

LAND USE
BOARD OF APPEALS

JUN 16 3 47 PM '87

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

CITIZENS FOR BETTER TRANSIT)
and DOUGLAS R. ALLEN,)
)
Petitioners,)
)
vs.)
)
METROPOLITAN SERVICE DISTRICT,)
)
Respondent.)

LUBA No. 86-022
FINAL OPINION
AND ORDER

Appeal from Metropolitan Service District.

James S. Coon, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Imperati, Barnett, Sherwood & Coon, P.C.

Eleanore S. Baxendale, Portland, filed a response brief and argued on behalf of Respondent Metropolitan Service District.

Ruth Spetter, Portland, filed a response brief and argued on behalf of Respondent City of Portland.

DuBAY, Chief Referee; BAGG, Referee; participated in the decision.

AFFIRMED 06/16/87

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Petitioners challenge part of Resolution 86-632, adopted by
4 Metropolitan Service District (Metro). The resolution approves
5 improvements to McLoughlin Boulevard in Portland and amends
6 Metro's Transportation Improvement Program (TIP) by allocating
7 \$20.8 million of federal funds for highway improvements.
8 Petitioners' challenge is directed at the part of the
9 resolution that amends the TIP.

10 FACTS

11 Under federal law, Metro has been designated as the
12 Metropolitan Planning Organization responsible for regional
13 highway planning. See 48 CFR 450.104(b)(3). Federal
14 regulations require Metropolitan Planning Organizations to
15 develop an urban transportation plan and the TIP, including an
16 annual element.¹ The TIP is a periodically updated priority
17 list of projects to carry out the RTP. It also designates
18 improvements that are recommended for federal funding. Metro's
19 Regional Transportation Plan (RTP) serves both as the urban
20 transportation plan required by federal law and as the
21 functional transportation plan required by ORS 268.390.²

22 Resolution 86-632 amends the TIP by allocating \$20.8
23 million in federal funds for construction of specified
24 improvements to the road system at the intersection of
25 McLoughlin Boulevard and Tacoma Street.³ Petitioners appeal
26 this TIP amendment.

1 PRELIMINARY ISSUES

2 Two issues require consideration before we address
3 petitioners' claims on the merits. The first is LUBA's
4 jurisdiction over this appeal. The second is petitioners'
5 standing.

6 Metro requests reconsideration of its motion to dismiss the
7 appeal for lack of jurisdiction on the ground that Resolution
8 86-632 is not a land use decision subject to LUBA's review. We
9 denied the motion for dismissal, holding that the amendment to
10 the TIP was a decision meeting the significant impact test
11 referred to in City of Pendleton v. Kerns, 294 Or 126, 653 P2d
12 992 (1982), and Billington v. Polk County, 299 Or 471, 703 P2d
13 232 (1985).⁴ Metro presses its arguments further, contending
14 that the significant impact test is not applicable in this
15 instance because no statute requires Metro to exercise general
16 land use planning responsibility in accordance with statewide
17 planning goals.⁵

18 According to Metro, the significant impact test is derived
19 from the court's analysis in Peterson v. Klamath Falls, 279 Or
20 249, 566 P2d 1193 (1977). The court in Peterson concluded
21 annexations are within a city's statutory zoning and planning
22 responsibility imposed by ORS 197.175 because it is a planning
23 activity that would have a significant impact on land use.⁶

24 Based on this, Metro postulates that the basic premise and
25 purpose of the significant impact test is

26 "that the local government by statute has a legal duty

1 to apply the goals to land use decisions but has
2 failed to do so because it did not recognize its
3 decision as a land use decision." Respondent's Brief
4 at 25.

5 We have difficulty with this rationale, for it leads full
6 circle back to the statutory definition of a land use decision
7 in ORS 197.015(10)(a)(A). We believe the significant impact
8 test as described in Kerns, supra, and Billington, supra,
9 encompasses a broader range of decisions than those that apply,
10 or should apply, statewide planning goals, comprehensive plans,
11 or land use regulations. Indeed, the court in Billington,
12 supra, points out that the significant impact test applies to
13 decisions "not expressly covered in a land use norm."
14 Billington, supra, at 479.

