTH ASSIGNMENT OF ERROR**

12 ORS 268.030 provides:

13 “(1) This chapter is enacted in order to provide a method of making
14 available in metropolitan areas public services not adequately provided
15 through previously authorized governmental agencies.

16 “(2) To this end not more than one district may be established under this
17 chapter in any metropolitan area.

18 “(3) Subject to the provisions of a district charter, a district, where formed,
19 shall provide for those aspects of land use planning having
20 *metropolitan significance*.”²⁰ (Emphasis added.)

21 Petitioners argue that the detailed planning required by the challenged ordinance exceeds
22 Metro’s authority to “provide for those aspects of land use planning having metropolitan
23 significance” under ORS 268.030.²¹

¹⁹We also have some question whether this assignment of error simply raises a plan-to-plan consistency issue under Goal 2. If so, we would be precluded by ORS 197.830(2)(c) from considering the issue.

²⁰ORS 268.020(3) defines “metropolitan significance” as “having major or district-wide impact.”

²¹We assume without deciding that petitioners are correct that ORS 268.030 is properly viewed as generally limiting Metro’s land use planning activities to those that have “metropolitan significance.”

1 “The Challenged Decision requires cities and counties to adopt or
2 substantially comply with Metro’s performance standards and Water Quality
3 and Flood Management Area maps, which together regulate the vast majority
4 of all wetlands, riparian areas, water bodies, and flood management areas
5 within Metro’s jurisdiction. By any reasonable consideration, these
6 requirements apply on a parcel-specific basis. Metro has, then, effectively
7 adopted a comprehensive plan for water-related resources. This is not
8 Metro’s legislated role. This is not dealing with regional issues that *cannot* be
9 handled by individual local governments; it goes beyond gap-filling. This
10 goes beyond addressing matters of metropolitan significance, to encroach on
11 matters of local responsibility. This is not an appropriate Metro regulation; it
12 is unnecessary Metro duplication.” Petition for Review 45-46 (emphasis in
13 original).

14 As noted earlier in this opinion, the challenged decision is, in part, an exercise of
15 Metro’s functional planning authority under ORS 268.390(1) and (2). *See* n 10. Water
16 quality is specifically included on a non-exclusive list of “areas and activities having
17 significant impact upon the orderly and responsible development of the metropolitan area.”
18 ORS 268.390(1). ORS 268.390(2) specifically authorizes Metro to adopt a functional plan
19 “to control metropolitan area impact on air and water quality [and] transportation[.]”

20 The functional plans that are specifically authorized in ORS 268.390(1) for air
21 quality, water quality and transportation have a common theme. They are all aspects of
22 urban life that frequently do not readily lend themselves to effective planning by small units
23 of local government. This is because watersheds, airsheds and transportation systems
24 routinely cross municipal boundaries. The need to bring a regional perspective to these areas
25 of metropolitan significance is one of Metro’s reasons for existence. ORS 268.030(1). This
26 does not mean that individual cities and counties may not be doing as good a job of
27 addressing water, air and transportation issues as they can reasonably be expected to, within
28 their boundaries. It simply means that individual cities and counties cannot be expected to
29 bring a metropolitan perspective to such planning issues, if such a metropolitan perspective
30 requires subordinating important local interests.

1 The foregoing does not mean that Metro could not, in exercising its statutory duty to
2 adopt functional plans for metropolitan area water quality and flooding issues, exceed its
3 authority under ORS 268.030. However, any argument that Metro has done so must go
4 beyond asserting that the site-specific nature of some aspects of Title 3 of the UGMFP have
5 that effect. An effective regional plan may require that a certain level of consistency in local
6 decision making be achieved. Achieving regional consistency by means of site-specific
7 requirements does not necessarily mean that Metro has exceeded its authority to “provide for
8 those aspects of land use planning having metropolitan significance.”

9 As a matter of policy, it is clear that petitioners believe local planning efforts to
10 address water quality and flooding issues have been improperly displaced and constrained by
11 the challenged decision. However, petitioner’s policy disagreement does not demonstrate
12 that the challenged decision constitutes a violation of ORS 268.030.²²

13 The fourth assignment of error is denied.

14 **FIFTH ASSIGNMENT OF ERROR**

15 Under the fifth assignment of error, petitioners argue that in adopting the challenged
16 decision, Metro failed to coordinate with local governments who have comprehensive plans
17 that have already been acknowledged by LCDC to comply with the statewide planning goals.
18 Such coordination is required by Statewide Planning Goal 2 (Land Use Planning).
19 Petitioners argue that requiring local plans to be amended to comply with the as-yet-
20 unacknowledged UGMFP Title 3 requirements runs the danger of forcing those local
21 comprehensive plans out of compliance with the goals. Petitioners argue that this is
22 particularly the case because the UGMFP Title 3 requirements have been adopted to comply
23 with Goals 6 (Air, Water and Land Resources Quality) and 7 (Areas Subject to Natural

²²Petitioners cite comments made during 1977 and 1993 legislative hearings. Assuming it is appropriate for us to consider those comments as legislative history, those statements simply express a general position that a distinction needs to be maintained between regional and local planning functions. Those statements do not demonstrate that the challenged decision violates ORS 268.030.

1 Disasters and Hazards) and were not adopted to comply with Goal 5. Metro apparently plans
2 to adopt another functional plan in the future to address Goal 5. According to petitioners
3 such a bifurcated approach will cause unnecessary duplication of local planning efforts.

4 Our resolution of the first assignment of error address makes it unnecessary to
5 consider the concerns petitioner expresses under this assignment of error about imposing the
6 UGMFP Title 3 amendments prior to acknowledgment. Petitioners remaining arguments
7 under the fifth assignment of error either raise issues of compliance with statewide planning
8 goals, which we may not consider under ORS 197.825(2)(c), or express disagreement with
9 Metro's approach as a matter of policy. These remaining arguments provide no additional
10 basis for reversal or remand.

11 The fifth assignment of error is denied.

12 Metro's decision is remanded.