15 We also note that LUBA's review is not limited to
16 examinations of compliance with the statewide goals or other
17 land use standards listed in ORS 197.015(10)(a)(A). ORS
18 197.835(8)(a) allows reversal or remand of land use decisions
19 for errors that may not arise out of nonconformity with
20 statewide planning goals, comprehensive plans or land use
21 regulations.⁷ Application of the goals is not the sine qua
22 non of a land use decision.

23 For these reasons we reject Metro's analysis and adhere to
24 the order denying Metro's motion to dismiss.⁸

25 Respondent City of Portland challenges petitioners'
26 standing to bring this appeal.

The Petition for Review states:

1 "Petitioner, Citizen's for Better Transit, is a
2 non-profit organization dedicated to the improvement
3 of public transit in the Portland area. Petitioner
4 Douglas Allen is a long time member and principal
5 spokesperson for CBT. Both petitioners have been
6 aggrieved by the decision of the Metropolitan Service
7 District (Metro) to spend \$20.8 million dollars out of
8 an available \$25 million in federal highway transfer
9 funds for the widening of McLoughlin Boulevard, making
10 such funds unavailable for public transit. Petitioner
11 Allen appeared below and testified orally before Metro
12 against Resolution 86-632." Record at 19.

7 The statement alleges Petitioner Allen testified against
8 Resolution 86-632, personally and as a spokesperson for an
9 organization dedicated to improvement of public transit. No
10 more is required to allege entitlement to standing as an
11 aggrieved party. Jefferson Landfill Comm. v Marion County, 297
12 Or 280, 686 P2d 310 (1984). The challenge to petitioners'
13 standing is denied.

14 FIRST ASSIGNMENT OF ERROR

15 Petitioners allege Resolution 86-632 violates Portland's
16 comprehensive plan. According to petitioners, the resolution
17 violates the following policy in the city 's Arterial Streets
18 Classification Policy in the plan:

19 "Highest priority should be given to development of
20 regional transit facilities and 'demand management'
21 programs, consisting of ride sharing flexible working
22 hours, and parking management to reduce the need for
23 new regional traffic facilities." ASCP at 17

22 Petitioners note that the \$25 million in Mt. Hood Freeway
23 transfer funds are the only federal funds available in the
24 region which can be spent on light rail transit projects in the
25 McLoughlin corridor. Petitioners state that by allocating
26

1 \$20.8 million of these funds for highway improvements, Metro
2 fails to give the highest priority to regional transit
3 facilities.

4 Metro denies these allegations, contending its RTP
5 emphasizes transit projects as well as highway development.
6 According to Metro, the RTP includes a program to develop both
7 public transit and highway improvements in the McLoughlin
8 Corridor and throughout the district. Seventy percent of
9 program funding is for transit. Metro adds that neither the
10 RTP nor the city's plan prohibit highway projects until
11 completion of planned public transit facilities.

12 These arguments, however, fail to come to grips with the
13 question whether the TIP amendment must comply with the city's
14 comprehensive plan. Petitioners cite no authority for this
15 proposition. Instead, petitioners argue that Metro's statutory
16 responsibilities to coordinate the comprehensive plans of
17 cities and counties within its boundaries implies an obligation
18 to make its decisions in conformity with such comprehensive
19 plans.

20 The coordination requirements for Metropolitan Service
21 Districts are several. ORS 268.380(3) simply requires such
22 districts to coordinate land-use planning activities of that
23 portion of the cities and counties within the district. ORS
24 268.385 and ORS 197.190(1) require Metro to serve as the
25 review, advisory and coordinative body for Multnomah, Clackamas
26 and Washington counties for the areas within the district, as

1 well as to coordinate all planning activities of cities within
2 the district to "assure an integrated comprehensive plan for
3 the entire area." These statutes confer on Metro the same
4 coordinating responsibilities given to counties. ORS
5 197.190(1). However, unlike counties, Metropolitan Service
6 Districts may require cities and counties to conform their
7 comprehensive plans to the district's metropolitan area goals
8 and objectives (ORS 268.380), to the district's functional
9 plans and its urban growth boundary (ORS 268.390(4)).

10 Coordination between units of government does not mean they
11 must agree. Metropolitan Service District v. Clackamas County,
12 2 Or LUBA 300 (1981).

13 "A plan is 'coordinated' when the needs of all levels
14 of governments, semi-public and private agencies and
15 the citizens of Oregon have been considered and
16 accommodated as much as possible." ORS 197.015(5).

17 Assuming petitioners are correct that Metro must coordinate its
18 functional plans authorized by ORS 268.390 with comprehensive
19 plans of cities and counties, the city's comprehensive plan has
20 not become the source of approval criteria for Metro's land use
21 decisions. Given Metro's statutory power to require cities and
22 counties to change their plans to conform to Metro's functional
23 plans, an interpretation of the statutes that Metro's actions
24 are controlled by local plans would put the cart before the
25 horse.

26 Metropolitan Service Districts have unique authority in
Oregon land use planning law. Undoubtedly, this authority is

1 granted to carry out the purposes expressed in ORS 268.015 to
2 consolidate certain regional governmental powers. We construe
3 the district's authority to amend the TIP does not require
4 compliance with Portland's comprehensive plan.

5 Even if we are wrong on this issue, this assignment of
6 error is denied for another reason. Petitioners claim is
7 founded on the proposition that the policies in Portland's ASCP
8 are mandatory approval standards. The ASCP makes no such claim
9 for itself. Indeed, it's implementation policies disavow
10 obligatory status by declaring:

11 "The street classifications, policies and district
12 policies are not intended to be a plan. Instead, they
13 serve as a guide to transportation project planning
and management and to land use decisions." ASCP at 58

14 Therefore, even if the TIP amendment is required to comply with
15 Portland's comprehensive plan, nonconformance with the ASCP
16 policies is not grounds for remand. See, Downtown Community
17 Association v. City of Portland, 80 Or App 336, 722 P2d 1258
18 (1986), Younger v. City of Portland, ___ Or LUBA ___ (1987) (No.
19 86-046, January 30, 1987).

20 For the above reasons, petitioners' First Assignment of
21 Error is denied.

22 SECOND ASSIGNMENT OF ERROR

23 Petitioners allege the TIP amendment violates Metro's
24 functional transportation plan, the RTP. Petitioners do not
25 point to any express provision of the RTP that controls
26 designation of the highway improvements eligible for federal

1 funding. Instead, petitioners contend Metro's statutory duty
2 to coordinate land use planning activities of cities operates
3 to make Portland's ASCP part of Metro's functional
4 transportation plan. Therefore, according to petitioners'
5 argument, violation of the ASCP is a violation of the RTP.

6 We do not agree with petitioners' basic premise that the
7 ASCP is part of Metro's functional transportation plan.
8 Petitioners cite ORS 268.385(1) which gives Metropolitan
9 Service Districts the "review, advisory and coordinative
10 functions assigned under ORS 197.190(1) to each county and city
11 that is within the district." The latter statute provides in
12 part:

13 "(E)ach county, through its governing body, shall be
14 responsible for coordinating all planning activities
15 affecting land uses within the county, including
16 planning activities of the county, cities, special
17 districts and state agencies, to assure an integrated
18 comprehensive plan for the entire area of the county."

19 Petitioners do not explain how this statute controls the
20 relationship between comprehensive plans of cities and counties
21 and the functional plans of Metropolitan Service Districts. A
22 construction favorable to petitioners' stance is not apparent
23 on its face.

24 Petitioners also cite to ORS 268.380(2) and ORS 268.390(2)
25 and (4). As noted above, under these provisions Metropolitan
26 Service Districts may require cities and counties to amend
their comprehensive plans to conform to the District's
metropolitan goals and objectives, its functional plans and its

1 urban growth boundaries, as well as statewide planning goals.
2 We fail to see how this authority implies that transportation
3 provisions in the city's comprehensive plan must also be in
4 Metro's functional transportation plan.

5 Petitioners claim that the TIP amendment violates Metro's
6 RTP is rejected. This assignment of error is denied.

7 THIRD AND FOURTH ASSIGNMENTS OF ERROR

8 Petitioners last assignments of error are also based on
9 their view that Metro's decision must comply with the city's
10 ASCP. The Third Assignment of Error claims Metro failed to
11 make findings of compliance with the ASCP. In the Fourth
12 Assignment of Error, they allege the decision violates a
13 comprehensive plan provision that

14 "a Regional Trafficway should not have interchanges
15 which would provide direct traffic access onto
16 Neighborhood Collector and Local Service Streets."
17 ASCP at 5.

18 As our previous discussion of the First and Second
19 Assignments of Error disclose, we do not accept petitioners'
20 claim that Metro's decision must comply with specific
21 provisions in the city's comprehensive plan. The last two
22 assignments of error are based on this assumption. For the
23 reasons set forth above, we deny them.

24 The Metro decision is affirmed.
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FOOTNOTES

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4 A TIP is defined in federal regulations as a "staged
5 multi-year program of transportation improvements including an
6 annual (or biennial) element." 23 CFR 450.104(b)(5). The
7 annual element of the TIP must "list . . . transportation
improvement projects proposed for implementation during the
first year (or two years) of the program." 23 CFR
450.104(b)(4).

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9 ORS 268.390 directs Metropolitan Service Districts to:

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

12 * * *

13 "(c) Transportation.

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

16

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17 The federal funds were originally intended for construction
18 of the Mt. Hood Freeway project. The United States Department
of Transportation withdrew \$152 million from the project, and
the withdrawn funds were reserved for transportation projects
in the metropolitan area.

19 In 1979, Metro allocated \$20.6 million of the withdrawn
20 funds for highway improvements to McLoughlin Boulevard north of
21 the City of Milwaukee. In 1983, Metro reserved these and other
previously allocated funds for further study of transportation
22 issues in the McLoughlin corridor. The TIP amendment in
Resolution 86-632 allocates a portion of the funds reserved in
1983.

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24 A decision is a land use decision subject to review by LUBA
25 if it meets the criteria in ORS 197.015(10)(a)(A), the
26 statutory test, or if the decision would have a significant
impact on present or future land use areas, the significant

1 impact test. See Billington v. Polk County, 299 Or 471, 703
2 P2d 232 (1985). In the order denying petitioners' motion to
3 dismiss this appeal, we did not address whether Resolution
4 86-632 met the statutory definition.

5

6 Metro must comply with statewide planning goals in specific
7 instances. It must adopt land use planning goals and
8 objectives for the district in compliance with the goals. ORS
9 268.380(1). It must recommend or require land use plans of
10 cities and counties within its boundaries to be amended to
11 comply with the goals. ORS 268.380(2). It must adopt urban
12 growth boundaries for the district in compliance with the
13 goals. ORS 268.390(3). However, no statute requires it to
14 exercise planning powers and responsibilities or to make land
15 use decisions in compliance with the goals in other
16 circumstances.

6

7 Peterson v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977)
8 predated LUBA's creation in 1979, and obviously did not address
9 LUBA's jurisdiction.

7

8 ORS 197.835(8)(a) states:

9 "In addition to the review under subsection (1) to (7) of
10 this section, the board shall reverse or remand the land
11 use decision under review if the board finds:

12 "(a) The local government or special district:

13 "(A) Exceeded its jurisdiction;

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

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

19 "(D) Improperly construed the applicable law; or

20 "(E) Made an unconstitutional decision;"

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21 We hasten to add that this view of the significant impact

1 test's applicability does not mean all local decisions
affecting land use are land use decisions subject to LUBA's
2 review. The test itself requires a determination that impacts
on present and future land use must be significant. Budgetary
3 and fiscal decisions are also outside the scope of the test's
applicability. State Housing Council v. City of Lake Oswego,
4 489 Or App 525, 617 P2d 655 (1980), pet for rev dismissed 291
Or 878, 635 P2d 647 (1981).

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